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FOURTEENTH AMENDMENT

RIGHTS GUARANTEED
PRIVILEGES AND IMMUNITIES OF CITIZENSHIP, DUE PROCESS AND EQUAL PROTECTION

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RIGHTS GUARANTEED

PRIVILEGES AND IMMUNITIES OF CITIZENSHIP, DUE PROCESS AND EQUAL PROTECTION

FOURTEENTH AMENDMENT

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

CITIZENS OF THE UNITED STATES

In the *Dred Scott Case*,[1] Chief Justice Taney for the Court ruled that United States citizenship was enjoyed by two classes of individuals: (1) white persons born in the United States as descendents of "persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States and [who] became also citizens of this new political body," the United States of America, and (2) those who, having been "born outside the dominions of the United States," had migrated thereto and been naturalized therein. The States were competent, he continued, to confer state citizenship upon anyone in their midst, but they could not make the recipient of such status a citizen of the United States. The "Negro," or "African race," according to the Chief Justice, was ineligible to attain United States citizenship, either from a State or by virtue of birth in the United States, even as a free man descended from a Negro residing as a free man in one of the States at the date of ratification of the Constitution.[2] Congress, first in § 1 of the Civil Rights Act of 1866 [3] and then in the first sentence

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[1] Scott v. Sandford, 60 U.S. (19 How.) 393, 404–06, 417–18, 419–20 (1857).

[2] The controversy, political as well as constitutional, which this case stirred and still stirs, is exemplified and analyzed in the material collected in S. KUTLER, THE DRED SCOTT DECISION: LAW OR POLITICS? (1967).

[3] "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous

of § 1 of the Fourteenth Amendment,[4] set aside the *Dred Scott* holding in a sentence "declaratory of existing rights, and affirmative of existing law. . . ."[5]

While clearly establishing a national rule on national citizenship and settling a controversy of long standing with regard to the derivation of national citizenship, the Fourteenth Amendment did not obliterate the distinction between national and state citizenship, but rather preserved it.[6] The Court has accorded the first sentence of § 1 a construction in accordance with the congressional intentions, holding that a child born in the United States of Chinese parents who themselves were ineligible to be naturalized is nevertheless a citizen of the United States entitled to all the rights and privileges of citizenship.[7] Congress' intent in including the qualifying phrase "and subject to the jurisdiction thereof," was apparently to exclude from the reach of the language children born of diplomatic representatives of a foreign state and children born of alien enemies in hostile occupation, both recognized exceptions to the common-law rule of acquired citizenship by birth,[8] as well as children of members of Indian tribes subject to tribal laws.[9] The lower courts have generally held that the citizenship of the parents determines the citizenship of children born on vessels in United States territorial waters or on the high seas.[10]

In *Afroyim v. Rusk*,[11] a divided Court extended the force of this first sentence beyond prior holdings, ruling that it withdrew

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condition of slavery or involuntary servitude . . . shall have the same right[s]. . . ." Ch. 31, 14 Stat. 27.

[4] The proposed amendment as it passed the House contained no such provision, and it was decided in the Senate to include language like that finally adopted. CONG. GLOBE, 39th Cong., 1st Sess. 2560, 2768–69, 2869 (1866). The sponsor of the language said: "This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is . . . a citizen of the United States." Id. at 2890. The legislative history is discussed at some length in Afroyim v. Rusk, 387 U.S. 253, 282–86 (1967) (Justice Harlan dissenting).

[5] United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898).

[6] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873).

[7] United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[8] Id. at 682.

[9] Id. at 680–82; Elk v. Wilkins, 112 U.S. 94, 99 (1884).

[10] United States v. Gordon, 25 Fed. Cas. 1364 (C.C.S.D.N.Y. 1861) (No. 15,231); In re Look Tin Sing, 21 F. 905 (C.C.Cal. 1884); Lam Mow v. Nagle, 24 F.2d 316 (9th Cir. 1928).

[11] 387 U.S. 253 (1967). Though the Court upheld the involuntary expatriation of a woman citizen of the United States during her marriage to a foreign citizen in Mackenzie v. Hare, 239 U.S. 299 (1915), the subject first received extended judicial treatment in Perez v. Brownell, 356 U.S. 44 (1958), in which by a five-to-four decision the Court upheld a statute denaturalizing a native-born citizen for having voted in a foreign election. For the Court, Justice Frankfurter reasoned that Congress' power to regulate foreign affairs carried with it the authority to sever the relationship of this country with one of its citizens to avoid national implication in

from the Government of the United States the power to expatriate United States citizens against their will for any reason. "[T]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other government unit. It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes. . . . This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted."[12] In a subsequent decision, however, the Court held that persons who were statutorily naturalized by being born abroad of at least one American parent could not claim the protection of the first sentence of § 1 and that Congress could therefore impose a reasonable and non-arbitrary condition subsequent upon their continued retention of United States citizenship.[13] Between these two decisions there is a tension which should call forth further litigation efforts to explore the meaning of the citizenship sentence of the Fourteenth Amendment.

Citizens of the United States within the meaning of this Amendment must be natural and not artificial persons; a corporate body is not a citizen of the United States.[14]

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acts of that citizen which might embarrass relations with a foreign nation. Id. at 60–62. Three of the dissenters denied that Congress had any power to denaturalize. *See* discussion supra pp. 272–76. In the years before *Afroyim*, a series of decisions had curbed congressional power.

[12] Afroyim v. Rusk, 387 U.S. 253, 262–63 (1967). Four dissenters, Justices Harlan, Clark, Stewart, and White, controverted the Court's reliance on the history and meaning of the Fourteenth Amendment and reasserted Justice Frankfurter's previous reasoning in *Perez*. Id. at 268.

[13] Rogers v. Bellei, 401 U.S. 815 (1971). This, too, was a five-to-four decision, Justices Blackmun, Harlan, Stewart, and White, and Chief Justice Burger in the majority, and Justices Black, Douglas, Brennan, and Marshall dissenting.

[14] Insurance Co. v. New Orleans, 13 Fed. Cas. 67 (C.C.D.La. 1870). Not being citizens of the United States, corporations accordingly have been declared unable "to claim the protection of that clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State." Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1869). This conclusion was in harmony with the earlier holding in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869), to the effect that corporations were not within the scope of the privileges and immunities clause of state citizenship set out in Article IV, § 2. *See also* Selover, Bates & Co. v. Walsh, 226 U.S. 112, 126 (1912); Berea College v. Kentucky, 211 U.S. 45 (1908); Liberty Warehouse Co. v. Tobacco Growers, 276 U.S. 71, 89 (1928); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

PRIVILEGES AND IMMUNITIES

Unique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a "practical nullity" by a single decision of the Supreme Court issued within five years after its ratification. In the *Slaughter-House Cases*,[15] a bare majority of the Court frustrated the aims of the most aggressive sponsors of this clause, to whom was attributed an intention to centralize "in the hands of the Federal Government large powers hitherto exercised by the States" with a view to enabling business to develop unimpeded by state interference. This expansive alteration of the federal system was to have been achieved by converting the rights of the citizens of each State as of the date of the adoption of the Fourteenth Amendment into privileges and immunities of United States citizenship and thereafter perpetuating this newly defined status quo through judicial condemnation of any state law challenged as "abridging" any one of the latter privileges. To have fostered such intentions, the Court declared, would have been "to transfer the security and protection of all the civil rights . . . to the Federal Government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," and to "constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character. . . . We are convinced that no such results were intended by the Congress . . . , nor by the legislatures . . . which ratified" this amendment, and that the sole "pervading purpose" of this and the other War Amendments was "the freedom of the slave race."

Conformably to these conclusions, the Court advised the New Orleans butchers that the Louisiana statute, conferring on a single corporation a monopoly of the business of slaughtering cattle, abrogated no rights possessed by them as United States citizens; insofar as that law interfered with their claimed privilege of pursuing the lawful calling of butchering animals, the privilege thus terminated was merely one of "those which belonged to the citizens of the States as such." Privileges and immunities of state citizenship

[15] 83 U.S. (16 Wall.) 36, 71, 77–79 (1873).

had been "left to the state governments for security and protection" and had not been placed by this clause "under the special care of the Federal Government." The only privileges which the Fourteenth Amendment protected against state encroachment were declared to be those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws."[16] These privileges, however, had been available to United States citizens and protected from state interference by operation of federal supremacy even prior to the adoption of the Fourteenth Amendment. The *Slaughter-House Cases*, therefore, reduced the privileges and immunities clause to a superfluous reiteration of a prohibition already operative against the states.

Although the Court has expressed a reluctance to attempt a definitive enumeration of those privileges and immunities of United States citizens which are protected against state encroachment, it nevertheless felt obliged in the *Slaughter-House Cases* "to suggest some which owe their existence to the Federal Government, its National character, its Constitution, or its laws."[17] Among those which it then identified were the right of access to the seat of Government and to the seaports, subtreasuries, land officers, and courts of justice in the several States, the right to demand protection of the Federal Government on the high seas or abroad, the right of assembly, the privilege of habeas corpus, the right to use the navigable waters of the United States, and rights secured by treaty. In *Twining v. New Jersey*,[18] the Court recognized "among the rights and privileges" of national citizenship the right to pass freely from State to State,[19] the right to petition Congress for a redress of grievances,[20] the right to vote for national officers,[21] the

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[16] Id. at 78–79.

[17] Id. at 79.

[18] 211 U.S. 78, 97 (1908).

[19] *Citing* Crandall v. Nevada, 73 U.S. (65 Wall.) 35 (1868). It was observed in United States v. Wheeler, 254 U.S. 281, 299 (1920), that the statute at issue in *Crandall* was actually held to burden directly the performance by the United States of its governmental functions. *Cf.* Passenger Cases, 48 U.S. (7 How.) 282, 491–92 (1849) (Chief Justice Taney dissenting). Four concurring Justices in Edwards v. California, 314 U.S. 160, 177, 181 (1941), would have grounded a right of interstate travel on the privileges and immunities clause. More recently, the Court declined to ascribe a source but was content to assert the right to be protected. United States v. Guest, 383 U.S. 745, 758 (1966); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969). Three Justices ascribed the source to this clause in Oregon v. Mitchell, 400 U.S. 112, 285–87 (1970) (Justices Stewart and Blackmun and Chief Justice Burger, concurring in part and dissenting in part).

[20] *Citing* United States v. Cruikshank, 92 U.S. 542 (1876).

[21] *Citing* Ex parte Yarbrough, 110 U.S. 651 (1884); Wiley v. Sinkler, 179 U.S. 58 (1900). Note Justice Douglas' reliance on this clause in Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (concurring in part and dissenting in part).

right to enter public lands,[22] the right to be protected against violence while in the lawful custody of a United States marshal,[23] and the right to inform the United States authorities of violation of its laws.[24] Earlier, in a decision not mentioned in *Twining*, the Court had also acknowledged that the carrying on of interstate commerce is "a right which every citizen of the United States is entitled to exercise."[25]

In modern times, the Court has continued the minor role accorded to the clause, only occasionally manifesting a disposition to enlarge the restraint which it imposes upon state action. *Colgate v. Harvey*,[26] which was overruled five years later,[27] represented the first attempt by the Court since adoption of the Fourteenth Amendment to convert the privileges and immunities clause into a source of protection of other than those "interests growing out of the relationship between the citizen and the national government." Here, the Court declared that the right of a citizen resident in one State to contract in another, to transact any lawful business, or to make a loan of money, in any State other than that in which the citizen resides was a privilege of national citizenship which was abridged by a state income tax law excluding from taxable income interest received on money loaned within the State. In *Hague v. CIO*,[28] two and perhaps three justices thought that freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by such act was a privilege and immunity of a United States citizen, and in *Edwards v. California*[29] four Justices were prepared to rely on the clause.[30] In *Oyama v. California*,[31] in a single sentence the Court agreed with the contention of a native-born youth that a state Alien Land Law, applied to work a forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible for citizenship and precluded from owning land, deprived him "of his privileges as an American citizen." The right to acquire and retain property had previously not been set

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[22] *Citing* United States v. Waddell, 112 U.S. 76 (1884).
[23] *Citing* Logan v. United States, 144 U.S. 263 (1892).
[24] *Citing* In re Quarles and Butler, 158 U.S. 532 (1895).
[25] Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).
[26] 296 U.S. 404 (1935).
[27] Madden v. Kentucky, 309 U.S. 83, 93 (1940).
[28] 307 U.S. 496, 510–18 (1939) (Justices Roberts and Black; Chief Justice Hughes may or may not have concurred on this point. Id. at 532). Justices Stone and Reed preferred to base the decision on the due process clause. Id. at 518.
[29] 314 U.S. 160, 177–83 (1941).
[30] *See also* Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (Justice Douglas); id. at 285–87 (Justices Stewart and Blackmun and Chief Justice Burger).
[31] 332 U.S. 633, 640 (1948).

forth in any of the enumerations as one of the privileges protected against state abridgment, although a federal statute enacted prior to the proposal and ratification of the Fourteenth Amendment did confer on all citizens the same rights to purchase and hold real property as white citizens enjoyed.[32]

In other respects, however, claims based on this clause have been rejected.[33]

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[32] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, now 42 U.S.C. § 1982, as amended.

[33] E.g., Holden v. Hardy, 169 U.S. 366, 380 (1898) (statute limiting hours of labor in mines); Williams v. Fears, 179 U.S. 270, 274 (1900) (statute taxing the business of hiring persons to labor outside the State); Wilmington Mining Co. v. Fulton, 205 U.S. 60, 73 (1907) (statute requiring employment of only licensed mine managers and examiners and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen); Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915) (statute restricting employment on state public works to citizens of the United States, with a preference to citizens of the State); Missouri Pacific Ry. v. Castle, 224 U.S. 541 (1912) (statute making railroads liable to employees for injuries caused by negligence of fellow servants and abolishing the defense of contributory negligence); Western Union Tel. Co. v. Milling Co., 218 U.S. 406 (1910) (statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873); In re Lockwood, 154 U.S. 116 (1894) (refusal of state court to license a woman to practice law); Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879) (law taxing a debt owed a resident citizen by a resident of another State and secured by mortgage of land in the debtor's State); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874); Mugler v. Kansas, 123 U.S. 623 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Giozza v. Tiernan, 148 U.S. 657 (1893) (statutes regulating the manufacture and sale of intoxicating liquors); In re Kemmler, 136 U.S. 436 (1890) (statute regulating the method of capital punishment); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (statute regulating the franchise to male citizens); Pope v. Williams, 193 U.S. 621 (1904) (statute requiring persons coming into a State to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters); Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922) (statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized); Walker v. Sauvinet, 92 U.S. 90 (1876) (statute restricting right to jury trial in civil suits at common law); Presser v. Illinois, 116 U.S. 252, 267 (1886) (statute restricting drilling or parading in any city by any body of men without license of the Governor); Maxwell v. Dow, 176 U.S. 581, 596, 597–98 (1900) (provision for prosecution upon information, and for a jury (except in capital cases) of eight persons); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 71 (1928) (statute penalizing the becoming or remaining a member of any oathbound association (other than benevolent orders, and the like) with knowledge that the association has failed to file its constitution and membership lists); Palko v. Connecticut, 302 U.S. 319 (1937) (statute allowing a State to appeal in criminal cases for errors of law and to retry the accused); Breedlove v. Suttles, 302 U.S. 277 (1937) (statute making the payment of poll taxes a prerequisite to the right to vote); Madden v. Kentucky, 309 U.S. 83, 92–93 (1940), (overruling Colgate v. Harvey, 296 U.S. 404, 430 (1935)) (statute whereby deposits in banks outside the State are taxed at 50¢ per $100); Snowden v. Hughes, 321 U.S. 1 (1944) (the right to become a candidate for state office is a privilege of state citizenship, not national citizenship); MacDougall v. Green, 335 U.S. 281 (1948) (Illinois Election Code requirement that a petition to form and nominate candidates for a new political party be signed by at least 200 voters from each of at least 50 of the 102 counties in the State, notwithstanding that 52% of the voters reside in only one county and 87% in the 49 most populous counties); New York v. O'Neill, 359 U.S. 1 (1959) (Uniform Reciprocal

DUE PROCESS OF LAW

The Development of Substantive Due Process

Although many years after ratification the Court ventured the not very informative observation that the Fourteenth Amendment "operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment,"[34] and that "ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth,"[35] the significance of the due process clause as a restraint on state action appears to have been grossly underestimated by litigants no less than by the Court in the years immediately following its adoption. From the outset of our constitutional history due process of law as it occurs in the Fifth Amendment had been recognized as a restraint upon government, but, with the conspicuous exception of the *Dred Scott* decision,[36] only in the narrower sense that a legislature must provide "due process for the enforcement of law."

Thus, in the *Slaughter-House Cases*,[37] in which the clause was invoked by a group of butchers challenging the validity of a Louisiana statute which conferred upon one corporation the exclusive privilege of butchering cattle in New Orleans, the Court declared that the prohibition against a deprivation of property "has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power. It is also to be found in some forms of expression in the constitution of nearly all the States, as a restraint upon the power of the States. . . . We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." Four years later, in *Munn v. Illinois*,[38] the Court again refused to interpret the due process clause as invalidating

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State Law to secure attendance of witnesses from within or without a State in criminal proceedings); James v. Valtierra, 402 U.S. 137 (1971) (a provision in a state constitution to the effect that low-rent housing projects could not be developed, constructed, or acquired by any state governmental body without the affirmative vote of a majority of those citizens participating in a community referendum).

[34] Hibben v. Smith, 191 U.S. 310, 325 (1903).

[35] Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 (1905). *See also* French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901).

[36] Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857), is the exception.

[37] 83 U.S. (16 Wall.) 36, 80–81 (1873).

[38] 94 U.S. 113, 134 (1877).

state legislation regulating the rates charged for the transportation and warehousing of grain. Rejecting contentions that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its use and by transferring to the public an interest in a private enterprise, Chief Justice Waite emphasized that "the great office of statutes is to remedy defects in the common law as they are developed. . . . We know that this power [of rate regulation] may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

Deploring such attempts, nullified consistently in the preceding cases, to convert the due process clause into a substantive restraint on the powers of the States, Justice Miller in *Davidson v. New Orleans*,[39] obliquely counseled against a departure from the conventional application of the clause, albeit he acknowledged the difficulty of arriving at a precise, all-inclusive definition thereof. "It is not a little remarkable," he observed, "that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude

[39] 96 U.S. 97, 103–04 (1878).

those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental of law.

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom . . . in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require. . . ."

A bare half-dozen years later, in again reaching a result in harmony with past precedents, the Justices gave fair warning of the imminence of a modification of their views. After noting that the due process clause, by reason of its operation upon "all the powers of government, legislative as well as executive and judicial," could not be appraised solely in terms of the "sanction of settled usage," Justice Mathews, speaking for the Court in *Hurtado v. California,*[40] declared that "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." Thus were the States put on notice that every species of state legislation, whether dealing with procedural or substantive rights, was subject to the scrutiny of the Court when the question of its essential justice was raised.

What induced the Court to dismiss its fears of upsetting the balance in the distribution of powers under the federal system and to enlarge its own supervisory powers over state legislation was the increasing number of cases seeking protection of property rights against the remedial social legislation States were enacting in the wake of industrial expansion. At the same time, the added emphasis on the due process clause afforded the Court an opportunity to compensate for its earlier virtual nullification of the privileges and immunities clause of the Amendment. So far as such modification of its position needed to be justified in legal terms, theories concerning the relation of government to private rights were available

[40] 110 U.S. 516, 528, 532, 536 (1884).

to demonstrate the impropriety of leaving to the state legislatures the same ample range of police power they had enjoyed prior to the Civil War. Preliminary to this consummation, however, the *Slaughter-House Cases* and *Munn v. Illinois* had to be overruled at least in part, and the views of the dissenting Justices in those cases converted into majority doctrine.

About twenty years were required to complete this process, in the course of which the restricted view of the police power advanced by Justice Field in his dissent in *Munn v. Illinois,*[41] namely, that it is solely a power to prevent injury, was in effect ratified by the Court itself. This occurred in *Mugler v. Kansas,*[42] where the power was defined as embracing no more than the power to promote public health, morals, and safety. During the same interval, ideas embodying the social compact and natural rights, which had been espoused by Justice Bradley in his dissent in the *Slaughter-House Cases,*[43] had been transformed tentatively into constitutionally enforceable limitations upon government.[44] The consequence was that the States in exercising their police powers could foster only those purposes of health, morals, and safety which the Court had enumerated, and could employ only such means as would not unreasonably interfere with the fundamentally natural rights of liberty and property, which Justice Bradley had equated with freedom to pursue a lawful calling and to make contracts for that purpose.[45]

So having narrowed the scope of the state's police power in deference to the natural rights of liberty and property, the Court next proceeded to read into the concepts currently accepted theories of *laissez faire* economics, reinforced by the doctrine of Social Darwinism as elaborated by Herbert Spencer, to the end that "liberty," in

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[41] 94 U.S. 113, 141–48 (1877).

[42] 123 U.S. 623, 661 (1887).

[43] 83 U.S. (16 Wall.) 36, 113–14, 116, 122 (1873).

[44] Loan Association v. Topeka, 87 U.S. (20 Wall.) 655, 662 (1875). "There are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist. . . ."

[45] "Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all. . . . This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property right. . . . A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116, 122 (1873) (Justice Bradley dissenting).

particular, became synonymous with governmental hands-off in the field of private economic relations. In *Budd v. New York*,[46] Justice Brewer in dictum declared: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government." And to implement this point of view the Court next undertook to water down the accepted maxim that a state statute must be presumed to be valid until clearly shown to be otherwise.[47] The first step was taken with opposite intention. This occurred in *Munn v. Illinois*,[48] where the Court, in sustaining the legislation before it, declared: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed." Ten years later, in *Mugler v. Kansas*,[49] this procedure was improved upon, and a state-wide anti-liquor law was sustained on the basis of the proposition that deleterious social effects of the excessive use of alcoholic liquors were sufficiently notorious for the Court to be able to take notice of them, that is to say, for the Court to review and appraise the consideration which had induced the legislature to enact the statute in the first place.[50] However, in *Powell v. Pennsylvania*,[51] decided the following year, the Court, confronted with a similar act involving oleomargarine, concerning which it was unable to claim a like measure of common knowledge, fell back upon the doctrine of presumed validity and sustained the measure, declaring that "it does not appear upon the face of the statute, or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law."

In contrast to the presumed validity rule, under which the Court ordinarily is not obliged to go beyond the record of evidence submitted by the litigants in determining the validity of a statute, the judicial notice principle, as developed in *Mugler v. Kansas*, carried the inference that unless the Court, independently of the record, is able to ascertain the existence of justifying facts accessible to it by the rules governing judicial notice, it will be obliged to invalidate a police power regulation as bearing no reasonable or adequate relation to the purposes to be subserved by the latter;

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[46] 143 U.S. 517, 551 (1892).

[47] *See* Fletcher v. Peck, 10. U.S. (6 Cr.) 87, 128 (1810).

[48] 94 U.S. 113, 123, 182 (1877).

[49] 123 U.S. 623 (1887).

[50] Id. at 662. "We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact . . . that . . . pauperism, and crime . . . are, in some degree, at least, traceable to this evil."

[51] 127 U.S. 678, 685 (1888).

namely, health, morals, or safety. For appraising state legislation affecting neither liberty nor property, the Court found the rule of presumed validity quite serviceable, but for invalidating legislation constituting governmental interference in the field of economic relations, and, more particularly, labor-management relations, the Court found the principle of judicial notice more advantageous. This advantage was enhanced by the disposition of the Court, in litigation embracing the latter type of legislation, to shift the burden of proof from the litigant charging unconstitutionality to the State seeking enforcement. To the State was transferred the task of demonstrating that a statute interfering with the natural right of liberty or property was in fact "authorized" by the Constitution, and not merely that the latter did not expressly prohibit enactment of the same.

In 1934 the Court in *Nebbia v. New York*[52] discarded this approach to economic legislation, and has not since returned to it. The modern approach was evidenced in a 1955 decision reversing a lower court's judgment invalidating a state statutory scheme regulating the sale of eyeglasses to the advantage of ophthalmologists and optometrists in private professional practice and adversely to opticians and to those employed by or using space in business establishments. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"[53] Yet the Court went on to assess the reasons which might have justified the legislature in prescribing the regulation at issue, leaving open the possibility that *some* regulation might be found unreasonable.[54] More recent decisions, however, have limited inquiry to whether the legislation is arbitrary or irrational, and have not addressed "reasonableness."[55]

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[52] 291 U.S. 502 (1934).

[53] Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

[54] Id. at 487, 491.

[55] The Court has pronounced a strict "hands-off" standard of judicial review, whether of congressional or state legislative efforts to structure and accommodate the burdens and benefits of economic life. Such legislation is to be "accorded the traditional presumption of constitutionality generally accorded economic regulations" and is to be "upheld absent proof of arbitrariness or irrationality on the part of Congress." That the accommodation among interests which the legislative branch has struck "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 83–84 (1978). *See also* Usery v. Turner Elkhorn Mining Co.,

"Persons" Defined.—Notwithstanding the historical controversy that has been waged concerning whether the framers of the Fourteenth Amendment intended the word "person" to mean only natural persons, or whether the word was substituted for the word "citizen" with a view to protecting corporations from oppressive state legislation,[56] the Supreme Court, as early as the *Granger Cases*,[57] decided in 1877, upheld on the merits various state laws without raising any question as to the status of railway corporation plaintiffs to advance due process contentions. There is no doubt that a corporation may not be deprived of its property without due process of law,[58] and although prior decisions had held that the "liberty" guaranteed by the Fourteenth Amendment is the liberty of natural, not artificial, persons,[59] nevertheless a newspaper corporation was sustained, in 1936, in its objection that a state law deprived it of liberty of press.[60] As to the natural persons protected by the due process clause, these include all human beings regardless of race, color, or citizenship.[61]

Ordinarily, the mere interest of an official as such, in contrast to an actual injury sustained by a natural or artificial person through invasion of personal or property rights, has not been

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428 U.S. 1, 14–20 (1976); Hodel v. Indiana, 452 U.S. 314, 333 (1981); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124–25 (1978); Brotherhood of Locomotive Firemen v. Chicago, R.I. & P. R.R., 393 U.S. 129, 143 (1968); Ferguson v. Skrupa, 372 U.S. 726, 730, 733 (1963).

[56] *See* Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L. J. 371 (1938).

[57] Munn v. Illinois, 94 U.S. 113 (1877). In a case arising under the Fifth Amendment, decided almost at the same time, the Court explicitly declared the United States "equally with the States . . . are prohibited from depriving persons or corporations of property without due process of law." Sinking Fund Cases, 99 U.S. 700, 718–19 (1879).

[58] Smyth v. Ames, 169 U.S. 466, 522, 526 (1898); Kentucky Co. v. Paramount Exch., 262 U.S. 544, 550 (1923); Liggett Co. v. Baldridge, 278 U.S. 105 (1928).

[59] Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). Earlier, in Northern Securities Co. v. United States, 193 U.S. 197, 362 (1904), a case interpreting the federal antitrust law, Justice Brewer, in a concurring opinion, had declared that "a corporation . . . is not endowed with the inalienable rights of a natural person."

[60] Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"). In First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), faced with the validity of state restraints upon expression by corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—but decided instead that expression was protected, irrespective of the speaker, because of the interests of the listeners. *See* id. at 778 n.14 (reserving question). *But see* id. at 809, 822 (Justices White and Rehnquist dissenting) (corporations as creatures of the state have the rights state gives them).

[61] Yick Wo v. Hopkins, 118 U.S. 356 (1886); Terrace v. Thompson, 263 U.S. 197, 216 (1923). *See* Hellenic Lines v. Rhodetis, 398 U.S. 306, 309 (1970).

deemed adequate to enable him to invoke the protection of the Fourteenth Amendment against state action.[62] Similarly, municipal corporations are viewed as having no standing "to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator," the State.[63] However, state officers are acknowledged to have an interest, despite their not having sustained any "private damage," in resisting an "endeavor to prevent the enforcement of laws in relation to which they have official duties," and, accordingly, may apply to federal courts for the "review of decisions of state courts declaring state statutes which [they] seek to enforce to be repugnant to the" Fourteenth Amendment.[64]

Police Power Defined and Limited.—The police power of a State today embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public safety, health, and morals, and is not confined to the suppression of what is offensive, disorderly, or unsanitary, but extends to what is for the greatest welfare of the state.[65]

Because the police power is the least limitable of the exercises of government, such limitations as are applicable are not readily definable. These limitations can be determined, therefore, only

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[62] Pennie v. Reis, 132 U.S. 464 (1889); Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900); Tyler v. Judges of Court of Registration, 179 U.S. 405, 410 (1900); Straus v. Foxworth, 231 U.S. 162 (1913); Columbus & G. Ry. v. Miller, 283 U.S. 96 (1931).

[63] City of Pawhuska v. Pawhuska Oil Co., 250 U.S. 394 (1919); City of Trenton v. New Jersey, 262 U.S. 182 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933). *But see* Madison School Dist. v. WERC, 429 U.S. 167, 175 n.7 (1976) (reserving question whether municipal corporation as an employer has a First Amendment right assertable against State).

[64] Coleman v. Miller, 307 U.S. 433, 441, 442, 443, 445 (1939); Boynton v. Hutchinson Gas Co., 291 U.S. 656 (1934); South Carolina Hwy. Dept. v. Barnwell Bros., 303 U.S. 177 (1938).

The converse is not true, however, and the interest of a state official in vindicating the Constitution gives him no legal standing to attack the constitutionality of a state statute in order to avoid compliance with it. Smith v. Indiana, 191 U.S. 138 (1903); Braxton County Court v. West Virginia, 208 U.S. 192 (1908); Marshall v. Dye, 231 U.S. 250 (1913); Stewart v. Kansas City, 239 U.S. 14 (1915). *See also* Coleman v. Miller, 307 U.S. 433, 437–46 (1939).

[65] Long ago Chief Justice Marshall described the police power as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824). *See* California Reduction Co. v. Sanitary Works, 199 U.S. 306, 318 (1905); Chicago B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 592 (1906); Bacon v. Walker, 204 U.S. 311 (1907); Eubank v. Richmond, 226 U.S. 137 (1912); Schmidinger v. Chicago, 226 U.S. 578 (1913); Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915); Nebbia v. New York, 291 U.S. 502 (1934); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (police power encompasses preservation of historic landmarks; land-use restrictions may be enacted to enhance the quality of life by preserving the character and aesthetic features of city); City of New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, 427 U.S. 50 (1976).

through appropriate regard to the subject matter of the exercise of that power.[66] "It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise."[67] Insofar as the police power is utilized by a State, the means employed to effect its exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to an end which is public, specifically, the public health, public safety, or public morals, or some other phase of the general welfare.[68]

A general rule often invoked is that if a police power regulation goes too far, it will be recognized as a taking of property for which compensation must be paid.[69] Yet where mutual advantage is a sufficient compensation, an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose seems to be a private use.[70] On the other hand, mere "cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power."[71] Moreover, it is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking without due process of law.[72] Similarly, initial compliance with a regulation which is valid when adopted occasions no forfeiture of the right to protest when that regulation subsequently loses its validity by becoming confiscatory in its operation.[73]

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[66] Hudson Water Co. v. McCarter, 209 U.S. 349 (1908); Eubank v. Richmond, 226 U.S. 137, 142 (1912); Erie R.R. v. Williams, 233 U.S. 685, 699 (1914); Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); Panhandle Eastern Pipeline Co. v. Highway Comm'n, 294 U.S. 613, 622 (1935).

[67] Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 558 (1914).

[68] Liggett Co. v. Baldridge, 278 U.S. 105, 111–12 (1928); Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1936).

[69] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Welch v. Swasey, 214 U.S. 91, 107 (1909). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980). See supra, pp. 1382–95.

[70] Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911).

[71] Erie R.R. v. Williams, 233 U.S. 685, 700 (1914).

[72] New Orleans Public Service v. New Orleans, 281 U.S. 682, 687 (1930).

[73] Abie State Bank v. Bryan, 282 U.S. 765, 776 (1931).

"Liberty".—The "liberty" guaranteed by the due process clause has been variously defined by the Court, as will be seen hereinafter. In general, in the early years, it meant almost exclusively "liberty of contract," but with the demise of liberty of contract came a general broadening of "liberty" to include personal, political and social rights and privileges.[74] Nonetheless, the Court is generally chary of expanding the concept absent statutorily recognized rights.[75]

Liberty of Contract

Regulatory Labor Laws Generally.—Liberty of contract, a concept originally advanced by Justices Bradley and Field in the *Slaughter-House Cases*,[76] was elevated to the status of accepted doctrine in *Allgeyer v. Louisiana*.[77] Applied repeatedly in subsequent cases as a restraint on federal and state power, freedom of contract was also alluded to as a property right, as is evident in the language of the Court in *Coppage v. Kansas*.[78] "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be

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[74] *See* the tentative effort in Hampton v. Mow Sun Wong, 426 U.S. 88, 102 & n.23 (1976), apparently to expand upon the concept of "liberty" within the meaning of the Fifth Amendment's due process clause and necessarily therefore the Fourteenth's.

[75] *See* the substantial confinement of the concept in Meachum v. Fano, 427 U.S. 215 (1976); and Montanye v. Haymes, 427 U.S. 236 (1976), in which the Court applied to its determination of what is a liberty interest the "entitlement" doctrine developed in property cases, in which the interest is made to depend upon state recognition of the interest through positive law, an approach contrary to previous due process-liberty analysis. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 482 (1972). For more recent cases, *see* DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (no Due Process violation for failure of state to protect an abused child from his parent, even though abuse had been detected by social service agency); Collins v. City of Harker Heights, 112 S. Ct. 1061 (1992) (failure of city to warn its employees about workplace hazards does not violate due process; the due process clause does not impose a duty on the city to provide employees with a safe working environment).

[76] 83 U.S. (16 Wall.) 36 (1873).

[77] 165 U.S. 578, 589 (1897). "The liberty mentioned in that [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

[78] 236 U.S. 1, 14 (1915).

struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

By a process of reasoning that was almost completely discarded during the Depression, the Court was nevertheless able, prior thereto, to sustain state ameliorative legislation by acknowledging that freedom of contract was "a qualified and not an absolute right. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community. . . . In dealing with the relation of the employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."[79]

While continuing to acknowledge in abstract terms that freedom of contract is not absolute, the Court in fact was committed to the principle that freedom of contract is the general rule and that legislative authority to abridge it could be justified only by exceptional circumstances. To maintain such abridgments at a minimum, the Court intermittently employed the rule of judicial notice in a manner best exemplified by a comparison of the early cases of *Holden v. Hardy*[80] and *Lochner v. New York*,[81] decisions which bear the same relation to each other as *Powell v. Pennsylvania*[82] and *Mugler v. Kansas*.[83]

In *Holden v. Hardy*,[84] the Court, in reliance upon the principle of presumed validity, allowed the burden of proof to remain with those attacking the validity of a statute and upheld a Utah act limiting the period of labor in mines to eight hours per day. Taking cognizance of the fact that labor below the surface of the earth was attended by risk to person and to health and for these reasons had long been the subject of state intervention, the Court registered its willingness to sustain a limitation on freedom of contract which a state legislature had adjudged "necessary for the preservation of health of employees," and for which there were "reasonable grounds for believing that . . . [it was] supported by the facts."

Seven years later, however, a radically altered Court was predisposed in favor of the doctrine of judicial notice, and applied that

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[79] Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549, 567, 570 (1911). *See also* Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 534 (1923).

[80] 169 U.S. 366 (1898).

[81] 198 U.S. 45 (1905).

[82] 127 U.S. 678 (1888).

[83] 123 U.S. 623 (1887).

[84] 169 U.S. 366, 398 (1898).

doctrine to conclude in *Lochner v. New York*[85] that a law restricting employment in bakeries to ten hours per day and 60 hours per week was an unconstitutional interference with the right of adult laborers, *sui juris*, to contract for their means of livelihood. Denying that in so holding the Court was in effect substituting its own judgment for that of the legislature, Justice Peckham nevertheless maintained that whether the act was within the police power of the State was a "question that must be answered by the Court," and then, in disregard of the accumulated medical evidence proffered in support of the act, uttered the following observation. "In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. . . . It might be safely affirmed that almost all occupations more or less affect the health. . . . But are we all, on that account, at the mercy of the legislative majorities?"[86]

Two dissenting opinions were filed in the case. Justice Harlan, pointing to the abundance of medical testimony tending to show that the life expectancy of bakers was below average, that their capacity to resist diseases was low, and that they were peculiarly prone to suffer irritations of the eyes, lungs, and bronchial passages, concluded that the very existence of such evidence left the reasonableness of the measure open to discussion and that the latter fact of itself put the statute within legislative discretion. "The responsibility therefor rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . [T]he public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."[87]

The second dissenting opinion, written by Justice Holmes, has received the greater measure of attention because the views expressed therein were a forecast of the line of reasoning to be fol-

[85] 198 U.S. 45 (1905).
[86] Id. at 58–59.
[87] Id. at 71, 74 (quoting Atkin v. Kansas, 191 U.S. 207, 223 (1903)).

lowed by the Court some decades later. "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relations of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." [88]

In part, Justice Holmes' criticism of his colleagues was unfair, for his "rational and fair man" could not function in a vacuum, and, in appraising the constitutionality of state legislation, could no more avoid being guided by his preferences or "economic predilections" than were the Justices constituting the majority. Insofar as he accepted the broader conception of due process of law in preference to the historical concept thereof as pertaining to the enforcement rather than the making of law, and did not affirmatively advocate a return to the maxim that the possibility of abuse is no argument against possession of a power, Justice Holmes, whether consciously or not, was thus prepared to observe, along with his opponents in the majority, the very practices which were deemed to have rendered inevitable the assumption by the Court of a "perpetual censorship" over state legislation. The basic distinction, therefore, between the positions taken by Justice Peckham for the majority and Justice Holmes, for what was then the minority, was the

[88] 198 U.S. at 75–76 (1905).

espousal of the conflicting doctrines of judicial notice by the former and of presumed validity by the latter.

Although the Holmes dissent bore fruit in time in the form of the *Bunting v. Oregon*[89] and *Muller v. Oregon*[90] decisions modifying *Lochner*, the doctrinal approach employed in the earlier of these by Justice Brewer continued to prevail until the Depression in the 1930's. In view of the shift in the burden of proof which application of the principle of judicial notice entailed, counsel defending the constitutionality of social legislation developed the practice of submitting voluminous factual briefs replete with medical or other scientific data intended to establish beyond question a substantial relationship between the challenged statute and public health, safety, or morals. Whenever the Court was disposed to uphold measures pertaining to industrial relations, such as laws limiting hours of work,[91] it generally intimated that the facts thus submitted by way of justification had been authenticated sufficiently for it to take judicial cognizance thereof. On the other hand, whenever it chose to invalidate comparable legislation, such as enactments establishing minimum wage for women and children,[92] it brushed aside such supporting data, proclaimed its inability to perceive any reasonable connection between the statute and the legitimate objectives of health or safety, and condemned the statute as an arbitrary interference with freedom of contract.

During the great Depression, however, the *laissez faire* tenet of self-help was supplanted by the belief that it is peculiarly the duty of government to help those who are unable to help themselves. To sustain remedial legislation enacted in conformity with the latter philosophy, the Court had to revise extensively its previously formulated concepts of "liberty" under the due process clause. Not only did the Court take judicial notice of the demands for relief arising from the Depression when it overturned prior holdings and sustained minimum wage legislation,[93] but, in upholding state legislation designed to protect workers in their efforts to organize and bargain collectively, the Court had to reconsider the scope of an

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[89] 243 U.S. 426 (1917).

[90] 208 U.S. 412 (1908).

[91] Id.

[92] Adkins v. Children's Hospital, 261 U.S. 525 (1923); Stettler v. O'Hara, 243 U.S. 629 (1917); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

[93] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Thus the National Labor Relations Act was declared not to "interfere with the normal exercise of the right of the employer to select its employees or to discharge them." However, restraint of the employer for the purpose of preventing an unjust interference with the correlative right of his employees to organize was declared not to be arbitrary. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44, 45–46 (1937).

employer's liberty of contract and recognize a correlative liberty of employees that state legislatures could protect.

To the extent that it acknowledged that liberty of the individual may be infringed by the coercive conduct of other individuals no less than by the arbitrary action of public officials, the Court in effect transformed the due process clause into a source of encouragement to state legislatures to intervene affirmatively to mitigate the effects of such coercion. By such modification of its views, liberty, in the constitutional sense of freedom resulting from restraint upon government, was replaced by the civil liberty which an individual enjoys by virtue of the restraints which government, in his behalf, imposes upon his neighbors.

Laws Regulating Hours of Labor.—Even during the *Lochner* era, the due process clause was construed as permitting enactment by the States of maximum hours laws applicable to women workers[94] and to workers in specified lines of work thought to be physically demanding or otherwise worthy of special protection.[95] Because of the almost plenary powers of the State and its municipal subdivisions to determine the conditions for work on public projects, statutes limiting the hours of labor on public works were also upheld at a relatively early date.[96]

Laws Regulating Labor in Mines.—The regulation of mines being patently within the police power, States during this period were also upheld in the enactment of laws providing for appointment of mining inspectors and requiring payment of their fees by mine owners,[97] compelling employment of only licensed mine managers and mine examiners, and imposing upon mine owners liability for the willful failure of their manager and examiner to furnish a reasonably safe place for workmen.[98] Other similar regulations which have been sustained have included laws requiring that underground passageways meet or exceed a minimum width,[99] that boundary pillars be installed between adjoining coal properties as

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[94] Miller v. Wilson, 236 U.S. 373 (1915) (statute limiting work to 8 hours/day, 48 hours/week); Bosley v. McLaughlin, 236 U.S. 385 (1915) (same restrictions for women working as pharmacists or student nurses). *See also* Muller v. Oregon, 208 U.S. 412 (1908) (10 hours/day as applied to work in laundries); Riley v. Massachusetts, 232 U.S. 671 (1914) (violation of lunch hour required to be posted).

[95] *See, e.g.,* Holden v. Hardy, 169 U.S. 366 (1898) (statute limiting the hours of labor in mines and smelters to eight hours per day); Bunting v. Oregon, 243 U.S. 426 (1917) (statute limiting to ten hours per day, with the possibility of 3 hours per day of overtime at time-and-a-half pay, work in any mill, factory, or manufacturing establishment).

[96] Atkin v. Kansas, 191 U.S. 207 (1903).

[97] St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203 (1902).

[98] Wilmington Mining Co. v. Fulton, 205 U.S. 60 (1907).

[99] Barrett v. Indiana, 229 U.S. 26 (1913).

a protection against flood in case of abandonment,[100] and that washhouses be provided for employees.[101]

Law Prohibiting Employment of Children in Hazardous Occupations.—To make effective its prohibition against the employment of persons under 16 years of age in dangerous occupations, a State has been held to be competent to require employers at their peril to ascertain whether their employees are in fact below that age.[102]

Laws Regulating Payment of Wages.—No unconstitutional deprivation of liberty of contract was deemed to have been occasioned by a statute requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages.[103] Nor was any constitutional defect discernible in laws requiring railroads to pay their employees semimonthly[104] and to pay them on the day of discharge, without abatement or reduction, any funds due them.[105] Similarly, freedom of contract was held not to be infringed by an act requiring that miners, whose compensation was fixed on the basis of weight, be paid according to coal in the mine car rather than at a certain price per ton for coal screened after it has been brought to the surface, and conditioning such payment on the presence of no greater percentage of dirt or impurities than that ascertained as unavoidable by the State Industrial Commission.[106]

Minimum Wage Laws.—The theory that a law prescribing minimum wages for women and children violates due process by impairing freedom of contract was finally discarded in 1937.[107] The modern theory of the Court, particularly when labor is the beneficiary of legislation, was stated by Justice Douglas for a majority of the Court, in the following terms: "Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits. . . . But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard

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[100] Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).

[101] Booth v. Indiana, 237 U.S. 391 (1915).

[102] Sturges & Burn v. Beauchamp, 231 U.S. 320 (1913).

[103] Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901); Dayton Coal and Iron Co. v. Barton, 183 U.S. 23 (1901); Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914).

[104] Erie R.R. v. Williams, 233 U.S. 685 (1914).

[105] St. Louis, I. Mt. & S.P. Ry. v. Paul, 173 U.S. 404 (1899).

[106] Rail Coal Co. v. Ohio Industrial Comm'n, 236 U.S. 338 (1915). *See also* McLean v. Arkansas, 211 U.S. 539 (1909).

[107] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923), a Fifth Amendment case); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."[108] Proceeding from this basis the Court sustained a Missouri statute giving employees the right to absent themselves four hours on election day, between the opening and closing of the polls, without deduction of wages for their absence.

It was admitted that this was a minimum wage law, but, said Justice Douglas, "the protection of the right of suffrage under our scheme of things is basic and fundamental," and hence within the police power. "Of course," the Justice added, "many forms of regulation reduce the net return of the enterprise. . . . Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases."[109]

Workers' Compensation Laws.—"This court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee."[110] "These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of em-

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[108] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

[109] Id. at 424–25. *See also* Dean v. Gadsden Times Pub. Co., 412 U.S. 543 (1973) (sustaining statute providing that employee excused for jury duty should be entitled to full compensation from employer, less jury service fee).

[110] New York Cent. R.R. v. White, 243 U.S. 188, 200 (1917).

ployment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change."[111] Accordingly, a state statute which provided an exclusive system to govern the liabilities of employers and the rights of employees and their dependents to compensation for disabling injuries and death caused by accident in certain hazardous occupations,[112] was held not to work a denial of due process in rendering the employer liable irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow-servants, nor in depriving the employee or his dependents of the higher damages which, in some cases, might be rendered under these doctrines.[113] Likewise, an act which allowed an injured employee an election of remedies permitting restricted recovery under a compensation law although guilty of contributory negligence, and full compensatory damages under the Employers' Liability Act, did not deprive an employer of his property without due process of law.[114]

The imposition upon coal mine operators, and ultimately coal consumers, of the liability of compensating *former* employees who terminated work in the industry before passage of the law for black lung disabilities contracted in the course of their work was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.[115] Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, i.e., that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law; therefore, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster.

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[111] Arizona Employers' Liability Cases, 250 U.S. 400, 419–20 (1919).

[112] In determining what occupations may be brought under the designation of "hazardous," the legislature may carry the idea to the "vanishing point." Ward & Gow v. Krinsky, 259 U.S. 503, 520 (1922).

[113] New York Central R.R. v. White, 243 U.S. 188 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

[114] Arizona Employers' Liability Cases, 250 U.S. 400 (1919).

[115] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976). *But see* id. at 38 (Justice Powell concurring).

Contracts limiting liability for injuries, consummated in advance of the injury received, may be prohibited by the legislature, which may further stipulate that subsequent acceptance of benefits under such contracts shall not constitute satisfaction of a claim for injuries thereafter sustained.[116] Also, as applied to a nonresident alien employee hired within the State but injured outside, an act forbidding any contracts exempting employers from liability for injuries outside the State has been construed as not denying due process to the employer.[117] The fact that a State, after having allowed employers to cover their liability with a private insurer, subsequently withdrew that privilege and required them to contribute to a state insurance fund was held to effect no unconstitutional deprivation as applied to an employer who had obtained protection from an insurance company before this change went into effect.[118] As long as the right to come under a workmen's compensation statute is optional with an employer, the latter, having chosen to accept benefits thereof, is estopped from attempting to escape its burdens by challenging the constitutionality of a provision thereof which makes the finding of fact of an industrial commission conclusive if supported by any evidence regardless of its preponderance.[119]

When, by the terms of a workers' compensation statute, the wrongdoer, in case of wrongful death, is obliged to indemnify the employer or the insurance carrier of the employer of the decedent, in the amount which the latter were required under the act to contribute into special compensation funds, no unconstitutional deprivation of the wrongdoer's property was discernible.[120] By the same course of reasoning neither the employer nor the carrier was held to have been denied due process by another provision in an act requiring payments by them, in case an injured employee dies without dependents, into special funds to be used for vocational rehabilitation or disability compensation of injured workers of other establishments.[121] Compensation also need not be based exclusively on loss of earning power, and an award authorized by statute for injuries resulting in disfigurement of the face or head, independent of compensation for inability to work, has been conceded to be neither an arbitrary nor oppressive exercise of the police power.[122]

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[116] Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549 (1911).

[117] Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[118] Thornton v. Duffy, 254 U.S. 361 (1920).

[119] Booth Fisheries v. Industrial Comm'n, 271 U.S. 208 (1926).

[120] Staten Island Ry. v. Phoenix Co., 281 U.S. 98 (1930).

[121] Sheehan Co. v. Shuler, 265 U.S. 371 (1924); New York State Rys. v. Shuler, 265 U.S. 379 (1924).

[122] New York Cent. R.R. v. Bianc, 250 U.S. 596 (1919). Attorneys are not deprived of property or their liberty of contract by restriction imposed by the State

Collective Bargaining.—During the 1930s, liberty, as translated into what one Justice labeled the *Allgeyer-Lochner-Adair-Coppage* doctrine,[123] lost its potency as an obstacle to legislation calculated to enhance the bargaining capacity of workers as against that already possessed by their employers. Prior to the manifestation, in *Senn v. Tile Layers Union*,[124] of a greater willingness to defer to legislative judgment as to the wisdom and need of such enactments, the Court had, on occasion, sustained measures affecting the employment relationship, e.g., a statute requiring every corporation to furnish, upon request by any employee being discharged or leaving its service, a letter, signed by the superintendent or manager, setting forth the nature and duration of the employee's service and the true cause for leaving.[125] Added provisions that such letters should be on plain paper selected by the em-

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on the fees which they may charge in cases arising under the workmen's compensation law. Yeiser v. Dysart, 267 U.S. 540 (1925).

[123] Justice Black in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949). In his concurring opinion, contained in the companion case of AFL v. American Sash & Door Co., 335 U.S. 538, 543–44 (1949), Justice Frankfurter summarized the now obsolete doctrines employed by the Court to strike down state laws fostering unionization. "[U]nionization encountered the shibboleths of a premachine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of 'liberty' were equated with theories of *laissez faire*. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. . . . The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage-earners' bargaining power. With that attitude as a premise, Adair v. United States, 208 U.S. 161 (1908), and Coppage v. Kansas, 236 U.S. 1 (1915), followed logically enough; not even Truax v. Corrigan, 257 U.S. 312 (1921), could be considered unexpected."

In *Adair* and *Coppage* the Court voided statutes outlawing "yellow dog" contracts whereby, as a condition of obtaining employment, a worker had to agree not to join or to remain a member of a union; these laws, the Court ruled, impaired the employer's "freedom of contract"—the employer's unrestricted right to hire and fire. In *Truax*, the Court on similar grounds invalidated an Arizona statute which denied the use of injunctions to employers seeking to restrain picketing and various other communicative actions by striking employees. And in Wolff Co. v. Industrial Court, 262 U.S. 522 (1923); 267 U.S. 552 (1925) and Dorchy v. Kansas, 264 U.S. 286 (1924), the Court had also ruled that a statute compelling employers and employees to submit their controversies over wages and hours to state arbitration was unconstitutional as part of a system compelling employers and employees to continue in business on terms not of their own making.

[124] 301 U.S. 486 (1937).

[125] Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922). In conjunction with its approval of this statute, the Court also sanctioned judicial enforcement of a local policy rule which rendered illegal an agreement of several insurance companies having a local monopoly of a line of insurance, to the effect that no company would employ within two years anyone who had been discharged from, or left, the service of any of the others.

ployee, signed in ink and sealed, and free from superfluous figures and words, were also sustained as not amounting to any unconstitutional deprivation of liberty and property.[126] On the ground that the right to strike is not absolute, the Court in a similar manner upheld a statute under which a labor union official was punished for having ordered a strike for the purpose of coercing an employer to pay a wage claim of a former employee.[127]

The significance of *Senn v. Tile Layers Union*[128] as an indicator of the range of the alteration of the Court's views concerning the constitutionality of state labor legislation, derives in part from the fact that the statute upheld therein was not appreciably different from that voided in *Truax v. Corrigan*.[129] Both statutes withheld the remedy of injunction. Because, however, the invalidated act did not contain the more liberal and also more precise definition of a labor dispute set forth in the sustained enactment and, above all, did not affirmatively purport to sanction peaceful picketing only, the Court was enabled to maintain that *Truax v. Corrigan*, insofar as "the statute there in question was . . . applied to legalize conduct which was not simply peaceful picketing," was distinguishable. The statute upheld in *Senn* authorized the giving of publicity to labor disputes, declared peaceful picketing and patrolling lawful, and prohibited the granting of injunctions against such conduct; the statute was applied to deny an injunction to a tiling contractor being picketed by a union because he refused to sign a closed shop agreement containing a provision requiring him to abstain from working in his own business as a tile layer or helper. Inasmuch as the enhancement of job opportunities for members of the union was a legitimate objective, the State was held competent to authorize the fostering of that end by peaceful picketing, and the fact that the sustaining of the union in its efforts at peaceful persuasion might have the effect of preventing Senn from continuing in business as an independent entrepreneur was declared to present an issue of public policy exclusively for legislative determination.[130]

Years later, the policy of many state legislatures had evolved in the direction of attempting to control the abuse of the enormous economic power that previously enacted protective measures had

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[126] Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922).

[127] Dorchy v. Kansas, 272 U.S. 306 (1926).

[128] 301 U.S. 468 (1937).

[129] 257 U.S. 312 (1921).

[130] Cases disposing of the contention that restraints on picketing amount to a denial of freedom of speech and constitute therefore a deprivation of liberty without due process of law have been set forth under the First Amendment. *See* pp. 1102, 1121, supra.

enabled labor unions to amass, and here too the Court found restrictions constitutional. Thus the Court upheld application of a state prohibition on racial discrimination by unions, rejecting claims that the measure interfered unlawfully with the union's right to choose its members and abridged its property rights, and liberty of contract. Inasmuch as the union "[held] itself out to represent the general business needs of employees" and functioned "under the protection of the State," the union was deemed to have forfeited the right to claim exemption from legislation protecting workers against discriminatory exclusion.[131]

Similarly approved as constitutional in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*[132] and *AFL v. American Sash & Door Co.*[133] were state laws outlawing the closed shop. When labor unions invoked in their own defense the freedom of contract doctrine that hitherto had been employed to nullify legislation intended for their protection, the Court, speaking through Justice Black, announced its refusal "to return . . . to . . . [a] due process philosophy that has been deliberately discarded. . . . The due process clause," it maintained, does not "forbid a State to pass laws clearly designed to safeguard the opportunity of nonunion workers to get and hold jobs, free from discrimination against them because they are nonunion workers."[134] Also in harmony with the last mentioned pair of cases is *UAW v. WERB*,[135] upholding enforcement of the Wisconsin Employment Peace Act to proscribe as an unfair labor practice efforts of a union, after collective bargaining negotiations had become deadlocked, to coerce an employer through a "slow-down" in production achieved by the frequent, irregular, and unannounced calling of union meetings during working hours. "No one," declared the Court, can question "the State's power to police coercion by . . . methods" which involve "considerable injury to

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[131] Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945). Justice Frankfurter, concurring, declared that "the insistence by individuals of their private prejudices . . ., in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." Id. at 98.

[132] 335 U.S. 525 (1949).

[133] 335 U.S. 538 (1949).

[134] 335 U.S. 525, 534, 537. In a lengthy opinion, in which he registered his concurrence with both decisions, Justice Frankfurter set forth extensive statistical data calculated to prove that labor unions not only were possessed of considerable economic power but by virtue of such power were no longer dependent on the closed shop for survival. He would therefore leave to the legislatures the determination "whether it is preferable in the public interest that trade unions should be subjected to state intervention or left to the free play of social forces, whether experience has disclosed 'union unfair labor practices,' and if so, whether legislative correction is more appropriate than self-discipline and pressure of public opinion. . . ." Id. at 538, 549–50.

[135] 336 U.S. 245 (1949).

property and intimidation of other employees by threats."[136] Finally, in *Giboney v. Empire Storage Co.*,[137] the Court acknowledged that no violation of the Constitution results when a state law forbidding agreements in restraint of trade is construed by state courts as forbidding members of a union of ice peddlers from peacefully picketing a wholesale ice distributor's place of business for the sole purpose of inducing the latter not to sell to nonunion peddlers.

Regulation of Business Enterprises: Rates, Charges, and Conditions of Service

"Business Affected With a Public Interest"—In endeavoring to measure the impact of the due process clause upon efforts by the States to control the charges exacted by various businesses for their services, the Supreme Court, almost from the inception of the Fourteenth Amendment, devoted itself to the examination of two questions: (1) whether the clause precluded that kind of regulation of certain types of business, and (2) the nature of the restraint, if any, which this clause imposed on state control of rates in the case of businesses as to which such control existed. For a brief interval following the ratification of the Fourteenth Amendment, the Supreme Court appears to have underestimated the significance of the due process clause as a substantive restraint on the power of States to fix rates chargeable by an industry deemed appropriately subject to such controls. Thus, in *Munn v. Illinois*,[138] the first of the "*Granger Cases*," in which maximum charges established by a state legislature for Chicago grain elevator companies were challenged, not as being confiscatory in character, but rather as a regulation beyond the power of any state agency to impose, the Court, in an opinion that was largely dictum, declared that the due process clause did not operate as a safeguard against oppressive rates, that if regulation was permissible, the severity thereof was within legislative discretion and could be ameliorated only by resort to the polls. Not much time elapsed, however, before the Court effected a complete withdrawal from this position. By 1890 [139] it had fully converted the due process clause into a positive restriction which the judicial branch was duty bound to enforce whenever state agencies sought to impose rates which, in its estimation, were arbitrary or unreasonable.

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[136] Id. at 253.

[137] 336 U.S. 490 (1949). Other recent cases regulating picketing are treated under the First Amendment. *See* pp. 1173–79, supra.

[138] 94 U.S. 113 (1877).

[139] Chicago, M. & St.P. Ry. v. Minnesota, 134 U.S. 418 (1890).

In contrast to the speed with which the Court arrived at those above mentioned conclusions, more than fifty years were to elapse before it developed its currently applicable formula for determining the propriety of subjecting specific businesses to state regulation of their prices or charges. Prior to 1934, unless a business was "affected with a public interest," control of its prices, rates, or conditions of service was viewed as an unconstitutional deprivation of liberty and property without due process of law. During the period of its application, however, this standard, "business affected with a public interest," never acquired any precise meaning, and as a consequence lawyers were never able to identify all those qualities or attributes which invariably distinguished a business so affected from one not so affected. The most coherent effort by the Court was the following classification prepared by Chief Justice Taft.[140] "(1) Those [businesses] which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. . . . (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Through application of this now outmoded formula the Court found it possible to sustain state laws regulating charges made by grain elevators,[141] stockyards,[142] and tobacco warehouses,[143] and fire insurance rates[144] and commissions paid to fire insurance agents.[145] Voided, because the businesses sought to be controlled

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[140] Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 535–36 (1923).

[141] Munn v. Illinois, 94 U.S. 113 (1877); Budd v. New York, 143 U.S. 517, 546 (1892); Brass v. North Dakota ex rel. Stoesser, 153 U.S. 391 (1894).

[142] Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901).

[143] Townsend v. Yeomans, 301 U.S. 441 (1937).

[144] German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); Aetna Insurance Co. v. Hyde, 275 U.S. 440 (1928).

[145] O'Gorman & Young v. Hartford Ins. Co., 282 U.S. 251 (1931).

were deemed to be not so affected, were state statutes fixing the price at which gasoline may be sold,[146] or at which ticket brokers may resell tickets purchased from theatres,[147] and limiting competition in the manufacture and sale of ice through the withholding of licenses to engage therein.[148]

Nebbia v. New York.—In upholding, by a vote of five-to-four, a depression-induced New York statute fixing prices at which fluid milk might be sold, the Court in 1934 finally shelved the concept of "a business affected with a public interest."[149] Older decisions, insofar as they negatived a power to control prices in businesses found not "to be clothed with a public use" were now viewed as resting, "finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. Price control, like any other form of regulation, is [now] unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." Conceding that "the dairy industry is not, in the accepted sense of the phrase, a public utility," that is, a "business affected with a public interest," the Court in effect declared that price control henceforth is to be viewed merely as an exercise by the government of its police power, and as such is subject only to the restrictions which due process imposes on arbitrary interference with liberty and property. Nor was the Court disturbed by the fact that a "scientific validity" had been claimed for the theories of Adam Smith relating to the "price that will clear the market." However much the minority might stress the unreasonableness of any artificial state regulation interfering with

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[146] Williams v. Standard Oil Co., 278 U.S. 235 (1929).

[147] Tyson & Bro. v. Banton, 273 U.S. 418 (1927).

[148] New State Ice Co. v. Liebmann, 285 U.S. 262 (1932). *See also* Adams v. Tanner, 244 U.S. 590 (1917); Weaver v. Palmer Bro., 270 U.S. 402 (1926).

[149] Nebbia v. New York, 291 U.S. 502, 531–32, 535–37, 539 (1934). In reaching this conclusion the Court might be said to have elevated to the status of prevailing doctrine the views advanced in previous decisions by dissenting Justices. Thus, Justice Stone, dissenting in Ribnik v. McBride, 277 U.S. 350, 359–60 (1928), had declared: "Price regulation is within the State's power whenever any combination of circumstances seriously curtails the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole." In his dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262, 302–03 (1932), Justice Brandeis had also observed: "The notion of a distinct category of business 'affected with a public interest' employing property 'devoted to a public use' rests upon historical error. In my opinion the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible."

the determination of prices by "natural forces,"[150] the majority was content to note that the "due process clause makes no mention of prices" and that "the courts are both incompetent and unauthorized to deal with the wisdom of the policy adopted or the practicability of the law enacted to forward it."

Having thus concluded that it is no longer the nature of the business that determines the validity of a regulation of its rates or charges but solely the reasonableness of the regulation, the Court had little difficulty in upholding, in *Olsen v. Nebraska*,[151] a state law prescribing the maximum commission which private employment agencies may charge. Rejecting the contentions of the employment agencies that the need for such protective legislation had not been shown, the Court held that differences of opinion as to the wisdom, need, or appropriateness of the legislation "suggest a choice which should be left to the States;" and that there was "no necessity for the State to demonstrate before us that evils persist despite the competition" between public, charitable, and private employment agencies. The older case of *Ribnik v. McBride*,[152] which had invalidated similar legislation upon the now obsolete concept of a "business affected with a public interest," was expressly overruled.

Judicial Review of Publicly Determined Rates and Charges

Development.—In *Munn v. Illinois*,[153] its initial holding concerning the applicability of the Fourteenth Amendment to governmental price fixing,[154] the Court not only asserted that governmental regulation of rates charged by public utilities and allied businesses was within the States' police power, but added that the determination of such rates by a legislature was conclusive and not subject to judicial review or revision. Expanding the range of per-

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[150] Justice McReynolds, speaking for the dissenting Justices, labelled the controls imposed by the challenged statute as a "fanciful scheme to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold." Intimating that the New York statute was as efficacious as a safety regulation which required "householders to pour oil on their roofs as a means of curbing the spread of a neighborhood fire," Justice McReynolds insisted that "this Court must have regard to the wisdom of the enactment," and must determine "whether the means proposed have reasonable relation to something within legislative power." 291 U.S., 556, 558 (1934).

[151] 313 U.S. 236, 246 (1941).

[152] 277 U.S. 350 (1928). Adams v. Tanner, 244 U.S. 590 (1917), was disapproved in Ferguson v. Skrupa, 372 U.S. 726 (1963), and Tyson & Bro. v. Banton, 273 U.S. 418 (1927), was effectively overruled in Gold v. DiCarlo, 380 U.S. 520 (1965), without the Court hearing argument on it.

[153] 94 U.S. 113 (1877). *See also* Peik v. Chicago & Nw. Ry., 94 U.S. 164 (1877).

[154] Rate-making is deemed to be one species of price fixing. FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 603 (1942).

missible governmental fixing of prices, the Court in *Nebbia*[155] declared that prices established for business in general would invite judicial condemnation only if "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." The latter standard of judicial appraisal, as will be subsequently noted, represents less of a departure from the principle enunciated in the *Munn* case than that which the Court evolved, in the years following 1877, to measure the validity of state imposed public utility rates, and this difference in the judicial treatment of prices and rates accordingly warrants an explanation at the outset. Unlike operators of public utilities who, in return for the grant of certain exclusive, virtually monopolistic privileges by the governmental unit enfranchising them, must assume an obligation to provide continuous service, proprietors of other businesses are in receipt of no similar special advantages and accordingly are unrestricted in the exercise of their right to liquidate and close their establishments. Owners of ordinary businesses, therefore, at liberty to escape by dissolution the consequences of publicly imposed charges deemed to be oppressive, have thus far been unable to convince the courts that they too, no less than public utilities, are in need of protection through judicial review.

Consistently with its initial pronouncement in the *Munn* case that reasonableness of compensation allowed under permissible rate regulation presented a legislative rather than a judicial question, the Court, in *Davidson v. New Orleans*,[156] also rejected the contention that, by virtue of the due process clause, businesses were nevertheless entitled to "just compensation" for losses resulting from price controls. Less than a decade was to elapse, however, before the Court, appalled perhaps by prospective consequences of leaving business "at the mercy of the majority of the legislature," began to reverse itself. Thus, in 1886, Chief Justice Waite, in the *Railroad Commission Cases*,[157] warned that "this power to regulate is not a power to destroy; [and] the State cannot do that in law which amounts to a taking of property for public use without just compensation or without due process of law;" in other words, a confiscatory rate could not be imposed. By treating "due process of law" and "just compensation" as equivalents, the Court, contrary to its earlier holding in *Davidson v. New Orleans*, was in effect asserting that the imposition of a rate so low as to damage or diminish private property ceased to be an exercise of a State's police

[155] Nebbia v. New York, 291 U.S. 502, 539 (1934).

[156] 96 U.S. 97 (1878). *See also* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

[157] 116 U.S. 307 (1886).

power and became one of eminent domain. Nevertheless, even the added measure of protection afforded by the doctrine of the *Railroad Commission Cases* proved inadequate to satisfy public utilities; the doctrine allowed courts to intervene only to prevent legislative imposition of a confiscatory rate, a rate so low as to be productive of a loss and to amount to taking of property without just compensation. The utilities sought nothing less than a judicial acknowledgment that courts could review the "reasonableness" of legislative rates. Although as late as 1888 the Court doubted that it possessed the requisite power,[158] it finally acceded to the wishes of the utilities in 1890, and, in *Chicago, M. & St.P. Railway v. Minnesota*[159] ruled as follows: "The question of the reasonableness of rates . . . , involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law. . . ."

Despite a last-ditch attempt to reconcile *Munn* with *Chicago, M. & St.P. Railway* by confining application of the latter decision to cases in which rates had been fixed by a commission and denying its pertinence to rates directly imposed by a legislature,[160] the Court in *Reagan v. Farmer's Loan and Trust Co.*[161] set at rest all lingering doubts over the scope of judicial intervention by declaring that, "if a carrier," in the absence of a legislative rate, "attempted to charge a shipper an unreasonable sum," the Court, in accordance with common law principles, will pass on the reasonableness of its rates, and has "jurisdiction . . . to award the shipper any amount exacted . . . in excess of a reasonable rate. . . . The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of a carrier prescribes the rates."[162] Reiterating virtually the same principle in *Smyth v. Ames*,[163] the

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[158] Dow v. Beidelman, 125 U.S. 680 (1888).

[159] 134 U.S. 418, 458 (1890).

[160] Budd v. New York, 143 U.S. 517 (1892).

[161] 154 U.S. 362, 397 (1894).

[162] Insofar as judicial intervention resulting in the invalidation of legislatively imposed rates has involved carriers, it should be noted that the successful complainant invariably has been the carrier, not the shipper.

[163] 169 U.S. 466 (1898). Of course the validity of rates prescribed by a State for services wholly within its limits must be determined wholly without reference to the interstate business done by a public utility. Domestic business should not be made to bear the losses on interstate business and vice versa. Thus a State has no power to require the hauling of logs at a loss or at rates that are unreasonable, even if a railroad receives adequate revenues from the intrastate long haul and the inter-

Court not only obliterated the distinction between confiscatory and unreasonable rates but contributed the additional observation that the requirements of due process are not met unless a court not only reviews the reasonableness of a rate but also determines whether the rate permits the utility to earn a fair return on a fair valuation of its investment.

Limitations on Judicial Review.—Even while reviewing the reasonableness of rates the Court recognized some limits on judicial review. As early as 1894, the Court asserted: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; . . . [however, there can be no doubt] of their power and duty to inquire whether a body of rates . . . is unjust and unreasonable . . . and if found so to be, to restrain its operation."[164] And later, in 1910, the Court made a similar observation that courts may not, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside" an order of the commission within the scope of the power delegated to such commission, upon the ground that such power was unwisely or expediently exercised.[165]

Also inferable from these early holdings, and effective to restrict the bounds of judicial investigation, is a distinction between factual questions that relate only to the wisdom or expediency of a rate order, and are unreviewable, and other factual determinations that bear on a commission's power to act and are inseparable from the constitutional issue of confiscation, hence are reviewable. This distinction was accorded adequate emphasis by the Court in

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state lumber haul taken together. On the other hand, in determining whether intrastate passenger railway rates are confiscatory, all parts of the system within the State (including sleeping, parlor, and dining cars) should be embraced in the computation, and the unremunerative parts should not be excluded because built primarily for interstate traffic or not required to supply local transportation needs. *See* Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 434–35 (1913); Chicago, M. & St.P. Ry. v. Public Util. Comm'n, 274 U.S. 344 (1927); Groesbeck v. Duluth, S.S. & A. Ry., 250 U.S. 607 (1919). The maxim that a legislature cannot delegate legislative power is qualified to permit creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. To prevent a holding of invalid delegation of legislative power, the legislature must constrain the board with a certain course of procedure and certain rules of decision in the performance of its functions, with which the agency must substantially comply to validate its action. Wichita R.R. v. Public Util. Comm'n, 260 U.S. 48 (1922).

[164] Reagan v. Farmers' Loan & Trust Co., 154, U.S. 362, 397 (1894).

[165] ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910). This statement, made in the context of federal ratemaking, appears to be equally applicable to judicial review of state agency actions.

Louisville & Nashville R.R. v. Garrett,[166] in which it declared that "the appropriate question for the courts" is simply whether a "commission," in establishing a rate, "acted within the scope of its power" and did not violate "constitutional rights . . . by imposing confiscatory requirements." The carrier contesting the rate was not entitled to have a court also pass upon a question of fact regarding the reasonableness of a higher rate the carrier charged prior to the order of the commission. All that need concern a court, it said, is the fairness of the proceeding whereby the commission determined that the existing rate was excessive, but not the expediency or wisdom of the commission's having superseded that rate with a rate regulation of its own.

Likewise, with a view to diminishing the number of opportunities courts have for invalidating rate regulations of state commissions, the Court placed various obstacles in the path of the complaining litigant. Thus, not only must a person challenging a rate assume the burden of proof,[167] but he must present a case of "manifest constitutional invalidity";[168] if, notwithstanding this effort, the question of confiscation remains in doubt, no relief will be granted.[169] Moreover, even though a public utility which has petitioned a commission for relief from allegedly confiscatory rates need not await indefinitely for the commission's decision before applying to a court for equitable relief,[170] the court ought not to interfere in advance of any experience of the practical result of such rates.[171]

In the course of time, however, a distinction emerged between ordinary factual determinations by state commissions and factual determinations which were found to be inseparable from the legal and constitutional issue of confiscation. In two older cases arising from proceedings begun in lower federal courts to enjoin rates, the Court initially adopted the position that it would not disturb findings of fact insofar as these were supported by substantial evidence. Thus, in *San Diego Land Company v. National City*,[172] the Court declared that after a legislative body had fairly and fully investigated and acted, by fixing what it believed to be reasonable rates, the courts cannot step in and set aside the action due to a different conclusion about the reasonableness of the rates. "Judicial

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[166] 231 U.S. 298, 310–13 (1913).

[167] Des Moines Gas Co. v. Des Moines, 238 U.S. 153 (1915).

[168] Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 452 (1913).

[169] Knoxville v. Water Co., 212 U.S. 1 (1909).

[170] Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926).

[171] Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909).

[172] 174 U.S. 739, 750, 754 (1899). *See also* Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 433 (1913).

interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." And in a similar later case[173] the Court expressed even more clearly its reluctance to reexamine ordinary factual determinations. It is not bound "to reexamine and weigh all the evidence . . . or to proceed according to . . . [its] independent opinion as to what are proper rates. It is enough if . . . [the Court] cannot say that it was impossible for a fair-minded board to come to the result which was reached."

Moreover, in reviewing orders of the Interstate Commerce Commission, the Court, at least in earlier years,[174] chose to be guided by approximately the same standards it had originally formulated for examining regulations of state commissions. The following excerpt from its holding in *ICC v. Union Pacific R.R.*[175] represents an adequate summation of the law as it stood prior to 1920: "[Q]uestions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that the rate is so low as to be confiscatory . . . ; or if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling . . . [The Commission's] conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision . . . can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The* Ben Avon *Case.—These standards of review were abruptly rejected by the Court in *Ohio Valley Co. v. Ben Avon Bor-*

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[173] San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 441, 442 (1903). *See also* Van Dyke v. Geary, 244 U.S. 39 (1917); Georgia Ry. v. Railroad Comm'n, 262 U.S. 625, 634 (1923).

[174] For its current position, *see* Crowell v. Benson, 285 U.S. 22 (1932).

[175] 222 U.S. 541, 547–48 (1912). *See also* ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910).

ough,[176] as being no longer sufficient to satisfy the requirements of due process. Unlike previous confiscatory rate litigation, which had developed from rulings of lower federal courts in injunctive proceedings, this case reached the Supreme Court by way of appeal from a state appellate tribunal;[177] although the state court had in fact reviewed the evidence and ascertained that the state commission's findings of fact were supported by substantial evidence, it also construed the statute providing for review as denying to state courts "the power to pass upon the weight of such evidence." Largely on the strength of this interpretation of the applicable state statute, the Court held that when the order of a legislature, or of a commission, prescribing a schedule of maximum future rates is challenged as confiscatory, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

Without departing from the ruling previously enunciated in *Louisville & Nashville R.R. v. Garrett*,[178] that the failure of a State to grant a statutory right of judicial appeal from a commission's regulation is not violative of due process as long as relief is obtainable by a bill in equity for injunction, the Court also held that the alternative remedy of injunction expressly provided by state law did not afford an adequate opportunity for testing judicially a confiscatory rate order. It conceded the principle stressed by the dissenting Justices that "where a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review."[179]

History of the Valuation Question.—For almost fifty years the Court wandered through a maze of conflicting formulas for valuing public service corporation property only to emerge therefrom in 1944 at a point not very far removed from *Munn v. Illinois*.[180]

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[176] 253 U.S. 287 (1920).

[177] Id. at 289. In injunctive proceedings, evidence is freshly introduced whereas in the cases received on appeal from state courts, the evidence is found within the record.

[178] 231 U.S. 298 (1913).

[179] 253 U.S. 287, 291, 295 (1920).

[180] 94 U.S. 113 (1877). Because some of these methods or formulas, no longer required as a matter of constitutional law, may continue to be used by state commissions in drafting rate orders, a survey is provided below.

(1) *Fair Value*.—On the premise that a utility is entitled to demand a rate schedule that will yield a "fair return upon the value" of the property which it employs for public convenience, the Court in Smyth v. Ames, 169 U.S. 466, 546–47

(1898), held that determination of such value necessitated consideration of at least such factors as "the original cost of construction, the amount expended in permanent improvements, the amount and market value of . . . [the utility's] bonds and stock, the present as compared with the original cost of construction, [replacement cost], the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses.

(2) *Reproduction Cost*.—Prior to the demise in 1944 of the *Smyth v. Ames* fair value formula, two of the components thereof were accorded special emphasis with the second quickly surpassing the first in measure of importance. These were: (1) the actual cost of the property ("the original cost of construction together with the amount expended in permanent improvements") and (2) reproduction costs ("the present as compared with the original cost of construction"). For varied application of the reproduction cost formula, *see* San Diego Land Co. v. National City, 174 U.S. 739, 757 (1899); San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 443 (1903); Willcox v. Consolidated Gas Co., 212 U.S. 19, 52 (1909); Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352 (1913); Galveston Elec. Co. v. Galveston, 258 U.S. 388, 392 (1922); Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276 (1923); Bluefield Co. v. Public Serv. Comm'n, 262 U.S. 679 (1923); Georgia Ry. v. Railroad Comm'n, 262 U.S. 625, 630 (1923); McCardle v. Indianapolis Co., 272 U.S. 400 (1926); St Louis & O'Fallon Ry. v. United States, 279 U.S. 461 (1929).

(3) *Prudent Investment* (Versus Reproduction Cost).—This method of valuation, championed by Justice Brandeis in a separate opinion in Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291–92, 302, 306–07 (1923), was defined as follows: "The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of capital . . . the allowance for the risk incurred; and enough more to attract capital. . . . Where the financing has been proper, the cost to the utility of the capital, required to construct, equip and operate its plant, should measure the rate of return which the Constitution guarantees opportunity to earn." Advantages to be derived from "adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return" would, according to Justice Brandeis, be nothing less than the attainment of a "basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as a matter of opinion. It would not fluctuate with the market price of labor, or materials, or money.

As a method of valuation, the prudent investment theory was not accorded any acceptance until the Depression of the 1930's. The sharp decline in prices which occurred during this period doubtless contributed to the loss of affection for reproduction costs. In Los Angeles Gas Co. v. Railroad Comm'n, 289 U.S. 287 (1933) and Railroad Comm'n v. Pacific Gas Co., 302 U.S. 388, 399, 405 (1938), the Court upheld respectively a valuation from which reproduction costs had been excluded and another in which historical cost served as the rate base. Later, in 1942, when in FPC v. Natural Gas Pipeline Co., 315 U.S. 575, the Court further emphasized its abandonment of the reproduction cost factor, there developed momentarily the prospect that prudent investment might be substituted. This possibility was quickly negatived, however, by the *Hope Gas* case, (FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)), which dispensed with the necessity of relying upon any formula for the purpose of fixing valid rates.

(4) *Depreciation*.—No less indispensable to the determination of the fair value mentioned in *Smyth v. Ames* was the amount of depreciation to be allowed as a deduction from the measure of cost employed, whether the latter be actual cost, reproduction cost, or any other form of cost determination. Although not mentioned in *Smyth v. Ames*, the Court gave this item consideration in Knoxville v. Water Co., 212 U.S. 1, 9–10 (1909); but notwithstanding its early recognition as an allowable item of deduction in determining value, depreciation continued to be the subject of controversy arising out of the difficulty of ascertaining it and of computing annual

By holding in *FPC v. Natural Gas Pipeline Co.,*[181] that the "Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas," and in *FPC v. Hope Natu-*

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allowances to cover the same. Indicative of such controversy was the disagreement as to whether annual allowances shall be in such amount as will permit the replacement of equipment at current costs, i.e., present value, or at original cost. In the *Hope Gas* case, 320 U.S. at 606, the Court reversed United Railways v. West, 280 U.S. 234, 253–254 (1930), insofar as that holding rejected original cost as the basis of annual depreciation allowances.

(5) *Going Concern Value and Good Will.*—Whether intangibles were to be included in valuation was not passed upon in *Smyth v. Ames,* but shortly thereafter, in Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 165 (1915), the Court declared it to be self-evident "that there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, . . . [and that] this element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return. . . ." Generally described as going concern value, this element has never been precisely defined by the Court. In its latest pronouncement on the subject, uttered in FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 589 (1942), the Court denied that there is any "constitutional requirement that going concern value, even when it is an appropriate element to be included in a rate base, must be separately stated and appraised as such. . . . [Valuations have often been sustained] without separate appraisal of the going concern element. . . . When that has been done, the burden rests on the regulated company to show that this item has neither been adequately covered in the rate base nor recouped from prior earnings of the business." Franchise value and good will, on the other hand, have been consistently excluded from valuation; the latter presumably because a utility invariably enjoys a monopoly and consumers have no choice in the matter of patronizing it. The latter proposition has been developed in the following cases: Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909); Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 163–64 (1915); Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922); Los Angeles Gas Co. v. Railroad Comm'n, 289 U.S. 287, 313 (1933).

(6) *Salvage Value.*—It is not a constitutional error to disregard theoretical reproduction cost for a plant which '"no responsible person would think of reproducing." Accordingly, where, due to adverse conditions, a street-surface railroad had lost all value except for scrap or salvage, it was permissible for a commission, as the Court held in Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 562, 564 (1945), to use as a rate the price at which the utility offered to sell its property to a citizen. Moreover, the Commission's order was not invalid even through under the prescribed rate the utility would operate at a loss; for the due process clause cannot be invoked to protect a public utility against business hazards, such as the loss of, or failure to obtain patronage. On the other hand, in the case of a water company whose franchise has expired, but where there is no other source of supply, its plant should be valued as actually in use rather than at what the property would bring for some other use in case the city should build its own plant. Denver v. Denver Union Water Co., 246 U.S. 178 (1918).

(7) *Past Losses and Gains.*—"The Constitution [does not] require that the losses of . . . [a] business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned." FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942). Nor can past losses be used to enhance the value of the property to support a claim that rates for the future are confiscatory, Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922), any more than profits of the past can be used to sustain confiscatory rates for the future Newton v. Consolidated Gas Co., 258 U.S. 165, 175 (1922); Board of Comm'rs v. New York Tel. Co., 271 U.S. 23, 31–32 (1926).

[181] 315 U.S. 575, 586 (1942).

ral Gas Co.,[182] that "it is the result reached not the method employed which is controlling, . . . [that] it is not the theory but the impact of the rate order which counts, [and that] if the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end," the Court, in effect, abdicated from the position assumed in the *Ben Avon* case.[183] Without surrendering the judicial power to declare rates unconstitutional on ground of a substantive deprivation of due process,[184] the Court announced that it would not overturn a result it deemed to be just simply because "the method employed [by a commission] to reach that result may contain infirmities. . . . [A] Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order . . . carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."[185] The Court recently reaffirmed *Hope Natural Gas's* emphasis on the bottom line: "[t]he Constitution within broad limits leaves the States free to decide what rate-setting methodology best meets their needs in balancing the interests of the utility and the public."[186]

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[182] 320 U.S. 591, 602 (1944). Although this and the previously cited decision arose out of controversies involving the National Gas Act of 1938, the principles laid down therein are believed to be applicable to the review of rate orders of state commissions, except insofar as the latter operate in obedience to laws containing unique standards or procedures.

[183] Ohio Valley Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

[184] In FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 599 (1942), Justices Black, Douglas, and Murphy, in a concurring opinion, proposed to travel the road all the way back to Munn v. Illinois, and deprive courts of the power to void rates simply because they deem the latter to be unreasonable. In a concurring opinion, in Driscoll v. Edison Co., 307 U.S. 104, 122 (1939), Justice Frankfurter temporarily adopted a similar position; he declared that "the only relevant function of law . . . [in rate controversies] is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process." However, in his dissent in FPC v. Hope Natural Gas Co., 320 U.S. 591, 625 (1944), he disassociated himself from this proposal, and asserted that "it was decided [more than fifty years ago] that the final say under the Constitution lies with the judiciary."

[185] FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944), *See also* Wisconsin v. FPC, 373 U.S. 294, 299, 317, 326 (1963), wherein the Court tentatively approved an "area rate approach," that is "the determination of fair prices for gas, based on reasonable financial requirements of the industry, for . . . the various producing areas of the country," and with rates being established on an area basis rather than on an individual company basis. Four dissenters, Justices Clark, Black, Brennan, and Chief Justice Warren, labelled area pricing a "wild goose chase," and stated that the Commission had acted in an arbitrary and unreasonable manner entirely outside traditional concepts of administrative due process. Area rates were approved in Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[186] Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989) (rejecting takings challenge to Pennsylvania rule preventing utilities from amortizing costs of canceled nuclear plants).

In dispensing with the necessity of observing the old formulas for rate computation, the Court did not articulate any substitute guidance for ascertaining whether a so-called end result is unreasonable. It did intimate that rate-making "involves a balancing of the investor and consumer interests," which does not, however, "'insure that the business shall produce net revenues'. . . . From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." [187]

Regulation of Public Utilities (Other Than Rates)

In General.—By virtue of the nature of the business they carry on and the public's interest in it, public utilities are subject to state regulation exerted either directly by the legislature or by duly authorized administrative bodies. [188] But because the property of public utilities remains under the full protection of the Constitution, it follows that whenever the state regulates in a manner that infringes the right of ownership in what the Court considers to be an "arbitrary" or "unreasonable" way, due process is violated. [189] Thus, a city cannot take possession of the equipment of a street railway company, the franchise of which has expired, [190] although it may subject the company to the alternative of accepting an inadequate price for its property or of ceasing operations and removing its property from the streets. [191] Likewise, a city desirous of establishing a lighting system of its own may not remove, without compensation, the fixtures of a lighting company already occupying the streets under a franchise, [192] although it may compete with a com-

[187] FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) (citing Chicago G.T. Ry. v. Wellman, 143 U.S. 339, 345–46 (1892)); Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291 (1923).

[188] Atlantic Coast Line R.R. v. Corporation Comm'n, 206 U.S. 1, 19 (1907) (citing Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877)). *See also* Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908); Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919).

[189] Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 344 (1892); Mississippi R.R. Comm'n v. Mobile & Ohio R.R., 244 U.S. 388, 391 (1917). *See also* Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935).

[190] Cleveland Electric Ry. v. Cleveland, 204 U.S. 116 (1907).

[191] Detroit United Ry. v. Detroit, 255 U.S. 171 (1921). *See also* Denver v. New York Trust Co., 229 U.S. 123 (1913).

[192] Los Angeles v. Los Angeles Gas Corp., 251 U.S. 32 (1919).

pany that has no exclusive charter.[193] The property of a telegraph company is not illegally taken, however, by a municipal ordinance that demands, as a condition for the establishment of poles and conduits in city streets, that the city's wires be carried free of charge, and which provides for the moving of the conduits, when necessary, at company expense.[194]

And, the fact that a State, by mere legislative or administrative fiat, cannot convert a private carrier into a common carrier will not protect a foreign corporation which has elected to enter a State the constitution and laws of which require that it operate its local private pipe line as a common carrier. Such foreign corporation is viewed as having waived its constitutional right to be secure against imposition of conditions which amount to a taking of property without due process of law.[195]

Compulsory Expenditures: Grade Crossings, and the Like.—Generally, the enforcement of uncompensated obedience to a regulation for the public health and safety is not an unconstitutional taking of property without due process of law.[196] Thus, where the applicable rule so required at the time of the granting of its charter, a water company may be compelled to furnish connections at its own expense to one residing on an ungraded street in which it voluntarily laid its lines.[197] However, if pipe and telephone lines are located on a right of way owned by a pipeline company, the latter cannot, without a denial of due process, be required to relocate such equipment at its own expense,[198] but if its pipes are laid under city streets, a gas company validly may be obligated to assume the cost of moving them to accommodate a municipal drainage system.[199]

To require a turnpike company, as a condition of its taking tolls, to keep its road in repair and to suspend collection thereof, conformably to a state statute, until the road is put in good order, does not take property without due process of law, notwithstanding the fact that present patronage does not yield revenue sufficient to

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[193] Newburyport Water Co. v. Newburyport, 193 U.S. 561 (1904). *See also* Skaneateles Water Co. v. Skaneateles, 184 U.S. 354 (1902); Helena Water Works Co. v. Helena, 195 U.S. 383 (1904); Madera Water Works v. Madera, 228 U.S. 454 (1913).

[194] Western Union Tel. Co. v. Richmond, 224 U.S. 160 (1912).

[195] Pierce Oil Corp. v. Phoenix Ref. Co., 259 U.S. 125 (1922).

[196] Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 558 (1914). *See also* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 255 (1897); Chicago, B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 591–92 (1906); New Orleans Pub. Serv. v. New Orleans, 281 U.S. 682 (1930).

[197] Consumers' Co. v. Hatch, 224 U.S. 148 (1912).

[198] Panhandle Eastern Pipe Line Co. v. Highway Comm'n, 294 U.S. 613 (1935).

[199] New Orleans Gas Co. v. Drainage Comm'n, 197 U.S. 453 (1905).

maintain the road in proper condition.[200] Nor is a railroad bridge company unconstitutionally deprived of its property when, in the absence of proof that the addition will not yield a reasonable return, it is ordered to widen its bridge by inclusion of a pathway for pedestrians and a roadway for vehicles.[201]

Similarly upheld against due process/taking claims were requirements that railroads repair a viaduct under which they operate,[202] or reconstruct a bridge or provide means for passing water for drainage through their embankment,[203] or sprinkle that part of the street occupied by them.[204] On the other hand, a requirement that an underground cattle-pass is be constructed, not as a safety measure but as a means of sparing the farmer the inconvenience attendant upon the use of an existing and adequate grade crossing, was held to be a prohibited taking of the railroad's property for private use.[205] As to grade crossing elimination, the rule is well established that the state may exact from railroads the whole, or such part, of the cost thereof as it deems appropriate, even though commercial highway users, who make no contribution whatsoever, benefit from such improvements.

While the power of the State in this respect is not unlimited, and an "arbitrary" and "unreasonable" imposition may be set aside, the Court's modern approach to substantive due process analysis makes this possibility far less likely than it once was. Distinguishing a 1935 case invalidating a statutorily mandated 50% cost sharing which in effect prevented particularized findings of reasonableness (and which contained language suggesting that railroads could not fairly be required to subsidize competitive transportation modes),[206] the Court in 1953 ruled that the costs of grade separation improvements need not be allocated solely on the basis of benefits that would accrue to railroad property.[207] While the Court cautioned that "allocation of costs must be fair and reasonable," it also took an approach very deferential to local governmental decisions, stating that in the exercise of the police power to meet transportation, safety, and convenience needs of a growing community,

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[200] Norfolk Turnpike Co. v. Virginia, 225 U.S. 264 (1912).

[201] International Bridge Co. v. New York, 254 U.S. 126 (1920).

[202] Chicago, B. & Q. R.R. v. Nebraska, 170 U.S. 57 (1898).

[203] Chicago, B. & Q. Ry. v. Drainage Comm'n, 200 U.S. 561 (1906); Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915); Lake Shore & Mich. So. Ry. v. Clough, 242 U.S. 375 (1917).

[204] Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919).

[205] Chicago, St. P., Mo. & O. Ry. v. Holmberg, 282 U.S. 162 (1930).

[206] Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). *See also* Lehigh Valley R.R. v. Commissioners, 278 U.S. 24, 35 (1928) (upholding imposition of grade crossing costs on a railroad although "near the line of reasonableness," and reiterating that "unreasonably extravagant" requirements would be struck down).

[207] Atchison T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346, 352 (1953).

"the cost of such improvements *may be* allocated all to the railroads."

Compellable Services.—The primary duty of a public utility being to serve on reasonable terms all those who desire the service it renders, it follows that a company cannot pick and choose and elect to serve only those portions of its territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. Compelling a gas company to continue serving specified cities as long as it continues to do business in other parts of the State entails therefore no unconstitutional deprivation.[208] Likewise, a railway may be compelled to continue the service of a branch or part of a line although the operation involves a loss.[209] But even though a utility, as a condition of enjoyment of powers and privileges granted by the State, is under a continuing obligation to provide reasonably adequate service, and even though that obligation cannot be avoided merely because performance occasions financial loss, yet if a company is at liberty to surrender its franchise and discontinue operations, it cannot be compelled to continue at a loss.[210]

Pursuant to the principle that a State may require railroads to provide adequate facilities suitable for the convenience of the communities they serve,[211] such carriers have been obligated to establish stations at proper places for the convenience of patrons,[212] to stop all their intrastate trains at county seats,[213] to run a regular passenger train instead of a mixed passenger and freight train,[214] to furnish passenger service on a branch line previously devoted exclusively to carrying freight,[215] to restore a siding used principally by a particular plant but available generally as a public track, and to continue, even though not profitable by itself, sidetrack[216] as well as the upkeep of a switch track leading from its main line to

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[208] United Gas Co. v. Railroad Comm'n, 278 U.S. 300, 308–09 (1929). *See also* New York ex rel. Woodhaven Gas Light Co. v. Public Serv. Comm'n, 269 U.S. 244 (1925); New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917).

[209] Missouri Pac. Ry. v. Kansas, 216 U.S. 262 (1910); Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603 (1917); Fort Smith Traction Co. v. Bourland, 267 U.S. 330 (1925).

[210] Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603, 607 (1917); Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396 (1920); Railroad Comm'n v. Eastern Tex. R.R., 264 U.S. 79 (1924); Broad River Co. v. South Carolina ex rel. Daniel, 281 U.S. 537 (1930).

[211] Atchison, T. & S.F. Ry. v. Railroad Comm'n, 283 U.S. 380, 394–95 (1931).

[212] Minneapolis & St. L. R.R. v. Minnesota, 193 U.S. 53 (1904).

[213] Gladson v. Minnesota, 166 U.S. 427 (1897).

[214] Missouri Pac. Ry. v. Kansas, 216 U.S. 262 (1910).

[215] Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603 (1917).

[216] Lake Erie & W. R.R. v. Public Util. Comm'n, 249 U.S. 422 (1919); Western & Atlantic R.R. v. Public Comm'n, 267 U.S. 493 (1925).

industrial plants.[217] However, a statute requiring a railroad without indemnification to install switches on the application of owners of grain elevators erected on its right-of-way was held void.[218] Whether a state order requiring transportation service is to be viewed as reasonable may necessitate consideration of such facts as the likelihood that pecuniary loss will result to the carrier, the nature, extent and productiveness of the carrier's intrastate business, the character of the service required, the public need for it, and its effect upon service already being rendered.[219] Requirements for service having no substantial relation to transportation have been voided, as in the case of an order requiring railroads to maintain cattle scales to facilitate trading in cattle,[220] and a prohibition against letting down an unengaged upper berth while the lower berth was occupied.[221]

"Since the decision in *Wisconsin, M. & P.R. Co. v. Jacobson*, 179 U.S. 287 (1900), there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connections. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. . . . If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' . . . Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the Court must consider all the facts—the places and persons interested, the vol-

[217] Alton R.R. v. Illinois Commerce Comm'n, 305 U.S. 548 (1939).

[218] Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910).

[219] Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603, 607 (1917).

[220] Great Northern Ry. v. Minnesota, 238 U.S. 340 (1915); Great Northern Ry. Co. v. Cahill, 253 U.S. 71 (1920).

[221] Chicago, M. & St. P. R.R. v. Wisconsin, 238 U.S. 491 (1915).

ume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier."[222]

Although a carrier is under a duty to accept goods tendered at its station, it cannot be required, upon payment simply for the service of carriage, to accept cars offered at an arbitrary connection point near its terminus by a competing road seeking to reach and use the former's terminal facilities. Nor may a carrier be required to deliver its cars to connecting carriers without adequate protection from loss or undue detention or compensation for their use.[223] But a carrier may be compelled to interchange its freight cars with other carriers under reasonable terms,[224] and to accept, for reshipment over its lines to points within the State, cars already loaded and in suitable condition.[225]

Due process is not denied when two carriers, who wholly own and dominate a small connecting railroad, are prohibited from exacting higher charges from shippers accepting delivery over said connecting road than are collected from shippers taking delivery at the terminals of said carriers.[226] Nor is it "unreasonable" or "arbitrary" to require a railroad to desist from demanding advance payment on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment.[227]

Safety Regulations Applicable to Railroads.—Governmental power to regulate railroads in the interest of safety has long been conceded. The following regulations have been upheld: a prohibition against operation on certain streets,[228] restrictions on speed, operations, and the like, in business sections,[229] requirement of construction of a sidewalk across a right of way,[230] or removal of a track crossing at a thoroughfare,[231] compelling the presence of a flagman at a crossing notwithstanding that automatic devices might be cheaper and better,[232] compulsory examination of

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[222] Washington ex rel. Oregon R.R. & Nav. Co. v. Fairchild, 224 U.S. 510, 528–29 (1912). *See also* Michigan Cent. R.R. v. Michigan R.R. Comm'n, 236 U.S. 615 (1915); Seaboard Air Line R.R. v. Georgia R.R. Comm'n, 240 U.S. 324, 327 (1916).

[223] Louisville & Nashville R.R. v. Stock Yards Co., 212 U.S. 132 (1909).

[224] Michigan Cent. R.R. v. Michigan R.R. Comm'n, 236 U.S. 615 (1915).

[225] Chicago, M. & St. P. Ry. v. Iowa, 233 U.S. 334 (1914).

[226] Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass'n, 247 U.S. 490 (1918). Nor are railroads denied due process when they are forbidden to exact a greater charge for a shorter distance than for a longer distance. Louisville & Nashville R.R. v. Kentucky, 183 U.S. 503, 512 (1902); Missouri Pacific Ry. v. McGrew Coal Co., 244 U.S. 191 (1917).

[227] Wadley Southern Ry. v. Georgia, 235 U.S. 651 (1915).

[228] Railroad Co. v. Richmond, 96 U.S. 521 (1878).

[229] Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548 (1914).

[230] Great Northern Ry. v. Minnesota ex rel. Clara City, 246 U.S. 434 (1918).

[231] Denver & R. G. R.R. v. Denver, 250 U.S. 241 (1919).

[232] Nashville, C. & St. L. Ry. v. White, 278 U.S. 456 (1929).

employees for color blindness,[233] full crews on certain trains,[234] specification of a type of locomotive headlight,[235] safety appliance regulations,[236] and a prohibition on the heating of passenger cars from stoves or furnaces inside or suspended from the cars.[237]

Statutory Liabilities and Penalties Applicable to Railroads.—A statute making the initial carrier,[238] or the connecting or delivering carrier,[239] liable to the shipper for the nondelivery of goods is not unconstitutional; nor is a law which provides that a railroad shall be responsible in damages to the owner of property injured by fire communicated by its locomotive engines and which grants the railroad an insurable interest in such property along its route and authority to procure insurance against such liability.[240] Equally consistent with the requirements of due process are the following two enactments: the first, imposing on all common carriers a penalty for failure to settle within a reasonable specified period claims for freight lost or damaged in shipment and conditioning payment of that penalty upon recovery by the claimant in a subsequent suit of more than the amount tendered,[241] and the second, levying double damages and an attorney's fee upon a railroad for failure to pay within a reasonable time after demand the amount claimed by an owner for stock injured or killed. However, the Court subsequently limited its approval of the latter statute to cases in which the plaintiff had not demanded more than he recovered in court;[242] when the penalty is exacted in a case in which the plaintiff initially demanded more than he sued for and recovered, a defendant railroad is arbitrarily deprived of its property for refusing to meet the initial excessive demand.[243]

Also invalidated during this period of heightened judicial scrutiny was a penalty imposed on a carrier that had collected transportation charges in excess of established maximum rates; the penalty of $500 liquidated damages plus a reasonable attorney's fee

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[233] Nashville, C. & St. L. Ry. v. Alabama, 128 U.S. 96 (1888).

[234] Chicago, R.I. & P. Ry. v. Arkansas, 219 U.S. 453 (1911); St. Louis, I. Mt. & So. Ry. v. Arkansas, 240 U.S. 518 (1916); Missouri Pacific R.R. v. Norwood, 283 U.S. 249 (1931); Firemen v. Chicago, R.I. & P.R.R. 393 U.S. 129 (1968).

[235] Atlantic Coast Line R.R. v. Georgia, 234 U.S. 280 (1914).

[236] Erie R.R. v. Solomon, 237 U.S. 427 (1915).

[237] New York, N.H. and H.R.R. v. New York, 165 U.S. 628 (1897).

[238] Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922). *See also* Yazoo & Miss. V.R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); *cf.* Adams Express Co. v. Croninger, 226 U.S. 491 (1913).

[239] Atlantic Coast Line R.R. v. Glenn, 239 U.S. 388 (1915).

[240] St. Louis & San Francisco Ry. v. Mathews, 165 U.S. 1 (1897).

[241] Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922).

[242] Kansas City Ry. v. Anderson, 233 U.S. 325 (1914).

[243] St. Louis, I. Mt. & So. Ry. v. Wynne, 224 U.S. 354 (1912). *See also* Chicago, M. & St. P. Ry. v. Polt, 232 U.S. 165 (1914).

was disproportionate to actual damages and was exacted under conditions not affording the carrier an adequate opportunity to safely test the validity of the rates before liability attached.[244] Where the carrier did have an opportunity to test the reasonableness of the rate, however, and collection of an overcharge did not proceed from any belief that the rate was invalid, the Court indicated that the validity of the penalty imposed need not be tested by comparison with the amount of the overcharge. Inasmuch as a penalty is imposed as punishment for violation of law, the legislature may adjust its amount to the public wrong rather than the private injury, and the only limitation which the Fourteenth Amendment imposes is that the penalty prescribed shall not be "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." In accordance with the latter standard, a statute granting an aggrieved passenger (who recovered $100 for an overcharge of 60 cents) the right to recover in a civil suit not less than $50 nor more than $300 plus costs and a reasonable attorney's fee was upheld.[245]

For like reasons, the Court also upheld a statute requiring railroads to erect and maintain fences and cattle guards, and making them liable in double the amount of damages for their failure to so maintain them,[246] and another law that established a minimum rate of speed for delivery of livestock and that required every carrier violating the requirement to pay the owner of the livestock the sum of $10 per car per hour.[247] On the other hand, the Court struck down as arbitrary and oppressive assessment of fines of $100 per day (and aggregating $3,600) on a telephone company that, in accordance with its established and uncontested regulations, suspended the service of a patron in arrears.[248]

Regulation of Corporations, Business, Professions, and Trades

Corporations.—Although a corporation is the creation of a State, which reserves the power to amend or repeal corporate charters, the retention of such power will not support the taking of corporate property without due process of law. To terminate the life of a corporation by annulling its charter is not to confiscate its property but to turn it over to the stockholders after liquidation.[1]

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[244] Missouri Pacific Ry. v. Tucker, 230 U.S. 340 (1913).

[245] St. Louis, I. Mt. & So. Ry. v. Williams, 251 U.S. 63, 67 (1919).

[246] Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885); Minneapolis Ry. v. Beckwith, 129 U.S. 26 (1889).

[247] Chicago, B. & Q. R.R. v. Cram, 228 U.S. 70 (1913).

[248] Southwestern Tel. Co. v. Danaher, 238 U.S. 482 (1915).

[1] New Orleans Debenture Redemption Co. v. Louisiana, 180 U.S. 320 (1901).

Foreign (out-of-state) corporations also enjoy the protection which the due process clause affords, but such protection does not entitle them to the unconditional right to enter another State or, once having been permitted to enter, to continue to do business therein. There is language in the early cases suggesting that the power of a State to exclude or to expel a foreign corporation is almost plenary.[2] While modern doctrines of the "negative" commerce clause constrain states' authority to discriminate against foreign corporations in favor of local commerce, it has always been acknowledged that states may subject corporate entry or continued operation to reasonable, non-discriminatory conditions. Thus, a state law which requires the filing of articles with a local official as a condition prerequisite to the validity of conveyances of local realty to such corporations is not violative of due process.[3] Also valid are statutes which require a foreign insurance company, as part of the price of entry, to maintain reserves computed by a specific percentage of premiums, including membership fees, received in all States,[4] or to consent to direct actions filed against it by persons injured in the State by tort-feasors whom it insures.[5] Similarly a statute requiring corporations to dispose of farm land not necessary to the conduct of their business was not invalid as applied to a foreign hospital corporation, even though the latter, because of changed economic conditions, was unable to recoup its original investment from the sale which it is thus compelled to make.[6]

Business in General.—"The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. . . . Statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State's competency."[7]

Laws Prohibiting Trusts, Discrimination, Restraint of Trade.—Even during the period when the Court was measuring statutes by substantive due process liberty of contract principles, it recognized the right of states to limit liberty of contract by prohibiting combinations in restraint of trade. Thus, states could prohibit

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[2] National Council U.A.M. v. State Council, 203 U.S. 151, 162–63 (1906).

[3] Munday v. Wisconsin Trust Co., 252 U.S. 499 (1920).

[4] State Farm Ins. Co. v. Duel, 324 U.S. 154 (1945).

[5] Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954).

[6] Asbury Hospital v. Cass County, 326 U.S. 207 (1945).

[7] Nebbia v. New York, 291 U.S. 502, 527–28 (1934). *See also* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978) (upholding regulation of franchise relationship).

agreements to pool and fix prices, divide net earnings, and prevent competition in the purchase and sale of grain.[8] Nor, the Court held, does the Fourteenth Amendment preclude a State from adopting a policy against all combinations of competing corporations and enforcing it even against combinations which may have been induced by good intentions and from which benefit and no injury may have resulted.[9] Also upheld were a statute that prohibited retail lumber dealers from uniting in an agreement not to purchase materials from wholesalers selling directly to consumers in the retailers' localities,[10] and another law punishing combinations for "maliciously" injuring a rival in the same business, profession, or trade.[11]

Similarly, a prohibition of unfair discrimination for the purpose of intentionally destroying competition of any other regular dealer in the same commodity by making sales thereof at a lower rate in one section of the State than in another, after equalization for distance, effects no invalid deprivation of property or interference with freedom of contract.[12] A law sanctioning contracts requiring that commodities identified by trademark will not be sold by the vendee or subsequent vendees except at prices stipulated by the original vendor does not violate the due process clause.[13] Also upheld as not depriving a company of due process was application of an unfair sales act to enjoin a retail grocery company from selling below statutory cost in violation of a state unfair sales act, even though its competitors were selling at unlawful prices. There is no constitutional right to employ retaliation against action outlawed by a State, and appellant had available a remedy whereby it could enjoin illegal activity of its competitors.[14]

Laws Preventing Fraud in Sale of Goods and Securities.—Laws and ordinances tending to prevent frauds and requiring honest weights and measures in the sale of articles of general consumption have long been considered lawful exertions of the po-

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[8] Smiley v. Kansas, 196 U.S. 447 (1905). *See* Waters Pierce Oil Co. v. Texas, 212 U.S. 86 (1909); National Cotton Oil Co. v. Texas, 197 U.S. 115 (1905), also upholding antitrust laws.

[9] International Harvester Co. v. Missouri, 234 U.S. 199 (1914). *See also* American Machine Co. v. Kentucky, 236 U.S. 660 (1915).

[10] Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910).

[11] Aikens v. Wisconsin, 195 U.S. 194 (1904).

[12] Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912). *But cf.* Fairmont Co. v. Minnesota, 274 U.S. 1 (1927) (invalidating on liberty of contract grounds similar statute punishing dealers in cream who pay higher prices in one locality than in another, the Court finding no reasonable relation between the statute's sanctions and the anticipated evil).

[13] Old Dearborn Co. v. Seagram Corp., 299 U.S. 183 (1936); Pep Boys v. Pyroil, 299 U.S. 198 (1936).

[14] Safeway Stores v. Oklahoma Grocers, 360 U.S. 334 (1959).

lice power.[15] Thus, a prohibition on the issuance or sale by other than an authorized weigher of any weight certificate for grain weighed at any warehouse or elevator where state weighers are stationed is not unconstitutional.[16] Nor is a municipal ordinance requiring that commodities sold in load lots by weight be weighed by a public weighmaster within the city invalid as applied to one delivering coal from state-tested scales at a mine outside the city.[17] A statute requiring merchants to record sales in bulk not made in the regular course of business is also within the police power.[18]

Similarly, the power of a State to prescribe standard containers to protect buyers from deception as well as to facilitate trading and to preserve the condition of the merchandise is not open to question. Accordingly, an administrative order issued pursuant to an authorizing statute and prescribing the dimensions, form, and capacity of containers for strawberries and raspberries is not arbitrary inasmuch as the form and dimensions bore a reasonable relation to the protection of the buyers and the preservation in transit of the fruit.[19] Similarly, an ordinance fixing standard sizes is not unconstitutional.[20] Regulations issued in furtherance of a statutory authorization which imposed a rate of tolerance for the minimum weight for a loaf of bread were upheld.[21] Likewise, a law requiring that lard not sold in bulk should be put up in containers holding one, three, or five pounds weight, or some whole multiple of these numbers, does not deprive sellers of their property without due process of law.[22]

The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of the police power and in the promotion of fair dealing, to require that the nature of the product be fairly set forth.[23]

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[15] Schmidinger v. City of Chicago, 226 U.S. 578, 588 (1913) (citing McLean v. Arkansas, 211 U.S. 539, 550 (1909)).

[16] Merchants Exchange v. Missouri, 248 U.S. 365 (1919).

[17] Hauge v. City of Chicago, 299 U.S. 387 (1937).

[18] Lemieux v. Young, 211 U.S. 489 (1909); Kidd, Dater Co. v. Musselman Grocer Co., 217 U.S. 461 (1910).

[19] Pacific States Co. v. White, 296 U.S. 176 (1935).

[20] Schmidinger v. City of Chicago, 226 U.S. 578 (1913).

[21] Petersen Baking Co. v. Bryan, 290 U.S. 570 (1934) (tolerances not to exceed three ounces to a pound of bread and requiring that the bread maintain the statutory minimum weight for not less than 12 hours after cooling). *But cf.* Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (tolerance of only two ounces in excess of the minimum weight per loaf is unreasonable, given finding that it was impossible to manufacture good bread without frequently exceeding the prescribed tolerance).

[22] Armor & Co. v. North Dakota, 240 U.S. 510 (1916).

[23] Heath & Milligan Co. v. Worst, 207 U.S. 338 (1907); Corn Products Ref. Co. v. Eddy, 249 U.S. 427 (1919); National Fertilizer Ass'n v. Bradley, 301 U.S. 178 (1937).

A statute providing that the purchaser of harvesting or threshing machinery for his own use shall have a reasonable time after delivery for inspecting and testing it, and permitting recission of the contract if the machinery does not prove reasonably adequate, and further declaring any agreement contrary to its provisions to be against public policy and void, does not violate the due process clause.[24] A prohibitive license fee upon the use of trading stamps is not unconstitutional.[25]

In the exercise of its power to prevent fraud and imposition, a State may regulate trading in securities within its borders, require a license of those engaging in such dealing, make issuance of a license dependent on a public officer's being satisfied of the good repute of the applicants, and permit the officer, subject to judicial review of his findings, to revoke the license.[26] A State may forbid the giving of options to sell or buy at a future time any grain or other commodity.[27] It may also forbid sales on margin for future delivery,[28] and may prohibit the keeping of places where stocks, grain, and the like, are sold but not paid for at the time, unless a record of the same be made and a stamp tax paid.[29] Making criminal any deduction by the purchaser from the actual weight of grain, hay, seed, or coal under a claim of right by reason of any custom or rule of a board of trade is valid exercise of the police power and does not deprive the purchaser of his property without due process of law nor interfere with his liberty of contract.[30]

Banking, Wage Assignments and Garnishment.—Regulation of banks and banking has always been considered well within the police power of states, and the Fourteenth Amendment did not eliminate this regulatory authority. A variety of regulations has been upheld over the years. For example, state banks are not deprived of property without due process by a statute subjecting them to assessments for a depositors' guaranty fund.[31] Also, a law requiring savings banks to turn over to the State deposits inactive for thirty years (when the depositor cannot be found), with provision for payment to the depositor or his heirs on establishment of

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[24] Advance-Rumely Co. v. Jackson, 287 U.S. 283 (1932).

[25] Rast v. Van Deman & Lewis, 240 U.S. 342 (1916); Tanner v. Little, 240 U.S. 369 (1916); Pitney v. Washington, 240 U.S. 387 (1916).

[26] Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917); Merrick v. Halsey & Co., 242 U.S. 568 (1917).

[27] Booth v. Illinois, 184 U.S. 425 (1902).

[28] Otis v. Parker, 187 U.S. 606 (1903).

[29] Brodnax v. Missouri, 219 U.S. 285 (1911).

[30] House v. Mayes, 219 U.S. 270 (1911).

[31] Noble State Bank v. Haskell, 219 U.S. 104 (1911); Shallenberger v. First State Bank, 219 U.S. 114 (1911); Assaria State Bank v. Dolley, 219 U.S. 121 (1911); Abie State Bank v. Bryan, 282 U.S. 765 (1931).

the right, does not effect an invalid taking of the property of said banks; nor does a statute requiring banks to turn over to the protective custody of the State deposits that have been inactive ten or twenty-five years (depending on the nature of the deposit).[32]

The constitutional rights of creditors in an insolvent bank in the hands of liquidators are not violated by a later statute permitting re-opening under a reorganization plan approved by the court, the liquidating officer, and by three-fourths of the creditors.[33] Similarly, a Federal Reserve bank is not unlawfully deprived of business rights of liberty of contract by a law which allows state banks to pay checks in exchange when presented by or through a Federal Reserve bank, post office, or express company and when not made payable otherwise by a maker.[34]

In fixing maximum rates of interest on money loaned within its borders, a State is acting clearly within its police power; and the details are within legislative discretion if not unreasonably or arbitrarily exercised.[35] Equally valid as an exercise of a State's police power is a requirement that assignments of future wages as security for debts of less than $200, to be valid, must be accepted in writing by the employer, consented to by the assignors, and filed in public office. Such a requirement deprives neither the borrower nor the lender of his property without due process of law.[36]

Insurance.—The general relations of those engaged in the insurance business[37] as well as the business itself have been peculiarly subject to supervision and control.[38] Even during the *Lochner* era the Court recognized that government may fix insurance rates and regulate the compensation of insurance agents,[39] and over the years the Court has upheld a wide variety of regulation. A state may impose a fine on "any person 'who shall act in any manner in the negotiation or transaction of unlawful insurance

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[32] Provident Savings Inst. v. Malone, 221 U.S. 660 (1911); Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944). When a bank conservator appointed pursuant to a new statute has all the functions of a receiver under the old law, one of which is the enforcement on behalf of depositors of stockholders' liability, which liability the conservator can enforce as cheaply as could a receiver appointed under the preexisting statute, it cannot be said that the new statute, in suspending the right of a depositor to have a receiver appointed, arbitrarily deprives a depositor of his remedy or destroys his property without the due process of law. The depositor has no property right in any particular form of remedy. Gibbes v. Zimmerman, 290 U.S. 326 (1933).

[33] Doty v. Love, 295 U.S. 64 (1935).

[34] Farmers Bank v. Federal Reserve Bank, 262 U.S. 649 (1923).

[35] Griffith v. Connecticut, 218 U.S. 563 (1910).

[36] Mutual Loan Co. v. Martell, 222 U.S. 225 (1911).

[37] La Tourette v. McMaster, 248 U.S. 465 (1919); Stipich v. Insurance Co., 277 U.S. 311, 320 (1928).

[38] German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914).

[39] O'Gorman & Young v. Hartford Ins. Co., 282 U.S. 251 (1931).

. . . with a foreign insurance company not admitted to do business [within said State].'"[40] A state may forbid life insurance companies and their agents to engage in the undertaking business and undertakers to serve as life insurance agents.[41] Foreign casualty and surety insurers were not deprived of due process, the Court held, by a Virginia law which prohibited the making of contracts of casualty or surety insurance except through registered agents, which required that such contracts applicable to persons or property in the State be countersigned by a registered local agent, and which prohibited such agents from sharing more than 50% of a commission with a nonresident broker.[42] And just as all banks may be required to contribute to a depositors' guaranty fund, so may all automobile liability insurers be required to submit to the equitable apportionment among them of applicants who are in good faith entitled to, but are financially unable to, procure such insurance through ordinary methods.[43]

However, a statute which prohibited the insured from contracting directly with a marine insurance company outside the State for coverage of property within the State was held invalid as a deprivation of liberty without due process of law.[44] For the same reason, the Court held, a State may not prevent a citizen from concluding a policy loan agreement with a foreign life insurance company at its home office whereby the policy on his life is pledged as collateral security for a cash loan to become due upon default in payment of premiums, in which case the entire policy reserve might be applied to discharge the indebtedness. Authority to subject such an agreement to the conflicting provisions of domestic law is not deducible from the power of a State to license a foreign insurance company as a condition of its doing business therein.[45]

A stipulation that policies of hail insurance shall take effect and become binding twenty-four hours after the hour in which an application is taken and further requiring notice by telegram of rejection of an application was upheld.[46] No unconstitutional restraint was imposed upon the liberty of contract of surety companies by a statute providing that, after enactment, any bond exe-

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[40] Nutting v. Massachusetts, 183 U.S. 553, 556 (1902) (distinguishing Allgeyer v. Louisiana, 165 U.S. 578 (1897)). *See also* Hoper v. California, 155 U.S. 648 (1895).

[41] Daniel v. Family Ins. Co., 336 U.S. 220 (1949).

[42] Osborn v. Ozlin, 310 U.S. 53, 68–69 (1940). Dissenting from the conclusion, Justice Roberts declared that the plain effect of the Virginia law is to compel a nonresident to pay a Virginia resident for services which the latter does not in fact render.

[43] California Auto. Ass'n v. Maloney, 341 U.S. 105 (1951).

[44] Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[45] New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).

[46] National Ins. Co. v. Wanberg, 260 U.S. 71 (1922).

cuted for the faithful performance of a building contract shall inure to the benefit of materialmen and laborers, notwithstanding any provision of the bond to the contrary.[47] Likewise constitutional was a law requiring that a motor vehicle liability policy shall provide that bankruptcy of the insured does not release the insurer from liability to an injured person.[48]

There also is no denial of due process for a state to require that casualty companies, in case of total loss, pay the total amount for which the property was insured, less depreciation between the time of issuing the policy and the time of the loss, rather than the actual cash value of the property at the time of loss.[49]

Moreover, even though it had its attorney-in-fact located in Illinois, signed all its contracts there, and forwarded therefrom all checks in payment of losses, a reciprocal insurance association covering real property located in New York could be compelled to comply with New York regulations which required maintenance of an office in that State and the countersigning of policies by an agent resident therein.[50] Also, to discourage monopolies and to encourage rate competition, a State constitutionally may impose on all fire insurance companies connected with a tariff association fixing rates a liability or penalty to be collected by the insured of 25% in excess of actual loss or damage, stipulations in the insurance contract to the contrary notwithstanding.[51]

A state statute by which a life insurance company, if it fails to pay upon demand the amount due under a policy after death of the insured, is made liable in addition for fixed damages, reasonable in amount, and for a reasonable attorney's fee is not unconstitutional even though payment is resisted in good faith and upon reasonable grounds.[52] It is also proper by law to cut off a defense by a life insurance company based on false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured.[53] A provision that suicide, unless contemplated when the application for a policy was made, shall be no defense is equally valid.[54] When a cooperative life insurance association is reorganized so as to permit it to do a life insurance business of every kind, policyholders are not deprived

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[47] Hartford Accident Co. v. Nelson Co., 291 U.S. 352 (1934).

[48] Merchants Liability Co. v. Smart, 267 U.S. 126 (1925).

[49] Orient Ins. Co. v. Daggs, 172 U.S. 577 (1899) (the statute was in effect when the contract at issue was signed).

[50] Hooperston Co. v. Cullen, 318 U.S. 313 (1943).

[51] German Alliance Ins. Co. v. Hale, 219 U.S. 307 (1911). *See also* Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905).

[52] Life & Casualty Co. v. McCray, 291 U.S. 566 (1934).

[53] Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243 (1906).

[54] Whitfield v. Aetna Life Ins. Co., 205 U.S. 489 (1907).

of their property without due process of law.[55] Similarly, when the method of liquidation provided by a plan of rehabilitation of a mutual life insurance company is as favorable to dissenting policyholders as would have been the sale of assets and *pro rata* distribution to all creditors, the dissenters are unable to show any taking without due process. Dissenting policyholders have no constitutional right to a particular form of remedy.[56]

Miscellaneous Businesses and Professions.—An act imposing license fees for operating employment agencies and prohibiting them from sending applicants to an employer who has not applied for labor does not deny due process of law.[57] Also, a state law prohibiting operation of a "debt pooling" or a "debt adjustment" business except as an incident to the legitimate practice of law is a valid exercise of legislative discretion.[58]

The Court has sustained a law establishing as a qualification for obtaining or retaining a pharmacy operating permit that one either be a registered pharmacist in good standing or that the corporation or association have a majority of its stock owned by registered pharmacists in good standing who were actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy.[59] The Court also upheld a state law forbidding (1) solicitation of the sale of frames, mountings, or other optical appliances, (2) solicitation of the sale of eyeglasses, lenses, or prisms by use of advertising media, (3) retailers from leasing, or otherwise permitting anyone purporting to do eye examinations or visual care to occupy space in a retail store, and (4) anyone, such as an optician, to fit lenses, or replace lenses or other optical appliances, except upon written prescription of an optometrist or opthalmologist licensed in the State is not invalid. A State may treat all who deal with the human eye as members of a profession that should refrain from merchandising methods to ob-

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[55] Polk v. Mutual Reserve Fund, 207 U.S. 310 (1907).

[56] Neblett v. Carpenter, 305 U.S. 297 (1938).

[57] Brazee v. Michigan, 241 U.S. 340 (1916). With four Justices dissenting, the Court in Adams v. Tanner, 244 U.S. 590 (1917), struck down a state law absolutely prohibiting maintenance of private employment agencies. Commenting on the "constitutional philosophy" thereof in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949), Justice Black stated that Olsen v. Nebraska, 313 U.S. 236 (1941), "clearly undermined *Adams v. Tanner*."

[58] Ferguson v. Skrupa, 372 U.S. 726 (1963).

[59] North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973). In the course of the decision, the Court overruled Liggett Co. v. Baldridge, 278 U.S. 105 (1928), in which it had voided a law forbidding a corporation to own any drug store, unless all its stockholders were licensed pharmacists, as applied to a foreign corporation, all of whose stockholders were not pharmacists, which sought to extend its business in the State by acquiring and operating therein two additional stores.

tain customers, and that should choose locations that reduce the temptations of commercialism; a state may also conclude that eye examinations are so critical that every change in frame and duplication of a lens should be accompanied by a prescription.[60]

The practice of medicine, using this word in its most general sense, has long been the subject of regulation.[61] A State may exclude osteopathic physicians from hospitals maintained by it or its municipalities,[62] may regulate the practice of dentistry by prescribing qualifications that are reasonably necessary, requiring licenses, establishing a supervisory administrative board, and prohibiting certain advertising regardless of its truthfulness.[63] But while statutes requiring pilots to be licensed[64] and setting reasonable competency standards (e.g., that railroad engineers pass color blindness tests) have been sustained,[65] an act making it a misdemeanor for a person to act as a railway passenger conductor without having had two years' experience as a freight conductor or brakeman was invalidated as not rationally distinguishing between those competent and those not competent to serve as conductor.[66]

The Court has also upheld a variety of other licensing or regulatory legislation applicable to places of amusement,[67] grain elevators,[68] detective agencies,[69] the sale of cigarettes[70] or cosmetics,[71] and the resale of theatre tickets.[72] Restrictions on advertising have also been upheld, including absolute bans on the advertising of cigarettes,[73] or the use of a representation of the United

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[60] Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[61] McNaughton v. Johnson, 242 U.S. 344, 349 (1917). *See also* Dent v. West Virginia, 129 U.S. 114 (1889); Hawker v. New York, 170 U.S. 189 (1898); Reetz v. Michigan, 188 U.S. 505 (1903); Watson v. Maryland, 218 U.S. 173 (1910); Barsky v. Board of Regents, 347 U.S. 442 (1954) sustaining a New York law authorizing suspension for six months of the license of a physician who had been convicted of crime in any jurisdiction, in this instance, contempt of Congress under 2 U.S.C. § 192. Three Justices, Black, Douglas, and Frankfurter, dissented.

[62] Collins v. Texas, 223 U.S. 288 (1912); Hayman v. Galveston, 273 U.S. 414 (1927).

[63] Semler v. Dental Examiners, 294 U.S. 608, 611 (1935). *See also* Douglas v. Noble, 261 U.S. 165 (1923); Graves v. Minnesota, 272 U.S. 425, 427 (1926).

[64] Olsen v. Smith, 195 U.S. 332 (1904).

[65] Nashville, C. & St. L. R.R. v. Alabama, 128 U.S. 96 (1888).

[66] Smith v. Texas, 233 U.S. 630 (1914). *See* DeVeau v. Braisted, 363 U.S. 144, 157–60 (1960), sustaining New York law barring from office in longshoremen's union persons convicted of felony and not thereafter pardoned or granted a good conduct certificate from a parole board.

[67] Western Turf Ass'n v. Greenberg, 204 U.S. 359 (1907).

[68] W.W. Cargill Co. v. Minnesota, 180 U.S. 452 (1901).

[69] Lehon v. Atlanta, 242 U.S. 53 (1916).

[70] Gundling v. Chicago, 177 U.S. 183, 185 (1900).

[71] Bourjois, Inc. v. Chapman, 301 U.S. 183 (1937).

[72] Weller v. New York, 268 U.S. 319 (1925).

[73] Packer Corp. v. Utah, 285 U.S. 105 (1932).

States flag on an advertising medium.[74] Similarly constitutional were prohibitions on the solicitation by a layman of the business of collecting and adjusting claims,[75] the keeping of private markets within six squares of a public market,[76] the keeping of billiard halls except in hotels,[77] or the purchase by junk dealers of wire, copper, and other items, without ascertaining the seller's right to sell.[78]

Protection of State Resources

Oil and Gas.—To prevent waste, production of oil and gas may be prorated; the prohibition of wasteful conduct, whether primarily in behalf of the owners of oil and gas in a common reservoir or because of the public interests involved, is consistent with the Constitution.[79] Thus, the Court upheld against due process challenge a statute which defined waste as including, in addition to its ordinary meaning, economic waste, surface waste, and production in excess of transportation or marketing facilities or reasonable market demands, and which limited each producer's share to a prorated portion of the total production that can be taken from the common source without waste.[80] Whether a system of proration based on hourly potential is as fair as one based upon estimated recoverable reserves or some other combination of factors is a question for administrative and not judicial judgment. In a domain of knowledge still shifting and growing, it has been held to be presumptuous for courts, on the basis of conflicting expert testimony, to invalidate an oil proration order, promulgated by an administrative commission in execution of a regulatory scheme intended to conserve a State's oil resources.[81] On the other hand, where the evidence showed that an order, purporting to limit daily total production of a gas field and to prorate the allowed production among several wells, had for its real purpose, not the prevention of waste nor the undue drainage from the reserves of other well owners, but rather the compelling of pipeline owners to furnish a market to those who had no pipeline connections, the order was held void as

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[74] Halter v. Nebraska, 205 U.S. 34 (1907).

[75] McCloskey v. Tobin, 252 U.S. 107 (1920).

[76] Natal v. Louisiana, 139 U.S. 621 (1891).

[77] Murphy v. California, 225 U.S. 623 (1912).

[78] Rosenthal v. New York, 226 U.S. 260 (1912).

[79] Thompson v. Consolidated Gas Co., 300 U.S. 55, 76–77 (1937) (citing Ohio Oil Co. v. Indiana (No. 1), 177 U.S. 190 (1900)); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

[80] Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932).

[81] Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940). *See also* Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941); Railroad Comm'n v. Humble Oil & Ref. Co., 311 U.S. 578 (1941).

a taking of private property for private benefit.[82] Also sustained as conservation measures were orders of the Oklahoma Corporation Commission, premised on a finding that existing low field prices for natural gas were resulting in economic and physical waste, fixing a minimum price for gas and requiring one producer to take gas ratably from another producer in the same field at the dictated price.[83]

Even though carbon black is more valuable than the gas from which it is extracted, and notwithstanding a resulting loss of investment in a plant for the manufacture of carbon black, a State, in the exercise of its police power, may forbid the use of natural gas for products, such as carbon black, in the production of which such gas is burned without fully utilizing for other manufacturing or domestic purposes the heat therein contained.[84] Likewise, for the purpose of regulating and adjusting coexisting rights of surface owners to underlying oil and gas, it is within the power of a State to prohibit the operators of wells from allowing natural gas, not conveniently necessary for other purposes, to come to the surface without the lifting power having been utilized to produce the greatest quality of oil in proportion.[85]

Protection of Property and Agricultural Crops.—An ordinance conditioning the right to drill for oil and gas within the city limits upon the filing of a bond in the sum of $200,000 for each well, to secure payment of damages from injuries to any persons or property resulting from the drilling operation, or maintenance of any well or structure appurtenant thereto, is consistent with due process of law and is not rendered unreasonable by the requirement that the bond be executed, not by personal sureties, but by a bonding company authorized to do business in the State.[86] On the other hand, a Pennsylvania statute, which forbade the mining of coal under private dwellings or streets of cities by a grantor that had reserved the right to mine, was viewed as restricting the use of private property too much and hence as a denial of due process and a "taking" without compensation.[87] Years later, however, a quite similar Pennsylvania statute was upheld, the Court finding that the new law no longer involved merely a balancing of private

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[82] Thompson v. Consolidated Gas Co., 300 U.S. 55 (1937).

[83] Cities Service Co. v. Peerless Co., 340 U.S. 179 (1950); Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190 (1950).

[84] Walls v. Midland Carbon Co., 254 U.S. 300 (1920). *See also* Henderson Co. v. Thompson, 300 U.S. 258 (1937).

[85] Bandini Co. v. Superior Court, 284 U.S. 8 (1931).

[86] Gant v. Oklahoma City, 289 U.S. 98 (1933).

[87] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). On the "taking" jurisprudence that has stemmed from this case, *see* supra, pp. 1382–84.

economic interests, but instead promoted such "important public interests" as conservation, protection of water supplies, and preservation of land values for taxation.[88] Also distinguished from *Pennsylvania Coal* was a challenge to an ordinance prohibiting sand and gravel excavation near the water table and imposing a duty to refill any existing excavation below that level. The ordinance was upheld; the fact that it prohibited a business that had been conducted for over 30 years did not give rise to a taking in the absence of proof that the land could not be used for other legitimate purposes.[89]

A statute requiring the destruction of cedar trees within two miles of apple orchards in order to prevent damage to the orchards caused by cedar rust was upheld as not unreasonable even in the absence of compensation. Apple growing being one of the principal agricultural pursuits in Virginia and the value of cedar trees throughout the State being small as compared with that of apple orchards, the State was constitutionally competent to require the destruction of one class of property in order to save another which, in the judgment of its legislature, was of greater value to the public.[90] Similarly, Florida was held to possess constitutional authority to protect the reputation of one of its major industries by penalizing the delivery for shipment in interstate commerce of citrus fruits so immature as to be unfit for consumption.[91]

Water.—A statute making it unlawful for a riparian owner to divert water into another State was held not to deprive the owner of property without due process of law. "The constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . What it has it may keep and give no one a reason for its will."[92] This holding has since been disapproved, but on interstate commerce rather than due process grounds.[93] States may, however, enact and enforce a variety of conservation measures for the protection of watersheds.[94]

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[88] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987). The Court in *Pennsylvania Coal* had viewed that case as one of "a single private house." 260 U.S. at 413.

[89] Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

[90] Miller v. Schoene, 276 U.S. 272, 277, 279 (1928).

[91] Sligh v. Kirkwood, 237 U.S. 52 (1915).

[92] Hudson Water Co. v. McCarter, 209 U.S. 349, 356–57 (1908).

[93] Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982). *See also* City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966).

[94] *See, e.g.*, Perley v. North Carolina, 249 U.S. 510 (1919) (upholding law requiring the removal of timber refuse from the vicinity of a watershed to prevent the spread of fire and consequent damage to such watershed).

Fish and Game.—A State has sufficient control over fish and wild game found within its boundaries[95] that it may regulate or prohibit fishing and hunting.[96] For the effective enforcement of such restrictions, a state may also forbid the possession within its borders of special instruments of violations, such as nets, traps, and seines, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor.[97] The Court also upheld a state law, designed to conserve for food fish found within its waters, restricting a commercial reduction plant from accepting more fish than it could process without deterioration, waste, or spoilage, and applying such restriction to fish imported into the State.[98]

The Court's early decisions rested on the legal fiction that states owned the fish and wild game within their borders, hence could reserve these possessions solely for use by their own citizens. The Court soon backed away from the ownership fiction,[99] and in *Hughes v. Oklahoma*[100] overruled *Geer v. Connecticut*, indicating instead that state conservation measures discriminating against out-of-state persons were to be measured under the commerce clause. Although a state's "concerns for conservation and protection of wild animals" were still a "legitimate" basis for regulation, these concerns could not justify disproportionate burdens on interstate commerce.[101] More recently still, in the context of recreational rather than commercial activity, the Court reached a result more deferential to state authority, holding that access to recreational big game hunting is not within the category of rights protected by the Privileges and Immunitites Clause, and that consequently a state could without differential cost justification charge out-of-staters significantly more than in-staters for a hunting license.[102] Suffice it to say that similar cases involving a state's efforts to reserve its fish and game for its own inhabitants are likely to be

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[95] Bayside Fish Co. v. Gentry, 297 U.S. 422, 426 (1936).

[96] Manchester v. Massachusetts, 139 U.S. 240 (1891); Geer v. Connecticut, 161 U.S. 519 (1896).

[97] Miller v. McLaughlin, 281 U.S. 261, 264 (1930).

[98] Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936). *See also* New York ex rel. Silz v. Hesterberg, 211 U.S. 31 (1908) (upholding law proscribing possession during the closed season of game imported from abroad).

[99] *See, e.g.*, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (invalidating Louisiana statute prohibiting transportation outside the state of shrimp taken in state waters, unless the head and shell had first been removed); Toomer v. Witsell, 334 U.S. 385 (1948) (invalidating law discriminating against out-of-state commercial fishermen); Douglas v. Seacoast Products, 431 U.S. 265, 284 (1977) (state could not discriminate in favor of its residents against out-of-state fishermen in federally licensed ships).

[100] 441 U.S. 322 (1979) (formally overruling *Geer*).

[101] Id. at 336, 338–39.

[102] Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978).

challenged under commerce or privileges and immunities principles, rather than under substantive due process.

Ownership of Real Property: Limitations, Rights

Zoning and Similar Actions.—That states and municipal subdivisions may zone land for designated uses is now a well established aspect of the police power. Zoning authority gained judicial recognition early in the 20th century. Initially, analogy was drawn to public nuisance law, the Court recognizing that States and their municipal subdivisions may declare that in particular circumstances and in particular localities specific businesses, which are not nuisances *per se*, are to be deemed nuisances in fact and in law.[103] Thus, a State may declare the emission of dense smoke in populous areas a nuisance and restrain it; regulations to that effect are not invalid even though they affect the use of property or subject the owner to the expense of complying with their terms.[104] So too, the Court upheld an ordinance that prohibited brickmaking in a designated area, even though the land contained valuable clay deposits which could not profitably be removed for processing elsewhere, was far more valuable for brickmaking than for any other purpose, had been acquired before it was annexed to the municipality, and had long been used as a brickyard.[105]

With increasing urbanization and consequent broadening of the philosophy of regulation of land use to protect not only health and safety but also the amenities of modern living,[106] the Court has recognized the discretion of government, within the loose confines of the due process clause, to zone in many ways and for many purposes. The Court will uphold a challengened land-use plan unless it determines that the plan is clearly arbitrary and unreasonable and has no substantial relation to the public health, safety, or general welfare,[107] or unless the plan as applied amounts to a tak-

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[103] Reinman v. City of Little Rock, 237 U.S. 171 (1915) (location of a livery stable within a thickly populated city "is well within the range of the power of the state to legislate for the health and general welfare"). *See also* Fischer v. St. Louis, 194 U.S. 361 (1904) (upholding restriction on location of dairy cow stables); Bacon v. Walker, 204 U.S. 311 (1907) (upholding restriction on grazing of sheep near habitations).

[104] Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916). For a case embracing a rather special set of facts, *see* Dobbins v. Los Angeles, 195 U.S. 223 (1904).

[105] Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[106] *Cf. Developments in the Law-Zoning*, 91 HARV. L. REV. 1427 (1978).

[107] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); St. Louis Poster Adv. Co. v. City of St. Louis, 249 U.S. 269 (1919).

ing of property without just compensation.[108] Applying these principles, the Court has held that the creation of a residential district in a village and the exclusion therefrom of apartment houses, retail stores, and billboards is a permissible exercise of municipal power.[109] So too, a municipality restricting housing in a community to one-family dwellings, in which any number of persons related by blood, adoption, or marriage could occupy a house but only two unrelated persons could do so, was sustained in the absence of any showing that it was aimed at the deprivation of a "fundamental interest."[110] Such a fundamental interest was found impaired by a zoning ordinance in *Moore v. City of East Cleveland*,[111] which restricted housing occupancy to a single family but so defined "family" that a grandmother who had been living with her two grandsons of different children was in violation of the ordinance. Similarly, black persons cannot be forbidden to occupy houses in blocks where the greater number of houses are occupied by white persons, or vice versa.[112] But aside from such basic constraints, a wide range of regulation is permissible. Government may regulate the height of buildings[113] and establish building setback requirements.[114] The preservation of open spaces, through density controls and restrictions on the numbers of houses,[115] and the preservation of historic structures[116] are also permissible utilizations of the zoning power.

In one aspect of zoning—the degree to which such decisions may be delegated to private persons—the Court has not attained consistency. Thus, it invalidated a city ordinance which conferred the power to establish building setback lines upon the owners of two thirds of the property abutting any street,[117] and, subsequently, it struck down an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas but only upon the written consent of the owners of two-thirds of

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[108] *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), and discussion of the Fifth Amendment's eminent domain power, supra pp. 1382–95.

[109] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[110] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[111] 431 U.S. 494 (1977). A plurality of the Court struck down the ordinance as a violation of substantive due process, an infringment of family living arrangements which are a protected liberty interest, id. at 498–506, while Justice Stevens concurred on the ground that the ordinance was arbitrary and unreasonable. Id. at 513. Four Justices dissented. Id. at 521, 531, 541.

[112] Buchanan v. Warley, 245 U.S. 60 (1917).

[113] Welch v. Swasey, 214 U.S. 91 (1909).

[114] Gorieb v. Fox, 274 U.S. 603 (1927).

[115] Agins v. City of Tiburon, 447 U.S. 255 (1980).

[116] Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[117] Eubank v. City of Richmond, 226 U.S. 137 (1912).

the property within 400 feet of the proposed facility.[118] In a decision falling chronologically between these two, it sustained an ordinance which permitted property owners to waive a municipal restriction prohibiting the construction of billboards.[119] In its most recent decision, upholding a city charter provision permitting the petitioning to citywide referendum of zoning changes and variances by the city planning commission and necessitating a 55% approval vote in the referendum to sustain the commission's decision, the Court distinguished between delegating to a small group of affected landowners such a decision relating to other people and the people's retention of the ultimate legislative power in themselves which for convenience they had delegated to a legislative body.[120] The zoning power may not be delegated to a church, the Court invalidating under the Establishment Clause a state law permitting any church to block issuance of a liquor license for a facility to be operated within 500 feet of the church.[121]

Estates, Succession, Abandoned Property.—The Court upheld a New York Decedent Estate Law that granted to a surviving spouse a right of election to take as in intestacy, as applied to a widow who, before enactment of the law, had waived any right to her husband's estate. Impairment of the widow's waiver by subsequent legislation did not deprive the husband's estate of property without due process of law. Because rights of succession to property are of statutory creation, the Court explained, New York could have conditioned any further exercise of testamentary power upon the giving of right of election to the surviving spouse regardless of any waiver however formally executed.[122]

Even after the creation of a testamentary trust, a State retains the power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration, especially such as the Depression presented to trusts containing mortgages. Accordingly, no constitutional right is violated by the retroactive application to an estate on which administration had already begun of a statute which had the effect of taking away a remainderman's right to judicial examination of the trustee's computation of income. Under the peculiar facts of the case, however, the remainderman's

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[118] Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).

[119] Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917). The Court thought the case different from *Eubank*, because in that case the ordinance established no rule but gave to decision of a narrow segment of the community the force of law, whereas in *Cusack* the ordinance barred the erection of any billboards but permitted the prohibition to be modified by the persons most affected. Id. at 531.

[120] City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976). Such referenda do, however, raise equal protection problems. *See* infra, p. 1858.

[121] Larkin v. Grendel's Den, 459 U.S. 116 (1982).

[122] Irving Trust Co. v. Day, 314 U.S. 556, 564 (1942).

right had been created by judicial rules promulgated after the death of the decedent, so the case is not precedent for a broad rule of retroactivity.[123]

States have several jurisdictional bases for application of escheat and abandoned property laws to out-of-state corporations. Application of New York's Abandoned Property Law to insurance policies on the lives of New York residents issued by foreign corporations did not deprive such companies of property without due process, where the insured persons had continued to be New York residents and the beneficiaries were resident at the maturity date of the policies. The relationship between New York and its residents who abandon claims against foreign insurance companies, and between New York and foreign insurance companies doing business therein, is sufficiently close to give New York jurisdiction.[124] In *Standard Oil Co. v. New Jersey*,[125] a divided Court held that due process is not violated by a statute escheating to the State shares of stock in a domestic corporation and unpaid dividends declared thereon, even though the last known owners were nonresidents and the stock was issued and the dividends were held in another State. The State's power over the debtor corporation gives it power to seize the debts or demands represented by the stock and dividends.

The large discretion the States possess to define abandoned property and to provide for its disposition is revealed in *Texaco v. Short*.[126] There upheld was an Indiana statute which terminated interests in coal, oil, gas, or other minerals which have not been used for twenty years and which provided for reversion to the owner of the interest out of which the mining interests had been carved. With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office. The "use" of a mineral interest which could prevent its extinction included the actual or attempted extraction of minerals, the payment of rents or royalties, and any payment of taxes. Merely filing a claim with the local recorder would preserve the interest. The statute provided no notice, save for its own publication, to owners

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[123] Demorest v. City Bank Co., 321 U.S. 36, 47–48 (1944).

[124] Connecticut Ins. Co. v. Moore, 333 U.S. 541 (1948). Justices Jackson and Douglas dissented on the ground that New York was attempting to escheat unclaimed funds not actually or constructively located in New York, and which were the property of beneficiaries who may never have been citizens or residents of New York.

[125] 341 U.S. 428 (1951).

[126] 454 U.S. 516 (1982).

of interests, nor did it require surface owners to notify owners of mineral interests that the interests were about to expire. By a narrow margin, the Court sustained the statute, holding that the State's interest in encouraging production, securing timely notices of property ownership, and settling property titles provided a basis for enactment, and finding that due process did not require any actual notice to holders of unused mineral interests. Property owners are charged with maintaining knowledge of the legal conditions of property ownership. The act provided a grace period and specified several actions which were sufficient to avoid extinguishment. The State "may impose on an owner of a mineral interest the burden of using that interest or filing a current statement of interests" and it may similarly "impose on him the lesser burden of keeping informed of the use or nonuse of his own property."[127]

Health, Safety, and Morals

Even under the narrowest concept of the police power as limited by substantive due process, it was generally conceded that states could exercise the power to protect the public health, safety, and morals.[128] Illustrative cases are noted below.

Safety Regulations.—A variety of measures designed to reduce fire hazards have been upheld. These include municipal ordinances that prohibit the storage of gasoline within 300 feet of any dwelling,[129] or require that all tanks with a capacity of more than ten gallons, used for the storage of gasoline, be buried at least three feet under ground,[130] or which prohibit washing and ironing in public laundries and wash houses, within defined territorial limits from 10 p.m. to 6 a.m.[131] Equally sanctioned by the Fourteenth Amendment is the demolition and removal by cities of wooden buildings erected within defined fire limits contrary to regulations in force at the time.[132] Construction of property in full compliance with existing laws, however, does not confer upon the owner an immunity against exercise of the police power. Thus, a 1944 amendment to a Multiple Dwelling Law, requiring installation of automatic sprinklers in lodginghouses of non-fireproof construction erected prior to said enactment, does not, as applied to a lodginghouse constructed in 1940 in conformity with all laws then

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[127] Id. at 538. The four dissenters thought that some specific notice was required for persons holding before enactment. Id. at 540.

[128] *See, e.g.,* Mugler v. Kansas, 123 U.S. 623, 661 (1887), and discussion supra p. 1575.

[129] Pierce Oil Corp. v. Hope, 248 U.S. 498 (1919).

[130] Standard Oil Co. v. Marysville, 279 U.S. 582 (1929).

[131] Barbier v. Connolly, 113 U.S. 27 (1885); Soon Hing v. Crowley, 113 U.S. 703 (1885).

[132] Maguire v. Reardon, 225 U.S. 271 (1921).

applicable, deprive the owner of due process, even though compliance entails an expenditure of $7,500 on a property worth only $25,000.[133]

Sanitation.—An ordinance for incineration of garbage and refuse at a designated place as a means of protecting public health is not taking of private property without just compensation even though such garbage and refuse may have some elements of value for certain purposes.[134] Compelling property owners to connect with a publicly maintained system of sewers and enforcing that duty by criminal penalties does not violate the due process clause.[135]

Food, Drugs, Milk.—"The power of the State to . . . prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established."[136] Statutes forbidding or regulating the manufacture of oleomargarine have been upheld as a valid exercise of such power.[137] For the same reasons, statutes ordering the destruction of unsafe and unwholesome food,[138] and prohibiting the sale and authorizing confiscation of impure milk[139] have been sustained, notwithstanding that such articles had a value for purposes other than food. There also can be no question of the authority of the State, in the interest of public health and welfare, to forbid the sale of drugs by itinerant vendors[140] or the sale of spectacles by an establishment not in charge of a physician or optometrist.[141] Nor is it any longer possible to doubt the validity of state regulations pertaining to the administration, sale, prescription, and use of dangerous and habit-forming drugs.[142]

Equally valid as police power regulations are laws forbidding the sale of ice cream not containing a reasonable proportion of butter fat[143] or of condensed milk made from skimmed milk rather than whole milk[144] or of food preservatives containing boric acid.[145] Similarly, a statute which prohibits the sale of milk to which has been added any fat or oil other than a milk fat, and

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[133] Queenside Hills Co. v. Saxl, 328 U.S. 80 (1946).
[134] California Reduction Co. v. Sanitary Works, 199 U.S. 306 (1905).
[135] Hutchinson v. City of Valdosta, 227 U.S. 303 (1913).
[136] Sligh v. Kirkwood, 237 U.S. 52, 59–60 (1915).
[137] Powell v. Pennsylvania, 127 U.S. 678 (1888); Magnano v. Hamilton, 292 U.S. 40 (1934).
[138] North American Storage Co. v. City of Chicago, 211 U.S. 306 (1908).
[139] Adams v. City of Milwaukee, 228 U.S. 572 (1913).
[140] Baccus v. Louisiana, 232 U.S. 334 (1914).
[141] Roschen v. Ward, 279 U.S. 337 (1929).
[142] Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41, 45 (1921).
[143] Hutchinson Ice Cream Co. v. Iowa, 242 U.S. 153 (1916).
[144] Hebe Co. v. Shaw, 248 U.S. 297 (1919).
[145] Price v. Illinois, 238 U.S. 446 (1915).

which has, as one of its purposes, the prevention of fraud and deception in the sale of milk products, does not, when applied to "filled milk" having the taste, consistency, and appearance of whole milk products, violate the due process clause. Filled milk is inferior to whole milk in its nutritional content and cannot be served to children as a substitute for whole milk without producing a dietary deficiency.[146] However, a statute forbidding the sale of bedding made with shoddy, even when sterilized and therefore harmless to health, was held to be arbitrary and therefore invalid.[147]

Intoxicating Liquor.—"[O]n account of their well-known noxious qualities and the extraordinary evils shown by experience to be consequent upon their use, a State . . . [is competent] to prohibit [absolutely the] manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders. . . ."[148] And to implement such prohibition, a State has the power to declare that places where liquor is manufactured or kept shall be deemed common nuisances,[149] and even to subject an innocent owner to the forfeiture of his property for the acts of a wrongdoer.[150]

Regulation of Motor Vehicles and Carriers.—The highways of a State are public property, the primary and preferred use of which is for private purposes; their uses for purposes of gain may generally be prohibited by the legislature or conditioned as it sees fit.[151] In limiting the use of its highways for intrastate transportation for hire, a State reasonably may provide that carriers who have furnished adequate, responsible, and continuous service over a given route from a specified data in the past shall be entitled to licenses as a matter of right but that the licensing of those whose service over the route began later than the date specified shall depend upon public convenience and necessity.[152] To require private contract carriers for hire to obtain a certificate of convenience and necessity, which is not granted if the service of common carriers is impaired thereby, and to fix minimum rates applicable thereto, which are not less than those prescribed for common carriers, is valid as a means of conserving highways,[153] but any attempt to

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[146] Sage Stores Co. v. Kansas, 323 U.S. 32 (1944).

[147] Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

[148] Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878); Mugler v. Kansas, 123 U.S. 623 (1887); Kidd v. Pearson, 128 U.S. 1 (1888); Purity Extract Co. v. Lynch, 226 U.S. 192 (1912); Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917); Barbour v. Georgia, 249 U.S. 454 (1919).

[149] Mugler v. Kansas, 123 U.S. 623, 671 (1887).

[150] Hawes v. Georgia, 258 U.S. 1 (1922); Van Oster v. Kansas, 272 U.S. 465 (1926).

[151] Stephenson v. Binford, 287 U.S. 251 (1932).

[152] Stanley v. Public Utilities Comm'n, 295 U.S. 76 (1935).

[153] Stephenson v. Binford, 287 U.S. 251 (1932).

convert private carriers into common carriers,[154] or to subject them to the burdens and regulations of common carriers, without expressly declaring them to be common carriers, is violative of due process.[155] In the absence of legislation by Congress, a State may, in protection of the public safety, deny an interstate motor carrier the use of an already congested highway.[156]

In exercising its authority over its highways, on the other hand, a State is not limited merely to the raising of revenue for maintenance and reconstruction or to regulating the manner in which vehicles shall be operated, but may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Accordingly, a statute limiting to 7,000 pounds the net load permissible for trucks is not unreasonable.[157] No less constitutional is a municipal traffic regulation which forbids the operation in the streets of any advertising vehicle, excepting vehicles displaying business notices or advertisements of the products of the owner and not used mainly for advertising; and such regulation may be validly enforced to prevent an express company from selling advertising space on the outside of its trucks. Inasmuch as it is the judgment of local authorities that such advertising affects public safety by distracting drivers and pedestrians, courts are unable to hold otherwise in the absence of evidence refuting that conclusion.[158]

Any appropriate means adopted to insure compliance and care on the part of licensees and to protect other highway users being consonant with due process, a State may also provide that a driver who fails to pay a judgment for negligent operation shall have his license and registration suspended for three years, unless, in the meantime, the judgment is satisfied or discharged.[159] Compulsory automobile insurance is so plainly valid as to present no federal constitutional question.[160]

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[154] Michigan Pub. Utils. Comm'n v. Duke, 266 U.S. 570 (1925).

[155] Frost Trucking v. Railroad Comm'n, 271 U.S. 583 (1926); Smith v. Cahoon, 283 U.S. 553 (1931).

[156] Bradley v. Public Utils. Comm'n, 289 U.S. 92 (1933).

[157] Sproles v. Binford, 286 U.S. 374 (1932).

[158] Railway Express Agency v. New York, 336 U.S. 106 (1949).

[159] Reitz v. Mealey, 314 U.S. 33 (1941); Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962). *But see* Perez v. Campbell, 402 U.S. 637 (1971). Procedural due process must, of course be observed. Bell v. Burson, 402 U.S. 535 (1971). A nonresident owner who loans his automobile in another state, by the law of which he is immune from liability for the borrower's negligence and who was not in the state at the time of the accident, is not subjected to any unconstitutional deprivation by a law thereof, imposing liability on the owner for the negligence of one driving the car with the owner's permission. Young v. Masci, 289 U.S. 253 (1933).

[160] Ex parte Poresky, 290 U.S. 30 (1933). *See also* Packard v. Banton, 264 U.S. 140 (1924); Sprout v. South Bend, 277 U.S. 163 (1928); Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).

Protecting Morality.—Unless effecting a clear, unmistakable infringement of rights secured by fundamental law, legislation suppressing prostitution[161] or gambling will be upheld by the Court as concededly within the police power of a State.[162] Accordingly, a state statute may provide that, in the event a judgment is obtained against a party winning money, a lien may be had on the property of the owner of the building where the gambling transaction was conducted when the owner knowingly consented to the gambling.[163] For the same reason, lotteries, including those operated under a legislative grant, may be forbidden, irrespective of any particular equities.[164]

Vested Rights, Remedial Rights, Political Candidacy

Inasmuch as the Due Process Clause protects against arbitrary deprivation of "property," privileges not constituting property are not entitled to protection.[165] Because an existing right of action to recover damages for an injury is property, that right of action is protected by the clause.[166] Thus, the retroactive repeal of a provision which made directors liable for moneys embezzled by corporate officers, by preventing enforcement of a liability which already had arisen, deprived certain creditors of their property without due process of law.[167] But while a vested cause of action is property, a person has no constitutionally protected property interest in any particular form of remedy and is guaranteed only the preservation of a substantial right to redress by any effective procedure.[168] Accordingly, a statute creating an additional remedy for enforcing stockholders' liability is not, as applied to stockholders then holding stock, violative of due process.[169] Nor is a law which lifts a statute of limitations and makes possible a suit, theretofore barred,

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[161] L'Hote v. New Orleans, 177 U.S. 587 (1900).

[162] Ah Sin v. Wittman, 198 U.S. 500 (1905).

[163] Marvin v. Trout, 199 U.S. 212 (1905).

[164] Stone v. Mississippi, 101 U.S. 814 (1880); Douglas v. Kentucky, 168 U.S. 488 (1897).

[165] *See, e.g.,* Snowden v. Hughes, 321 U.S. 1 (1944) (right to become a candidate for state office is a privilege only, hence an unlawful denial of such right is not a denial of a right of "property"). Cases under the equal protection clause now mandate a different result. *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 75 (1978) (seeming to conflate due process and equal protection standards in political rights cases).

[166] Angle v. Chicago, St. Paul, M. & D. Ry., 151 U.S. 1 (1894).

[167] Coombes v. Getz, 285 U.S. 434, 442, 448 (1932).

[168] Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (limitation of common-law liability of private industry nuclear accidents in order to encourage development of energy a rational action, especially when combined with congressional pledge to take necessary action in event of accident; whether limitation would have been of questionable validity in absence of pledge uncertain but unlikely).

[169] Shriver v. Woodbine Bank, 285 U.S. 467 (1932).

for the value of certain securities. "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression . . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment."[170]

Control of Local Units of Government

The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, and whether they shall be appointed or popularly elected.[171] Thus, a statute requiring cities to indemnify owners of property damaged by mobs or during riots effects no unconstitutional deprivation of the property even in circumstances when the city could not have prevented the violence.[172] Likewise, a person obtaining a judgment against a municipality for damages resulting from a riot is not deprived of property without due process of law by an act which so limits the municipality's taxing power as to prevent collection of funds adequate to pay it. As long as the judgment continues as an existing liability no unconstitutional deprivation is experienced.[173]

Local units of government obliged to surrender property to other units newly created out of the territory of the former cannot successfully invoke the due process clause,[174] nor may taxpayers allege any unconstitutional deprivation as a result of changes in their tax burden attendant upon the consolidation of contiguous municipalities.[175] Nor is a statute requiring counties to reimburse cities of the first class but not other classes for rebates allowed for prompt payment of taxes in conflict with the due process clause.[176]

Taxing Power

Generally.—It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power

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[170] Chase Securities Corp. v. Donaldson, 325 U.S. 304, 315–16 (1945).

[171] Soliah v. Heskin, 222 U.S. 522 (1912); City of Trenton v. New Jersey, 262 U.S. 182 (1923). The equal protection clause has been employed, however, to limit a State's discretion with regard to certain matters. Infra, pp. 1892–1911.

[172] City of Chicago v. Sturges, 222 U.S. 313 (1911).

[173] Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 289 (1883).

[174] Michigan ex rel. Kies v. Lowrey, 199 U.S. 233 (1905).

[175] Hunter v. Pittsburgh, 207 U.S. 161 (1907).

[176] Stewart v. Kansas City, 239 U.S. 14 (1915).

of the States.[1] Rather, the purpose of the amendment was to extend to the residents of the States the same protection against arbitrary state legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment.[2]

Public Purpose.—As a general matter, public moneys cannot be expended for other than public purposes. Some early cases applied this principle by invalidating taxes judged to be imposed to raise money for purely private rather than public purposes.[3] However, modern notions of public purpose have expanded to the point where the limitation has little practical import. Whether a use is public or private, while it is ultimately a judicial question, "is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court."[4] Taxes levied for each of the following purposes have been held to be for a public use: a city coal and fuel yard,[5] a state bank, a warehouse, an elevator, a flourmill system, homebuilding projects,[6] a society for preventing cruelty to animals (dog license tax),[7] a railroad tunnel,[8] books for school children attending private as well as public schools,[9] and relief of unemployment.[10]

Other Considerations Affecting Validity: Excessive Burden; Ratio of Amount of Benefit Received.—When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers,[11] and the Court will refrain from condemning a

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[1] Tonawanda v. Lyon, 181 U.S. 389 (1901); Cass Farm Co. v. Detroit, 181 U.S. 396 (1901).

[2] Southwestern Oil Co. v. Texas, 217 U.S. 114, 119 (1910).

[3] Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655 (1875) (voiding tax employed by city to make a substantial grant to a bridge manufacturing company to induce it to locate its factory in the city). *See also* City of Parkersburg v. Brown, 106 U.S. 487 (1882) (private purpose bonds not authorized by state constitution).

[4] Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 515 (1937). In applying the Fifth Amendment Due Process Clause the Court has said that discretion as to what is a public purpose "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Helvering v. Davis, 301 U.S. 619, 640 (1937); United States v. Butler, 297 U.S. 1, 67 (1936). That payment may be made to private individuals is now irrelevant. *Carmichael*, supra, at 518. *Cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (sustaining tax imposed on mine companies to compensate workers for black lung disabilities, including those contracting disease before enactment of tax, as way of spreading cost of employee liabilities).

[5] Jones v. City of Portland, 245 U.S. 217 (1917).

[6] Green v. Frazier, 253 U.S. 233 (1920).

[7] Nicchia v. New York, 254 U.S. 228 (1920).

[8] Milheim v. Moffat Tunnel Dist., 262 U.S. 710 (1923).

[9] Cochran v. Board of Education, 281 U.S. 370 (1930).

[10] Carmichael v. Southern Coal & Coke Co., 300 U.S. 644 (1937).

[11] Fox v. Standard Oil Co., 294 U.S. 87, 99 (1935).

tax solely on the ground that it is excessive.[12] Nor can the constitutionality of taxation be made to depend upon the taxpayer's enjoyment of any special benefits from use of the funds raised by taxation.[13]

Estate, Gift, and Inheritance Taxes.—The power of testamentary disposition and the privilege of inheritance being legitimate subjects of taxation, a State may apply its inheritance tax to either the transmission, or the exercise of the legal power of transmission, of property by will or descent, or to the legal privilege of taking property by devise or descent.[14] Accordingly, an inheritance tax law, enacted after the death of a testator but before the distribution of his estate, constitutionally may be imposed on the shares of legatees, notwithstanding that under the law of the State in effect on the date of such enactment, ownership of the property passed to the legatees upon the testator's death.[15] Equally consistent with due process is a tax on an *inter vivos* transfer of property by deed intended to take effect upon the death of the grantor.[16]

When remainders indisputably vest at the time of the creation of a trust and a succession tax is enacted thereafter, the imposition of the tax on the transfer of such remainder is unconstitutional.[17] But where the remaindermen's interests are contingent and do not vest until the donor's death subsequent to the adoption of the statute, the tax is valid.[18]

The Court has noted that insofar as retroactive taxation of vested gifts has been voided, the justification therefor has been that "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the [retroactive] statute later made the taxable event. . . . Taxation . . . of a gift which . . . [the donor] might well

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[12] Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). *See also* Kelly v. City of Pittsburgh, 104 U.S. 78 (1881); Chapman v. Zobelein, 237 U.S. 135 (1915); Alaska Fish Salting & By-Products Co. v. Smith, 255 U.S. 44 (1921); Magnano Co. v. Hamilton, 292 U.S. 40 (1934); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[13] Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937). A taxpayer therefore cannot contest the imposition of an income tax on the ground that, in operation, it returns to his town less income tax than he and its other inhabitants pay. Dane v. Jackson, 256 U.S. 589 (1921).

[14] Stebbins v. Riley, 268 U.S. 137, 140, 141 (1925).

[15] Cahen v. Brewster, 203 U.S. 543 (1906).

[16] Keeney v. New York, 222 U.S. 525 (1912).

[17] Coolidge v. Long, 282 U.S. 582 (1931).

[18] Binney v. Long, 299 U.S. 280 (1936); Nickel v. Cole, 256 U.S. 222 (1921). *See also* Salomon v. State Tax Comm'n, 278 U.S. 484 (1929) (contingent remainder); and Orr v. Gilman, 183 U.S. 278 (1902) (power of appointment).

have refrained from making had he anticipated the tax . . . [is] thought to be so arbitrary . . . as to be a denial of due process."[19]

Income Taxes.—The authority of states to tax income is "universally recognized."[20] Years ago the Court explained that "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits."[21] Also, a tax on income is not constitutionally suspect because retroactive. The routine practice of making taxes retroactive for the entire year of the legislative session in which the tax is enacted has long been upheld,[22] and there are also situations in which courts have upheld retroactive application to the preceding year or two.[23]

Franchise Taxes.—A city ordinance imposing annual license taxes on light and power companies is not violative of the due process clause merely because the city has entered the power business in competition with such companies.[24] Nor does a municipal charter authorizing the imposition upon a local telegraph company of a tax upon the lines of the company within its limits at the rate at which other property is taxed but upon an arbitrary valuation per mile, deprive the company of its property without due process of law, inasmuch as the tax is a mere franchise or privilege tax.[25]

Severance Taxes.—A state excise tax on the production of oil which extends to the royalty interest of the lessor as well as to the interest of the lessee engaged in the active work of production, the tax being apportioned between these parties according to their respective interest in the common venture, is not arbitrary as applied to the lessor, but consistent with due process.[26]

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[19] Welch v. Henry, 305 U.S. 134, 147 (1938).

[20] New York ex rel. Cohn v. Graves, 300 U.S. 308, 313 (1937).

[21] Id. *See also* Shaffer v. Carter, 252 U.S. 37, 49–52 (1920); and Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) (states may tax the income of nonresidents derived from property or activity within the state).

[22] *See, e.g.*, Stockdale v. Insurance Companies, 87 U.S. (20 Wall.) 323 (1874); United States v. Hudson, 299 U.S. 498 (1937); United States v. Darusmont, 449 U.S. 292 (1981).

[23] Welch v. Henry, 305 U.S. 134 (1938) (upholding imposition in 1935 of tax liability for 1933 tax year; due to the scheduling of legislative sessions, this was the legislature's first opportunity to adjust revenues after obtaining information of the nature and amount of the income generated by the original tax). Since "[t]axation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract," the Court explained, "its retroactive imposition does not necessarily infringe due process." Id. at 146–47.

[24] Puget Sound Co. v. Seattle, 291 U.S. 619 (1934).

[25] New York Tel. Co. v. Dolan, 265 U.S. 96 (1924).

[26] Barwise v. Sheppard, 299 U.S. 33 (1936).

Real Property Taxes.—The maintenance of a high assessment in the face of declining value is merely another way of achieving an increase in the rate of property tax. Hence, an overassessment constitutes no deprivation of property without due process of law.[27] Likewise, land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation.[28]

A State may defray the entire expense of creating, developing, and improving a political subdivision either from funds raised by general taxation or by apportioning the burden among the municipalities in which the improvements are made or by creating, or authorizing the creation of, tax districts to meet sanctioned outlays.[29] Where a state statute authorizes municipal authorities to define the district to be benefited by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, after due hearing of the owners as required by the statute cannot, when not arbitrary or fradulent, be reviewed under the Fourteenth Amendment upon the ground that other property benefited by the improvement was not included.[30]

It is also proper to impose a special assessment for the preliminary expenses of an abandoned road improvement, even though the assessment exceeds the amount of the benefit which the assessors estimated the property would receive from the completed work.[31] Likewise a levy upon all lands within a drainage district of a tax of twenty-five cents per acre to defray preliminary expenses does not unconstitutionally take the property of landowners within that district who may not be benefited by the completed drainage plans.[32] On the other hand, when the benefit to be derived by a railroad from the construction of a highway will be largely offset by the loss of local freight and passenger traffic, an assessment upon such railroad is violative of due process,[33] whereas any gains from increased traffic reasonably expected to result from a road improvement will suffice to sustain an assessment thereon.[34] Also the

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[27] Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

[28] Paddell v. City of New York, 211 U.S. 446 (1908).

[29] Hagar v. Reclamation Dist., 111 U.S. 701 (1884).

[30] Butters v. City of Oakland, 263 U.S. 162 (1923).

[31] Missouri Pac. R.R. v. Road District, 266 U.S. 187 (1924). *See also* Roberts v. Irrigation Dist., 289 U.S. 71 (1933), in which it was also stated that an assessment to pay the general indebtedness of an irrigation district is valid, even though in excess of the benefits received.

[32] Houck v. Little River Dist., 239 U.S. 254 (1915).

[33] Road Dist. v. Missouri Pac. R.R., 274 U.S. 188 (1927).

[34] Kansas City Ry. v. Road Dist., 266 U.S. 379 (1924).

fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, for lack of benefits, an assessment thereon for grading, curbing, and paving.[35] However, when a high and dry island was included within the boundaries of a drainage district from which it could not be benefitted directly or indirectly, a tax imposed on the island land by the district was held to be a deprivation of property without due process of law.[36] Finally, a State may levy an assessment for special benefits resulting from an improvement already made[37] and may validate an assessment previously held void for want of authority.[38]

Jurisdiction to Tax

The operation of the Due Process Clause as a limitation on the taxing power of the states has been an issue in a variety of different contexts, but most involve one of the other of two basic issues, first, the relationship between the state exercising taxing power and the object of that exercise of power, and second, whether the degree of contact is sufficient to justify the state's imposition of a particular obligation. Often these issues arise in conjunction with claims that the state's actions are also violative of the Commerce Clause. Illustrative of the factual settings in which such issues arise are 1), determining the scope of the business activity of a multijurisdictional entity that is subject to a state's taxing power, 2) application of wealth transfer taxes to gifts or bequests of nonresidents, 3) allocation of the income of multijurisdictional entities for tax purposes, 4) the scope of state authority to tax the income of nonresidents, and 5) collection of state use taxes.

The Court's opinions in these cases have often discussed due process and Commerce Clause issues as if they were indistinguishable. The recent decision in *Quill Corp. v. North Dakota*,[39] however, utilized a two-tier analysis that found sufficient contact to satisfy due process but not Commerce Clause requirements. *Quill* may be read as implying that the more stringent Commerce Clause standard subsumes due process jurisdictional issues, and that consequently these due process issues need no longer be separately considered. This interpretation has yet to be confirmed, however, and a detailed review of due process precedents may prove useful.

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[35] Louisville & Nashville R.R. v. Barber Asphalt Co., 197 U.S. 430 (1905).
[36] Myles Salt Co. v. Iberia Drainage Dist., 239 U.S. 478 (1916).
[37] Wagner v. Baltimore, 239 U.S. 207 (1915).
[38] Charlotte Harbor Ry. v. Welles, 260 U.S. 8 (1922).
[39] 112 S. Ct. 1904 (1992).

Sales/Use Taxes.—In *Quill Corp. v. North Dakota,*[40] the Court struck down a state statute requiring an out-of-state mail order company with neither outlets nor sales representatives in the state to collect and transmit use taxes on sales to state residents, but did so on Commerce Clause rather than due process grounds. Taxation of an interstate business does not offend due process, the Court held, if that business "purposefully avails itself of the benefits of an economic market in the [taxing] State . . . even if it has no physical presence in the State."[41] A physical presence within the state is necessary, however, under Commerce Clause analysis applicable to taxation of mail order sales.[42]

Land.—Even prior to the ratification of the Fourteenth Amendment, it was a settled principle that a State could not tax land situated beyond its limits; subsequently elaborating upon that principle the Court has said that, "we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by a court."[43] Insofar as a tax payment may be viewed as an exaction for the maintenance of government in consideration of protection afforded, the logic sustaining this rule is self-evident.

Tangible Personalty.—As long as tangible personal property has a situs within its borders, a State validly may tax the same, whether directly through an *ad valorem* tax or indirectly through death taxes, irrespective of the residence of the owner.[44] By the same token, if tangible personal property makes only occasional incursions into other States, its permanent situs remains in the State

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[40] 112 S. Ct. 1904 (1992).

[41] The Court had previously held that the requirement in terms of a benefit is minimal. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622–23 (1982), (quoting Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 521–23 (1937)). It is satisfied by a "minimal connection" between the interstate activities and the taxing State and a rational relationship between the income attributed to the State and the intrastate values of the enterprise. Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436–37 (1980); Moorman Mfg. Co. v. Bair, 437 U.S. 267, 272–73 (1978). *See* especially Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560, 562 (1975); National Geographic Society v. California Bd. of Equalization, 430 U.S. 551 (1977).

[42] Quill Corp. v. North Dakota, 112 S. Ct. at 1911–16 (refusing to overrule the Commerce Clause ruling in National Bellas Hess v. Department of Revenue, 386 U.S. 753, 756 (1967)). *See also* Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358 (1991) (neither the Commerce Clause nor the Due Process Clause is violated by application of a business tax, measured on a value added basis, to a company that manufactures goods in another state, but that operates a sales office and conducts sales within state).

[43] Union Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905). *See also* Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[44] Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910); Frick v. Pennsylvania, 268 U.S. 473 (1925); Blodgett v. Silberman, 277 U.S. 1 (1928).

of origin, and, subject to certain exceptions, is taxable only by the latter.[45] The ancient maxim, *mobilia sequuntur personam*, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the "law of the place where the property is kept and used." The tendency has been to treat tangible personal property as "having a situs of its own for the purpose of taxation, and correlatively to . . . exempt [it] at the domicile of its owner."[46] When rolling stock is permanently located and employed in the prosecution of a business outside the boundaries of a domiciliary State, the latter has no jurisdiction to tax it.[47] Vessels, however, inasmuch as they merely touch briefly at numerous ports, never acquire a taxable situs at any one of them, and are taxable by the domicile of their owners or not at all,[48] unless of course, the ships operate wholly on the waters within one State, in which event they are taxable there and not at the domicile of the owners.[49] Airplanes have been treated in a similar manner for tax purposes. Noting that the entire fleet of airplanes of an interstate carrier were "never continuously without the [domiciliary] State during the whole tax year," that such airplanes also had their "home port" in the domiciliary State, and that the company maintained its principal office therein, the Court sustained a personal property tax applied by the domiciliary State to all the airplanes owned by the taxpayer. No other State was deemed able to accord the same protection and benefits as the taxing State in which the taxpayer had both its domicile and its business situs; the doctrines of *Union Transit Co. v. Kentucky*,[50] as to the taxability of permanently located tangibles, and that of

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[45] New York ex rel. New York Cent. R.R. v. Miller, 202 U.S. 584 (1906). As to the competence of States to tax equipment of foreign carriers which enter their jurisdiction intermittently, *see* supra, pp. 227–33.

[46] Wheeling Steel Corp. v. Fox, 298 U.S. 193, 209–10 (1936); Union Transit Co. v. Kentucky, 199 U.S. 194, 207 (1905); Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933).

[47] Union Transit Co. v. Kentucky, 199 U.S. 194 (1905). Justice Black, in Central R.R. v. Pennsylvania, 370 U.S. 607, 619–21 (1962), had his "doubts about the use of the Due Process Clause to . . . [invalidate State taxes]. The modern use of due process to invalidate State taxes rests on two doctrines: (1) that a State is without 'jurisdiction to tax' property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited. Nothing in the language or the history of the Fourteenth Amendment, however, indicates any intention to establish either of these two doctrines . . . And in the first case [Railroad Co. v. Jackson, 74 U.S. (7 Wall.) 262 (1869)] striking down a State tax for lack of judisdiction to tax after the passage of that Amendment, neither the Amendment nor its Due Process Clause . . . was ever mentioned." He also maintained that Justice Holmes shared this view in Union Transit Co. v. Kentucky, supra, at 211.

[48] Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911).

[49] Old Dominion Steamship Co. v. Virginia, 198 U.S. 299 (1905).

[50] 199 U.S. 194 (1905). *See also* Central R.R. v. Pennsylvania, 370 U.S. 607, 611–17 (1962).

apportionment, for instrumentalities engaged in interstate commerce[51] were held to be inapplicable.[52]

Conversely, a nondomiciliary State, although it may not tax property belonging to a foreign corporation which has never come within its borders, may levy on movables which are regularly and habitually used and employed therein. Thus, while the fact that cars are loaded and reloaded at a refinery in a State outside the owner's domicile does not fix the situs of the entire fleet in that State, the latter may nevertheless tax the number of cars which on the average are found to be present within its borders.[53] Moreover, in assessing that part of a railroad within its limits, a State need not treat it as an independent line, disconnected from the part without, and place upon the property within the State only a value which could be given to it if operated separately from the balance of the road. The State may ascertain the value of the whole line as a single property and then determine the value of the part within on a mileage basis, unless there be special circumstances which distinguish between conditions in the several States.[54] But no property of an interstate carrier can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State.[55] Also, a state property tax on railroads, which is measured by gross earnings apportioned to mileage, is not unconstitutional in the absence of proof that it exceeds what would be legitimate as an ordinary tax on the property valued as part of a going concern or that it is relatively higher than taxes on other kinds of property.[56] The tax reaches only revenues derived from local operations, and the fact that the apportionment formula does not result in mathematical exactitude is not a constitutional defect.[57]

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[51] Pullman's Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

[52] Northwest Airlines v. Minnesota, 322 U.S. 292, 294–97, 307 (1944). The case was said to be governed by New York ex rel. New York Cent. R.R. v. Miller, 202 U.S. 584, 596 (1906). As to the problem of multiple taxation of such airplanes, which had in fact been taxed proportionately by other States, the Court declared that the "taxability of any part of this fleet by any other State, than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us." Justice Jackson, in a concurring opinion, would treat Minnesota's right to tax as exclusively of any similar right elsewhere.

[53] Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933).

[54] Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894).

[55] Wallace v. Hines, 253 U.S. 66 (1920). For example, the ratio of track mileage within the taxing State to total track mileage cannot be employed in evaluating that portion of total railway property found in the State when the cost of the lines in the taxing State was much less than in other States and the most valuable terminals of the railroad were located in other States. *See also* Fargo v. Hart, 193 U.S. 490 (1904); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919).

[56] Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929).

[57] Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940).

Intangible Personalty.—To determine whether a State, or States, may tax intangible personal property, the Court has applied the fiction, *mobilia sequuntur personam* and has also recognized that such property may acquire, for tax purposes, a business or commercial situs where permanently located, but it has never clearly disposed of the issue whether multiple personal property taxation of intangibles is consistent with due process. In the case of corporate stock, however, the Court has obliquely acknowledged that the owner thereof may be taxed at his own domicile, at the commercial situs of the issuing corporation, and at the latter's domicile; constitutional lawyers speculated whether the Court would sustain a tax by all three jurisdictions, or by only two of them, and, if the latter, which two, the State of the commercial situs and of the issuing corporation's domicile, or the State of the owner's domicile and that of the commercial situs.[58]

Thus far, the Court has sustained the following personal property taxes on intangibles:

(1) A debt held by a resident against a nonresident, evidenced by a bond of the debtor and secured by a mortgage on real estate in the State of the debtor's residence.[59]

(2) A mortgage owned and kept outside the State by a nonresident but on land within the State.[60]

(3) Investments, in the form of loans to a resident, made by a resident agent of a nonresident creditor, are taxable to the nonresident creditor.[61]

(4) Deposits of a resident in a bank in another State, where he carries on a business and from which these deposits are derived, but belonging absolutely to him and not used in the business, are subject to a personal property tax in the city of his residence, whether or not they are subject to tax in the State where the business is carried on. The tax is imposed for the general advantage of living within the jurisdiction (benefit-protection theory), and may be measured by reference to the riches of the person taxed.[62]

(5) Membership owned by a nonresident in a domestic exchange, known as a chamber of commerce.[63]

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[58] Howard, *State Jurisdiction to Tax Intangibles: A Twelve Year Cycle*, 8 MO. L. REV. 155, 160–62 (1943); Rawlins, *State Jurisdiction to Tax Intangibles: Some Modern Aspects*, 18 TEX. L. REV. 196, 314–15 (1940).

[59] Kirtland v. Hotchkiss, 100 U.S. 491, 498 (1879).

[60] Savings Society v. Multnomah County, 169 U.S. 421 (1898).

[61] Bristol v. Washington County, 177 U.S. 133, 141 (1900).

[62] Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54 (1917).

[63] Rogers v. Hennepin County, 240 U.S. 184 (1916).

(6) Membership by a resident in a stock exchange located in another State. "Double taxation" the Court observed "by one and the same State is not" prohibited "by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interest falling within the jurisdiction of both, forbidden."[64]

(7) A resident owner may be taxed on stock held in a foreign corporation that does no business and has no property within the taxing State. The Court also added that "undoubtedly the State in which a corporation is organized may . . . [tax] all of its shares whether owned by residents or nonresidents."[65]

(8) Stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing State. The Court attached no importance to the fact that the shares were already taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the stock owner was domiciled, or at any rate did not find it necessary to pass upon the validity of the latter two taxes. The present levy was deemed to be tenable on the basis of the benefit-protection theory, namely, "the economic advantages realized through the protection at the place . . . [of business situs] of the ownership of rights in intangibles. . . ."[66]

(9) Shares owned by nonresident shareholders in a domestic corporation, the tax being assessed on the basis of corporate assets and payable by the corporation either out of its general fund or by collection from the shareholder. The shares represent an aliquot portion of the whole corporate assets, and the property right so represented arises where the corporation has its home, and is therefore within the taxing jurisdiction of the State, notwithstanding that ownership of the stock may also be a taxable subject in another State.[67]

(10) A tax on the dividends of a corporation may be distributed ratably among stockholders regardless of their residence outside the State, the stockholders being the ultimate beneficiaries of the corporation's activities within the taxing State and protected by the latter and subject to its jurisdiction.[68] This tax, though collected by the corporation, is on the transfer to a stockholder of his share of

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[64] Citizens National Bank v. Durr, 257 U.S. 99, 109 (1921).
[65] Hawley v. Malden, 232 U.S. 1, 12 (1914).
[66] First Bank Corp. v. Minnesota, 301 U.S. 234, 241 (1937).
[67] Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938).
[68] International Harvester Co. v. Department of Taxation, 322 U.S. 435 (1944).

corporate dividends within the taxing State and is deducted from said dividend payments.[69]

(11) Stamp taxes on the transfer within the taxing State by one nonresident to another of stock certificates issued by a foreign corporation,[70] and upon promissory notes executed by a domestic corporation, although payable to banks in other States.[71] These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution in the latter which took place in the taxing State.

The following personal property taxes on intangibles have been invalidated:

(1) Debts evidenced by notes in safekeeping within the taxing State, but made and payable and secured by property in a second State and owned by a resident of a third State.[72]

(2) A property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another State and as to which the beneficiary had neither control nor possession, apart from the receipt of income therefrom.[73] However, a personal property tax may be collected on one-half of the value of the corpus of a trust from a resident who is one of the two trustees thereof, not withstanding that the trust was created by the will of a resident of another State in respect of intangible property located in the latter State, at least where it does not appear that the trustee is exposed to the danger of other *ad valorem* taxes in another State.[74] The first case, *Brooke v. Norfolk*,[75] is distinguishable by virture of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Different too is *Safe Deposit & T. Co. v. Virginia*,[76] where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control.

(3) A tax, measured by income, levied on trust certificates held by a resident, representing interests in various parcels of land (some inside the State and some outside), the holder of the certificates, though without a voice in the management of the property,

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[69] Wisconsin Gas Co. v. United States, 322 U.S. 526 (1944).
[70] New York ex rel. Hatch v. Reardon, 204 U.S. 152 (1907).
[71] Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931).
[72] Buck v. Beach, 206 U.S. 392 (1907).
[73] Brooke v. City of Norfolk, 277 U.S. 27 (1928).
[74] Greenough v. Tax Assessors, 331 U.S. 486, 496–97 (1947).
[75] 277 U.S. 27 (1928).
[76] 280 U.S. 83 (1929).

being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale.[77]

A State in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the latter's bank deposits and accounts receivable even though the deposits are outside the State and the accounts receivable arise from manufacturing activities in another State.[78] Similarly, a nondomiciliary State in which a foreign corporation did business can tax the "corporate excess" arising from property employed and business done in the taxing State.[79] On the other hand, when the foreign corporation transacts only interstate commerce within a State, any excise tax on such excess is void, irrespective of the amount of the tax.[80] A domiciliary State, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this "corporate excess" arose from property located and business done in another State and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise.[81] Also a domiciliary State, which imposes no franchise tax on a stock fire insurance corporation, validly may assess a tax on the full amount of its paid-in capital stock and surplus, less deductions for liabilities, notwithstanding that such domestic corporation concentrates its executive, accounting, and other business offices in New York, and maintains in the domiciliary State only a required registered office at which local claims are handled. Despite "the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered . . . ," the presumption persists that intangible property is taxable by the State of origin.[82] But a property tax on the capital stock of a domestic company which includes in the appraisal thereof the value of coal mined in the taxing State but located in another State awaiting sale deprives the corporation of its property without due process of

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[77] Senior v. Braden, 295 U.S. 422 (1935).

[78] Wheeling Steel Corp v. Fox, 298 U.S. 193 (1936). *See also* Memphis Gas Co. v. Beeler, 315 U.S. 649, 652 (1942).

[79] Adams Express Co. v. Ohio, 165 U.S. 194 (1897).

[80] Alpha Cement Co. v. Massachusetts, 268 U.S. 203 (1925).

[81] Cream of Wheat Co. v. County of Grand Forks, 253 U.S. 325 (1920).

[82] Newark Fire Ins. Co. v. State Board, 307 U.S. 313, 318, 324 (1939). Although the eight Justices affirming this tax were not in agreement as to the reasons to be assigned in justification of this result, the holding appears to be in line with the dictum uttered by Chief Justice Stone in Curry v. McCanless, 307 U.S. 357, 368 (1939), to the effect that the taxation of a corporation by a State where it does business, measured by the value of the intangibles used in its business there, does not preclude the State of incorporation from imposing a tax measured by all its intangibles.

law.[83] Also void for the same reason is a state tax on the franchise of a domestic ferry company which includes in the valuation thereof the worth of a franchise granted to the said company by another State.[84]

Transfer (Inheritance, Estate, Gift) Taxes.—Being competent to regulate exercise of the power of testamentary disposition and the privilege of inheritance, a State may base its succession taxes upon either the transmission or an exercise of the legal power of transmission, of property by will or by descent, or the enjoyment of the legal privilege of taking property by devise or descent.[85] But whatever may be the justification of their power to levy such taxes, States have consistently found themselves restricted by the rule, established as to property taxes in 1905 in *Union Transit Co. v. Kentucky*,[86] and subsequently reiterated in *Frick v. Pennsylvania*[87] in 1925, which precludes imposition of transfer taxes upon tangible personal property by any State other than the one in which such tangibles are permanently located or have an actual situs. In the case of intangibles, however, the Court has oscillated in upholding, then rejecting, and again currently sustaining the levy by more than one State of death taxes upon intangibles comprising the estate of a decedent.

Until 1930, transfer taxes upon intangibles levied by both the domiciliary as well as nondomiciliary, or situs State, were with rare exceptions approved. Thus, in *Bullen v. Wisconsin*,[88] the domiciliary State of the creator of a trust was held competent to levy an inheritance tax, upon the death of the settlor, on his trust fund consisting of stocks, bonds, and notes kept and administered in another State and as to which the settlor reserved the right to control disposition and to direct payment of income for life, such reserved powers being equivalent to a fee. Cognizance was taken of the fact that the State in which these intangibles had their situs had also

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[83] Delaware, L. & W.P.R.R. v. Pennsylvania, 198 U.S. 341 (1905).

[84] Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[85] Stebbins v. Riley, 268 U.S. 137, 140–41 (1925).

[86] 199 U.S. 194 (1905). In dissenting in State Tax Comm'n v. Aldrich, 316 U.S. 174, 185 (1942), Justice Jackson asserted that a reconsideration of this principle had become timely.

[87] 268 U.S. 473 (1925). *See also* Treichler v. Wisconsin, 338 U.S. 251 (1949); City Bank Co. v. Schnader, 293 U.S. 112 (1934).

[88] 240 U.S. 635, 631 (1916). A decision rendered in 1926 which is seemingly in conflict was Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567 (1926), in which North Carolina was prevented from taxing the exercise of a power of appointment through a will executed therein by a resident, when the property was a trust fund in Massachusetts created by the will of a resident of the latter State. One of the reasons assigned for this result was that by the law of Massachusetts the property involved was treated as passing from the original donor to the appointee. However, this holding was overruled in Graves v. Schmidlapp, 315 U.S. 657 (1942).

taxed the trust. Levy of an inheritance tax by a nondomiciliary State was sustained on similar grounds in *Wheeler v. New York*, wherein it was held that the presence of a negotiable instrument was sufficient to confer jurisdiction upon the State seeking to tax its transfer.[89] On the other hand, the mere ownership by a foreign corporation of property in a nondomiciliary State was held insufficient to support a tax by that State on the succession to shares of stock in that corporation owned by a nonresident decedent.[90] Also against the trend was *Blodgett v. Silberman*,[91] wherein the Court defeated collection of a transfer tax by the domiciliary State by treating coins and bank notes deposited by a decedent in a safe deposit box in another State as tangible property, albeit it conceded that the domiciliary State could tax the transfer of books and certificates of indebtness found in that safe deposit box as well as the decedent's interest in a foreign partnership.

In the course of about two years following the Depression, the Court handed down a group of four decisions which placed the stamp of disapproval upon multiple transfer and—by inference—other multiple taxation of intangibles.[92] Asserting, as it did in one of these cases, that "practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform rule confining the jurisdiction to impose death transfer taxes as to intangibles to the State of the [owner's] domicile,"[93] the Court, through consistent application of the maxim, *mobilia sequuntur personam*, proceeded to deny the right of nondomiciliary States to tax and to reject as inadequate jurisdictional claims of the latter founded upon such bases as control, benefit, and protection or situs. During this interval, 1930–1932, multiple transfer taxation of intangibles came to be viewed, not merely as undesirable, but as so arbitrary and unreasonable as to be prohibited by the due process clause.

While the Court expressly overruled only one of these four decisions condemning multiple succession taxation of intangibles, beginning with *Curry v. McCanless*[94] in 1939, it announced a departure from the "doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one State. . . ." Taking cognizance of the fact

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[89] 233 U.S. 434 (1914).

[90] Rhode Island Trust Co. v. Doughton, 270 U.S. 69 (1926).

[91] 277 U.S. 1 (1928).

[92] First Nat'l Bank v. Maine, 284 U.S. 312 (1932); Beidler v. South Carolina Tax Comm'n, 282 U.S. 1 (1930); Baldwin v. Missouri, 281 U.S. 586 (1930); Farmer's Loan Co. v. Minnesota, 280 U.S. 204 (1930).

[93] First National Bank v. Maine, 284 U.S. 312, 330–31 (1932).

[94] 307 U.S. 357, 363, 366–68, 372 (1939).

that this doctrine had never been extended to the field of income taxation or consistently applied in the field of property taxation, the Court declared that a correct interpretation of constitutional requirements would dictate the following conclusions: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. . . . But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another State, in such a way as to bring his person or . . . [his intangibles] within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, . . . [However], the State of domicile is not deprived, by the taxpayer's activities, elsewhere, of its constitutional jurisdiction to tax." In accordance with this line of reasoning, Tennessee, where a decedent died domiciled, and Alabama, where a trustee, by conveyance from said decedent, held securities on specific trusts, were both deemed competent to impose a tax on the transfer of these securities passing under the will of the decedent. "In effecting her purposes," the testatrix was viewed as having "brought some of the legal interests which she created within the control of one State by selecting a trustee there, and others within the control of the other State, by making her domicile there." She had found it necessary to invoke "the aid of the law of both States and her legatees" were subject to the same necessity.

These statements represented a belated adoption of the views advanced by Chief Justice Stone in dissenting or concurring opinions which he filed in three of the four decisions during 1930–1932. By the line of reasoning taken in these opinions, if protection or control was extended to, or exercised over, intangibles or the person of their owner, then as many States as afforded such protection or were capable of exerting such dominion should be privileged to tax the transfer of such property. On this basis, the domiciliary State would invariably qualify as a State competent to tax as would a nondomiciliary State, so far as it could legitimately exercise control or could be shown to have afforded a measure of protection that was not trivial or insubstantial.

On the authority of *Curry v. McCanless*, the Court, in *Pearson v. McGraw*,[95] also sustained the application of an Oregon transfer tax to intangibles handled by an Illinois trust company and never

[95] 308 U.S. 313 (1939).

physically present in Oregon. Jurisdiction to tax was viewed as dependent, not on the location of the property in the State, but on control over the owner who was a resident of Oregon. In *Graves v. Elliott*,[96] the Court upheld the power of New York, in computing its estate tax, to include in the gross estate of a domiciled decedent the value of a trust of bonds managed in Colorado by a Colorado trust company and already taxed on its transfer by Colorado, which trust the decedent had established while in Colorado and concerning which he had never exercised any of his reserved powers of revocation or change of beneficiaries. It was observed that "the power of disposition of property is the equivalent of ownership, . . . and its exercise in the case of intangibles is . . . [an] appropriate subject of taxation at the place of the domicile of the owner of the power. Relinquishment at death, in consequence of the nonexercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation."[97] Consistent application of the principle enunciated in *Curry v. McCanless* is also discernible in two later cases in which the Court sustained the right of a domiciliary State to tax the transfer of intangibles kept outside its boundaries, notwithstanding that "in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose legal protection they enjoyed." In *Graves v. Schmidlapp*,[98] an estate tax was levied upon the value of the subject of a general testamentary power of appointment effectively exercised by a resident donee over intangibles held by trustees under the will of a nonresident donor of the power. Viewing the transfer of interest in the intangibles by exercise of the power of appointment as the equivalent of ownership, the Court quoted from *McCulloch v. Maryland*[99] to the effect that the power to tax "'is an incident of sovereignty, and is coextensive with that to which it is an incident.'" Again, in *Central Hanover Bank Co. v. Kelly*,[100] the Court approved a New Jersey transfer tax imposed on the occasion of the death of a New Jersey grantor of an irrevocable trust executed, and consisting of securities located in New York, and providing for the disposition of the corpus to two nonresident sons.

The costliness of multiple taxation of estates comprising intangibles is appreciably aggravated when each of several States founds its tax not upon different events or property rights but upon an identical basis, namely that the decedent died domiciled within its

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[96] 307 U.S. 383 (1939).
[97] Id. at 386.
[98] 315 U.S. 657, 660, 661 (1942).
[99] 17 U.S. (4 Wheat.) 316, 429 (1819).
[100] 319 U.S. 94 (1943).

borders. Not only is an estate then threatened with excessive contraction but the contesting States may discover that the assets of the estate are insufficient to satisfy their claims. Thus, in *Texas v. Florida*,[101] the State of Texas filed an original petition in the Supreme Court, in which it asserted that its claim, together with those of three other States, exceeded the value of the estate, that the portion of the estate within Texas alone would not suffice to discharge its own tax, and that its efforts to collect its tax might be defeated by adjudications of domicile by the other States. The Supreme Court disposed of this controversy by sustaining a finding that the decedent had been domiciled in Massachusetts, but intimated that thereafter it would take jurisdiction in like situations only in the event that an estate did not exceed in value the total of the conflicting demands of several States and that the latter were confronted with a prospective inability to collect.

Corporate Privilege Taxes.—Since the tax is levied not on property but on the privilege of doing business in corporate form, a domestic corporation may be subjected to a privilege tax graduated according to paid-up capital stock, even though the latter represents capital not subject to the taxing power of the State.[102] By the same token, the validity of a franchise tax, imposed on a domestic corporation engaged in foreign maritime commerce and assessed upon a proportion of the total franchise value equal to the ratio of local business done to total business, is not impaired by the fact that the total value of the franchise was enhanced by property and operations carried on beyond the limits of the State.[103] However, a State, under the guise of taxing the privilege of doing an intrastate business, cannot levy on property beyond its borders; therefore, as applied to foreign corporations, a license tax based on

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[101] 306 U.S. 398 (1939). Resort to the Supreme Court's original jurisdiction was necessary because in Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937), the Court, proceeding on the basis that inconsistent determinations by the courts of two States as to the domicile of a taxpayer do not raise a substantial federal constitutional question, held that the Eleventh Amendment precluded a suit by the estate of the decedent to establish the correct State of domicile. In California v. Texas, 437 U.S. 601 (1978), a case on all points with *Texas v. Florida*, the Court denied leave to file an original action to adjudicate a dispute between the two States about the actual domicile of Howard Hughes, a number of Justices suggesting that *Worcester County* no longer was good law. Subsequently, the Court reaffirmed *Worcester County*, Cory v. White, 457 U.S. 85 (1982), and then permitted an original action to proceed, California v. Texas, 457 U.S. 164 (1982), several Justices taking the position that neither *Worcester County* nor *Texas v. Florida* was any longer viable.

[102] Kansas City Ry. v. Kansas, 240 U.S. 227 (1916); Kansas City, M. & B. R.R. v. Stiles, 242 U.S. 111 (1916).

[103] Schwab v. Richardson, 263 U.S. 88 (1923).

authorized capital stock is void,[104] even though there be a maximum to the fee,[105] unless apportioned according to some method, as, for example, a franchise tax based on such proportion of outstanding capital stock as it represented by property owned and used in business transacted in the taxing State.[106] An entrance fee, on the other hand, collected only once as the price of admission to do an intrastate business, is distinguishable from a tax and accordingly may be levied on a foreign corporation on the basis of a sum fixed in relation to the amount of authorized capital stock (in this instance, a $5,000 fee on an authorized capital of $100,000,000).[107]

A municipal license tax imposed as a percentage of the receipts of a foreign corporation derived from the sales within and without the State of goods manufactured in the city is not a tax on business transactions or property outside the city and therefore does not violate the due process clause.[108] But a State lacks jurisdiction to extend its privilege tax to the gross receipts of a foreign contracting corporation for work done outside the taxing State in fabricating equipment later installed in the taxing State. Unless the activities which are the subject of the tax are carried on within its territorial limits, a State is not competent to impose such a privilege tax.[109]

A tax on chain stores, at a rate per store determined by the number of stores both within and without the State is not unconstitutional as a tax in part upon things beyond the jurisdiction of the State.[110]

Individual Income Taxes.—Consistent with due process of law, a State annually may tax the entire net income of resident individuals from whatever source received,[111] and that portion of a nonresident's net income derived from property owned, and from any business, trade, or profession carried on, by him within its borders.[112] Jurisdiction, in the case of residents, is founded upon the rights and privileges incident to domicile, and, in the case of non-

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[104] Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910); Pullman Co. v. Kansas, 216 U.S. 56 (1910); Looney v. Crane Co., 245 U.S. 178 (1917); International Paper Co. v. Massachusetts, 246 U.S. 135 (1918).

[105] Cudahy Co. v. Hinkle, 278 U.S. 460 (1929).

[106] St. Louis S. W. Ry. v. Arkansas, 235 U.S. 350 (1914).

[107] Atlantic Refining Co. v. Virginia, 302 U.S. 22 (1937).

[108] American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919). Nor does a state license tax on the production of electricity violate the due process clause because it may be necessary, to ascertain, as an element in its computation, the amounts delivered in another jurisdiction. Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

[109] James v. Dravo Contracting Co., 302 U.S. 134 (1937).

[110] Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937).

[111] Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932).

[112] Shaffer v. Carter, 252 U.S. 37 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

residents, upon dominion over either the receiver of the income or the property or activity from which it is derived and upon the obligation to contribute to the support of a government which renders secure the collection of such income. Accordingly, a State may tax residents on income from rents of land located outside the State and from interest on bonds physically without the State and secured by mortgage upon lands similarly situated[113] and from a trust created and administered in another State, and not directly taxable to the trustee.[114] The fact that another State has lawfully taxed identical income in the hands of trustees operating therein does not necessarily destroy a domiciliary State's right to tax the receipt of income by a resident beneficiary. "The taxing power of a state is restricted to her confines and may not be exercised in respect of subjects beyond them."[115] Likewise, even though a nonresident does no business within a State, the latter may tax the profits realized by the nonresident upon his sale of a right appurtenant to membership in a stock exchange within its borders.[116]

Corporate Income Taxes: Foreign Corporations.—A tax based on the income of a foreign corporation may be determined by allocating to the State a proportion of the total.[117] However, such a basis may work an unconstitutional result if the income thus attributed to the State is out of all appropriate proportion to the business there transacted by the corporation. Evidence may always be submitted which tends to show that a State has applied a method which, albeit fair on its face, operates so as to reach profits which are in no sense attributable to transactions within its jurisdication.[118] Nevertheless, a foreign corporation is in error when it contends that due process is denied by a franchise tax measured by income, which is levied, not upon net income from intrastate business alone, but on net income justly attributable to all classes of business done within the State, interstate and foreign,

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[113] New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937).

[114] Maguire v. Trefy, 253 U.S. 12 (1920).

[115] Guaranty Trust Co. v. Virginia, 305 U.S. 19, 23 (1938).

[116] New York ex. rel. Whitney v. Graves, 299 U.S. 366 (1937).

[117] Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); Bass, Ratcliff & Gretton Ltd. v. Tax Comm'n 266 U.S. 271 (1924). The Court has recently considered and expanded the ability of the States to use apportionment formulae to allocate to each State for taxing purposes a fraction of the income earned by an integrated business conducted in several States as well as abroad. Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980); Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980). *Exxon* refused to permit a unitary business to use separate accounting techniques that divided its profits among its various functional departments to demonstrate that a State's formulary apportionment taxes extraterritorial income improperly. *Bair*, supra, at 276–80, implied that a showing of actual multiple taxation was a necessary predicate to a due process challenge but might not be sufficient.

[118] Hans Rees' Sons v. North Carolina, 283 U.S. 123 (1931).

as well as intrastate business.[119] Inasmuch as the privilege granted by a State to a foreign corporation of carrying on local business supports a tax by that State on the income derived from that business, it follows that the Wisconsin privilege dividend tax, consistent with the due process clause, may be applied to a Delaware corporation, having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. The tax is imposed on the "privilege of declaring and receiving dividends" out of income derived from property located and business transacted in the State, equal to a specified percentage of such dividends, the corporation being required to deduct the tax from dividends payable to resident and nonresident shareholders and pay it over to the State.[120]

Insurance Company Taxes.—A privilege tax on the gross premiums received by a foreign life insurance company at its home office for business written in the State does not deprive the company of property without due process,[121] but a tax is bad when the company has withdrawn all its agents from the State and has ceased to do business, merely continuing to be bound to policyholders resident therein and receiving at its home office the renewal premiums.[122] Also violative of due process is a state gross premium tax imposed on a nonresident firm, doing business in the taxing jurisdiction, which purchased coverage of property located therein from an unlicensed out-of-state insurer which consummated the contract, serviced the policy, and collected the premiums outside that taxing jurisdiction.[123] Distinguishable therefrom is the following tax which was construed as having been levied, not upon annual premiums nor upon the privilege merely of doing business during the period that the company actually was within the State, but upon the privilege of entering and engaging in business, the percentage "on the annual premiums to be paid

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[119] Matson Nav. Co. v. State Board, 297 U.S. 441 (1936).

[120] Wisconsin v. J.C. Penney Co., 311 U.S. 435, 448–49 (1940). Dissenting, Justice Roberts, along with Chief Justice Hughes and Justices McReynolds and Reed, stressed the fact that the use and disbursement by the corporation at its home office of income derived from operations in many States does not depend on and cannot be controlled by, any law of Wisconsin. The act of disbursing such income as dividends, he contended is "one wholly beyond the reach of Wisconsin's sovereign power, one which it cannot effectively command, or prohibit or condition." The assumption that a proportion of the dividends distributed is paid out of earnings in Wisconsin for the year immediately preceding payment is arbitrary and not borne out by the facts. Accordingly, "if the exaction is an income tax in any sense it is such upon the stockholders (many of whom are nonresidents) and is obviously bad." *See also* Wisconsin v. Minnesota Mining Co., 311 U.S 452 (1940).

[121] Equitable Life Soc'y v. Pennsylvania, 238 U.S. 143 (1915).

[122] Provident Savings Ass'n v. Kentucky, 239 U.S. 103 (1915).

[123] State Bd. of Ins. v. Todd Shipyards, 370 U.S. 451 (1962).

throughout the life of the policies issued." By reason of this difference a State may continue to collect such tax even after the company's withdrawal from the State.[124]

A State which taxes the insuring of property within its limits may lawfully extend its tax to a foreign insurance company which contracts with an automobile sales corporation in a third State to insure its customers against loss of cars purchased through it, so far as the cars go into possession of a purchaser within the taxing State.[125] On the other hand, a foreign corporation admitted to do a local business, which insures its property with insurers in other States who are not authorized to do business in the taxing State, cannot constitutionally be subjected to a 5% tax on the amount of premiums paid for such coverage.[126] Likewise a Connecticut life insurance corporation, licensed to do business in California, which negotiated reinsurance contracts in Connecticut, received payment of premiums thereon in Connecticut, and was there liable for payment of losses claimed thereunder, cannot be subjected by California to a privilege tax measured by gross premiums derived from such contracts, notwithstanding that the contracts reinsured other insurers authorized to do business in California and protected policies effected in California on the lives of residents therein. The tax cannot be sustained whether as laid on property, business done, or transactions carried on, within California, or as a tax on a privilege granted by that State.[127]

When policy loans to residents are made by a local agent of a foreign insurance company, in the servicing of which notes are signed, security taken, interest collected, and debts are paid within the State, such credits are taxable to the company, notwithstanding that the promissory notes evidencing such credits are kept at the home office of the insurer.[128] But when a resident policyholder's loan is merely charged against the reserve value of his policy, under an arrangement for extinguishing the debt and interest thereon by deduction from any claim under the policy, such credit is not taxable to the foreign insurance company.[129] Premiums due from residents on which an extension has been granted by foreign companies also are credits on which the latter may be taxed by the State of the debtor's domicile;[130] the mere fact that the insurers

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[124] Continental Co. v. Tennessee, 311 U.S. 5, 6 (1940) (emphasis added).
[125] Palmetto Ins. Co. v. Connecticut, 272 U.S. 295 (1926).
[126] St. Louis Compress Co. v. Arkansas, 260 U.S. 346 (1922).
[127] Connecticut General Co. v. Johnson, 303 U.S. 77 (1938).
[128] Metropolitan Life Ins. Co. v. City of New Orleans, 205 U.S. 395 (1907).
[129] Orleans Parish v. New York Life Ins. Co., 216 U.S 517 (1910).
[130] Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U.S. 346 (1911).

charge these premiums to local agents and give no credit directly to policyholders does not enable them to escape this tax.[131]

Procedure in Taxation

Generally.—Exactly what due process requires in the assessment and collection of general taxes has never been decided by the Supreme Court. While it was held that "notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential" for imposition of special taxes, it has also ruled that laws for assessment and collection of general taxes stand upon a different footing and are to be construed with the utmost liberality, even to the extent of acknowledging that no notice whatever is necessary.[132] Due process of law as applied to taxation does not mean judicial process;[133] neither does it require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.[134] If a taxpayer is given an opportunity to test the validity of a tax at any time before it is final, whether the proceedings for review take place before a board having a quasi-judicial character, or before a tribunal provided by the State for the propose of determining such questions, due process of law is not denied.[135]

Notice and Hearing in Relation to Taxes.—"Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel

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[131] Orient Ins. Co. v. Assessors of Orleans, 221 U.S. 358 (1911).

[132] Turpin v. Lemon, 187 U.S. 51, 58 (1902); Glidden v. Harrington, 189 U.S. 255 (1903).

[133] McMillen v. Anderson, 95 U.S. 37, 42 (1877).

[134] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 239 (1890).

[135] Hodge v. Muscatine County, 196 U.S. 276 (1905).

or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it." [136]

Notice and Hearing in Relation to Assessments.—"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceedings by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law." [137]

Nevertheless, it has never been considered necessary to the validity of a tax that the party charged shall have been present, or had an opportunity to be present, in some tribunal when he was assessed. [138] Where a tax board has its time of sitting fixed by law and where its sessions are not secret, no obstacle prevents the appearance of any one before it to assert a right or redress a wrong and in the business of assessing taxes, this is all that can be reasonably asked. [139] Nor is there any constitutional command that notice of an assessment as well as an opportunity to contest it be given in advance of the assesment. It is enough that all available defenses may be presented to a competent tribunal during a suit to collect the tax and before the demand of the State for remittance becomes final. [140] A hearing before judgment, with full opportunity to submit evidence and arguments being all that can be adjudged vital, it follows that rehearings and new trials are not essential to due process of law. [141] One hearing is sufficient to constitute due

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[136] Hagar v. Reclamation Dist., 111 U.S. 701, 709–10 (1884).

[137] Id. at 710.

[138] McMillen v. Anderson, 95 U.S. 37, 42 (1877).

[139] State Railroad Tax Cases, 92 U.S. 575, 610 (1876).

[140] Nickey v. Mississippi, 292 U.S. 393, 396 (1934). *See also* Clement Nat'l Bank v. Vermont, 231 U.S. 120 (1913).

[141] Pittsburgh C. C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894).

process,[142] and the requirements of due process are also met if a taxpayer, who had no notice of a hearing, does receive notice of the decision reached there and is privileged to appeal it and, on appeal, to present evidence and be heard on the valuation of his property.[143]

However, when special assessments are made by a political subdivision, a taxing board or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into that determination.[144] The hearing need not amount to a judicial inquiry,[145] but a mere opportunity to submit objections in writing, without the right of personal appearance, is not sufficient.[146] If an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, the property owner is not entitled to be heard in advance on the question of benefits.[147] On the other hand, if the area of the assessment district was not determined by the legislature, a landowner does have the right to be heard respecting benefits to his property before it can be included in the improvement district and assessed, but due process is not denied if, in the absence of actual fraud or bad faith, the decision of the agency vested with the initial determination of benefits is made final.[148] The owner has no constitutional right to be heard in opposition to the launching of a project which may end in assessment, and once his land has been duly included within a benefit district, the only privilege which he thereafter enjoys is to a hearing upon the apportionment, that is, the amount of the tax which he has to pay.[149] Nor can he rightfully complain because the statute renders conclusive, after a hearing, the determination as to apportionment by the same body which levied the assessment.[150]

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[142] Michigan Central R.R. v. Powers, 201 U.S. 245, 302 (1906).

[143] Pittsburgh C. C. & St. L. Ry. v. Board of Pub. Works, 172 U.S. 32, 45 (1898).

[144] St. Louis Land Co. v. Kansas City, 241 U.S. 419, 430 (1916); Paulsen v. Portland, 149 U.S. 30, 41 (1893); Bauman v. Ross, 167 U.S. 548, 590 (1897).

[145] Tonawanda v. Lyon, 181 U.S. 389, 391 (1901).

[146] Londoner v. Denver, 210 U.S. 373 (1908).

[147] Withnell v. Ruecking Constr. Co., 249 U.S. 63, 68 (1919); Browning v. Hooper, 269 U.S. 396, 405 (1926). Likewise, the committing to a board of county supervisors of authority to determine, without notice or hearing, when repairs to an existing drainage system are necessary cannot be said to deny due process of law to landowners in the district, who, by statutory requirement, are assessed for the cost thereof in proportion to the original assessment. Breiholz v. Board of Supervisors, 257 U.S. 118 (1921).

[148] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 168, 175 (1896); Browning v. Hooper, 269 U.S. 396, 405 (1926).

[149] Utley v. Petersburg, 292 U.S. 106, 109 (1934); French v. Barber Asphalt Paving Co., 181 U.S. 324, 341 (1901). *See also* Soliah v. Heskin, 222 U.S. 522 (1912).

[150] Hibben v. Smith, 191 U.S. 310, 321 (1903).

More specifically, where the mode of assessment resolves itself into a mere mathematical calculation, there is no necessity for a hearing.[151] Statutes and ordinances providing for the paving and grading of streets, the cost thereof to be assessed on the front foot rule, do not, by their failure to provide for a hearing or review of assessments, generally deprive a complaining owner of property without due process of law.[152] In contrast, when an attempt is made to cast upon particular property a certain proportion of the construction cost of a sewer not calculated by any mathematical formula, the taxpayer has a right to be heard.[153]

Collection of Taxes.—To reach property which has escaped taxation, a State may tax estates of decedents for a period prior to death and grant proportionate deductions for all prior taxes which the personal representative can prove to have been paid.[154] Collection of an inheritance tax also may be expedited by a statute requiring the sealing of safe deposit boxes for at least ten days after the death of the renter and obliging the lessor to retain assets found therein sufficient to pay the tax that may be due the State.[155] Moreover, with a view to achieving a like result in the case of gasoline taxes, a State may compel retailers to collect such taxes from consumers and, under penalty of a fine for delinquency, to remit monthly the amounts thus collected.[156] Likewise, a tax on the tangible personal property of a nonresident owner may be collected from the custodian or possessor of such property, and the latter, as an assurance of reimbursement, may be granted a lien on such property.[157] In collecting personal income taxes, however, most States require employers to deduct and withhold the tax from the wages of employees, but the duty thereby imposed on the employer has never been viewed as depriving him of property without due process of law, nor has the adjustment of his system of accounting and paying salaries which withholding entails been viewed as an unreasonable regulation of the conduct of his business.[158]

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[151] Hancock v. Muskogee, 250 U.S. 454, 458 (1919). Likewise, a taxpayer does not have a right to a hearing before a state board of equalization preliminary to issuance by it of an order increasing the valuation of all property in a city by 40%. Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915).

[152] City of Detroit v. Parker, 181 U.S. 399 (1901).

[153] Paulsen v. Portland, 149 U.S. 30, 38 (1893).

[154] Bankers Trust Co. v. Blodgett, 260 U.S. 647 (1923).

[155] National Safe Deposit Co. v. Stead, 232 U.S. 58 (1914).

[156] Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924).

[157] Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910).

[158] Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

Moreover, no unconstitutional deprivation of the property rights of vendors of trucks, sold under conditional sales contract to a carrier, results when a State asserts against such trucks a prior lien for highway use taxes levied against the carrier and (1) accruing from the operation by the carrier of trucks, other than those sold by the vendors, either before or during the time the carrier operated the vendors' trucks, or (2) arising from assessments against the carrier, after vendors repossessed their trucks, and based upon the carrier's operations preceding such repossession. A vendor is not privileged to contend that the lien asserted must be limited to taxes attributable solely to operation of its own trucks; for the wear on the highways occasioned by the carrier's operation is in no way altered by the vendor's retention of title.[159]

As a State may provide in advance that taxes shall bear interest from the time they become due, it may with equal validity stipulate that taxes which have become delinquent shall bear interest from the time the delinquency commenced. A State may adopt new remedies for the collection of taxes and apply these remedies to taxes already delinquent.[160] After liability of a taxpayer has been fixed by appropriate procedure, collection of a tax by distress and seizure of his person does not deprive him of liberty without due process of law.[161] Nor is a foreign insurance company denied due process of law when its personal property is distrained to satisfy unpaid taxes.[162]

The requirements of due process are fulfilled by a statute which, in conjunction with affording an opportunity to be heard, provides for the forfeiture of titles to land for failure to list and pay taxes thereon for certain specified years.[163] No less constitutional, as a means of facilitating collection, is an *in rem* proceeding, to which the land alone is made a party, whereby tax liens on land are foreclosed and all preexisting rights or liens are eliminated by a sale under a decree.[164] On the other hand, while the conversion of an unpaid special assessment into both a personal judgment against the owner as well as a charge on the land is consistent with the Fourteenth Amendment,[165] a judgment imposing personal liability against a nonresident taxpayer over whom the state court acquired no jurisdiction is void.[166] Apart from such restraints,

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[159] International Harvester Corp. v. Goodrich, 350 U.S. 537 (1956).
[160] League v. Texas, 184 U.S. 156 (1902).
[161] Palmer v. McMahon, 133 U.S. 660, 669 (1890).
[162] Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905).
[163] King v. Mullins, 171 U.S. 404 (1898); Chapman v. Zobelein, 237 U.S. 135 (1915).
[164] Leigh v. Green, 193 U.S. 79 (1904).
[165] Davidson v. City of New Orleans, 96 U.S. 97, 107 (1878).
[166] Dewey v. Des Moines, 173 U.S. 193 (1899).

however, a State is free to adopt new remedies for the collection of taxes and even to apply new remedies to taxes already delinquent.[167]

Sufficiency and Manner of Giving Notice.—Notice, insofar as it is required, may be either personal, or by publication, or by statute fixing the time and place of hearing.[168] A state statute, consistent with due process, may designate a corporation as the agent of a nonresident stockholder to receive notice and to represent him in proceedings for correcting assessment.[169] Also "where the State . . . [desires] to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment. . ."[170] A description, even though it not be technically correct, which identifies the land will sustain an assessment for taxes and a notice of sale therefor when delinquent. If the owner knows that the property so described is his, he is not, by reason of the insufficient description, deprived of his property without due process. Where tax proceedings are *in rem*, owners are bound to take notice thereof, and to pay taxes on their property, even if assessed to unknown or other persons, and if an owner stands by and sees his property sold for delinquent taxes, he is not thereby wrongfully deprived of his property.[171]

However, due process was deemed not to have been accorded an incompetent taxpayer, for whom a guardian had not yet been appointed, but who was well known to town officials to be financially responsible, when, in accordance with statutory procedure, notice of a real property tax delinquency was mailed to her and published in local papers as well as posted in the town post office, and thereafter, without appearance on her part, the property was foreclosed and deeded to the town.[172] On the other hand, due process was not denied to appellants when, through dereliction of their

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[167] League v. Texas, 184 U.S. 156, 158 (1902). *See also* Straus v. Foxworth, 231 U.S. 162 (1913).

[168] Londoner v. Denver, 210 U.S. 373 (1908). *See also* Kentucky Railroad Tax Cases, 115 U.S. 321, 331 (1885); Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526, 537 (1895); Merchants Bank v. Pennsylvania, 167 U.S. 461, 466 (1897); Glidden v. Harrington, 189 U.S. 255 (1903).

[169] Corry v. Baltimore, 196 U.S. 466, 478 (1905).

[170] Leigh v. Green, 193 U.S. 79, 92–93 (1904).

[171] Ontario Land Co. v. Yordy, 212 U.S. 152 (1909). *See also* Longyear v. Toolan, 209 U.S. 414 (1908).

[172] Covey v. Town of Somers, 351 U.S. 141 (1956).

bookkeeper, they were not apprised of the receipt of mailed notices, and thus were unable to avert foreclosure of liens for unpaid water charges outstanding against two parcels of land held by them in trust; this conclusion is unaffected by the disparity between the value of the land taken and the amount owed nor by the fact that the city, in one instance, retained the proceeds of sale after lapse of time to redeem. Having issued appropriate notices, the city cannot be held responsible for the negligence of the bookkeeper and the managing trustee in overlooking arrearages on tax bills, nor is it obligated to inquire why appellants regularly paid real estate taxes on their property.[173]

Sufficiency of Remedy.—When no other remedy is available, due process is denied by a judgment of a state court withholding a decree in equity to enjoin collection of a discriminatory tax.[174] Requirements of due process are similarly violated by a statute which limits a taxpayer's right to challenge an assessment to cases of fraud or corruption,[175] and by a state tribunal which prevents a recovery of taxes imposed in violation of the Constitution and laws of the United States by invoking a state law limiting suits to recover taxes alleged to have been assessed illegally to taxes paid at the time and in the manner provided by said law.[176] In this as in other areas, the state must provide procedural safeguards against imposition of an unconstitutional tax. These procedures need not apply *predeprivation*, but a state that denies predeprivation remedy by requiring that tax payments be made before objections are heard must provide a *postdeprivation* remedy.[177] In the case of a tax held unconstitutional as a discrimination against interstate commerce and not invalidated in its entirety, the state has several alternatives for equalizing incidence of the tax: it may pay a refund equal to the difference between the tax paid and the tax that would have been due under rates afforded to in-state competitors; it may assess and collect back taxes from those competitors; or it may combine the two approaches.[178]

Laches.—Persons failing to avail themselves of an opportunity to object and be heard cannot thereafter complain of assessments as arbitrary and unconstitutional.[179] Likewise a car company, which failed to report its gross receipts as required by statute, has

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[173] Nelson v. New York City, 352 U.S. 103 (1956).

[174] Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930).

[175] Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907).

[176] Carpenter v. Shaw, 280 U.S. 363 (1930). *See also* Ward v. Love County, 253 U.S. 17 (1920).

[177] McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990).

[178] Id.

[179] Farncomb v. Denver, 252 U.S. 7 (1920).

no further right to contest the state comptroller's estimate of those receipts and his adding thereto the 10 percent penalty permitted by law.[180]

Eminent Domain

The due process clause of the Fourteenth Amendment has been held to require that when a state or local governmental body, or a private body exercising delegated power, takes private property it must provide just compensation and take only for a public purpose. Applicable principles are discussed under the Fifth Amendment.[181]

Substantive Due Process and Noneconomic Liberty

At the heyday of economic substantive due process, the Court ruled in two cases which, while they also involved property, promised substantially to extend judicial supervision of the reasonableness of legislation. This promise was not realized, but later cases brought forth an avalanche of exposition. In *Meyer v. Nebraska*,[182] the Court struck down a state law forbidding the teaching in any school in the State, public or private, of any modern foreign language, other than English, to any child who had not successfully finished the eighth grade; in *Pierce v. Society of Sisters*,[183] it declared unconstitutional a state law which required public school education of children aged eight to sixteen. Both cases involved, as noted, property rights which the Court asserted were protected; the statute in *Meyer* interfered with the occupation of a teacher of German who had been convicted of teaching that language, while the private school plaintiffs in *Pierce* were threatened with destruction of their businesses and the values of their properties.[184] Yet in both cases the Court also permitted these persons adversely affected in their property interests to represent the interests of parents and children in the assertion of other aspects of "liberty" of which they could not be denied.

"Without doubt," Justice McReynolds said, liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his

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[180] Pullman Co. v. Knott, 235 U.S. 23 (1914).

[181] For analysis of the law of eminent domain, *see* supra, pp. 1369–95.

[182] 262 U.S. 390 (1923). Justices Holmes and Sutherland entered a dissent, applicable to *Meyer*, in Bartels v. Iowa, 262 U.S. 404, 412 (1923).

[183] 268 U.S. 510 (1925).

[184] Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 531, 533, 534 (1928).

own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[185] The right of the parents to have their children instructed in a foreign language was "within the liberty of the [Fourteenth] Amendment."[186] *Meyer* was relied on in *Pierce* by the Court in asserting that the statute there "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[187]

Other assertions of the liberty to be free from compulsory state provisions proved unsuccessful,[188] although dicta in these cases continued to broadly define liberty.[189] And in *Loving v. Virginia*,[190] a statute prohibiting interracial marriage was held to deny due process. Marriage was termed "one of the 'basic civil rights of man'" and a "fundamental freedom." "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." The classification of marriage rights on a racial basis was "unsupportable." But the expansion of the Bill of Rights to restrict state action, especially the religion and free expression provisions of the First Amendment, afforded the Court an opportunity to base certain decisions voiding state policies on these grounds rather than on due process.[191]

In *Poe v. Ullman*,[192] Justice Harlan advocated the application of a due process standard of reasonableness—the same standard he

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[185] 262 U.S. at 399.

[186] Id. at 400.

[187] 268 U.S. at 534–35.

[188] E.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905); Zucht v. King, 260 U.S. 174 (1922) (compulsory vaccination); Buck v. Bell, 274 U.S. 200 (1927) (sexual sterilization of inmates of state institutions found to be afflicted with hereditary forms of insanity or imbecility); Minnesota v. Probate Court ex rel. Pearson, 309 U.S. 270 (1940) (institutionalization of habitual sexual offenders as psychopathic personalities).

[189] *See also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage and procreation are among "the basic civil rights of man"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (care and nurture of children by the family are within "the private realm of family life which the state cannot enter").

[190] 388 U.S. 1, 12 (1967).

[191] Indeed, in Griswold v. Connecticut, 381 U.S. 479, 482 (1965), Justice Douglas reinterpreted *Meyer* and *Pierce* as having been based on the First Amendment. Note that in Epperson v. Arkansas, 393 U.S. 97, 105 (1968), and Tinker v. Des Moines School District, 393 U.S. 503, 506–07 (1969), Justice Fortas for the Court approvingly noted the due process basis of *Meyer* and *Pierce* while deciding both cases on First Amendment grounds.

[192] 367 U.S. 497, 522, 539–45 (1961). Justice Douglas, also dissenting, relied on a due process analysis, which began with the texts of the first eight Amendments

would have applied to test economic legislation—to a Connecticut statute banning the use of contraceptives, even by married couples. According to the Justice, due process is limited neither to procedural guarantees nor restricted to the rights enumerated in the first eight Amendments of the Bill of Rights, but is rather "a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions." The liberty protected by the clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Applying a lengthy analysis, he concluded that the statute infringed upon a fundamental liberty without the showing of a justification which would support the intrusion. Yet, when the same issue returned to the Court, a majority of the Justices, rejecting reliance on substantive due process,[193] decided it on the basis of the statute's invasion of privacy, a "penumbral" right protected by a matrix of constitutional provisions.[194] The analysis, however, approached the matter in terms, and in reliance on cases, reminiscent of substantive due process, although the separate concurrences of Justices Harlan and White specifically based on substantive due process,[195] indicates that the majority's position was at least definitionally different. Subsequent cases, functionally grounded in equal protection analysis, relied in great degree upon a view of rationality and reasonableness not too different from Justice Harlan's dissent in *Poe v. Ullman*.[196]

The Court remains divided over how broadly to define a liberty interest. In *Bowers v. Hardwick*,[197] for example, the Court majority found no right to engage in homosexual sodomy, and rejected the dissent's suggestion that focus should instead be placed on a right to privacy and autonomy in matters of sexual intimacy. Similar disagreement over the appropriate level of generality for definition of a liberty interest was evident in *Michael H. v. Gerald D.*,

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as the basis of fundamental due process and continued into the "emanations" from this as also protected. Id. at 509.

[193] "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (opinion of Court by Justice Douglas).

[194] Supra, pp. 1504–05.

[195] 381 U.S. at 499, 502.

[196] Eisenstadt v. Baird, 405 U.S. 438 (1972), is the principal case. *See also* Stanley v. Illinois, 405 U.S. 645 (1972).

[197] 478 U.S. 186 (1986).

involving the rights of an adulterous biological father to establish paternity and to associate with his child.[198] Justice Scalia, joined only by Chief Justice Rehnquist in this part of the plurality decision, argued for "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[199] Dissenting Justice Brennan, joined by two others, rejected the emphasis on tradition, and argued instead that the Court should "ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected [as] an aspect of 'liberty.'"[200] The resurgence of substantive due process reasoning became evident upon the Court's confrontation with cases raising the constitutionality of laws proscribing or limiting abortions.

Abortion.—Laws limiting or prohibiting abortions in practically all the States, the District of Columbia, and the territories were invalidated by a ruling recognizing a right of personal privacy protected by the due process clause that included a qualified right of a woman to determine whether or not to bear a child. On the basis of its analysis of the competing individual rights and state interests, the Court in *Roe v. Wade*[201] discerned a three-stage balancing of rights and interests extending over the full nine-month term of pregnancy.

"(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

"(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

"(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses,

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[198] 491 U.S. 110 (1989). Five Justices agreed that a liberty interest was implicated, but the Court ruled that California's procedures for establishing paternity did not unconstitutionally impinge on that interest.

[199] Id. at 128 n.6.

[200] Id. at 142.

[201] Roe v. Wade, 410 U.S. 113 (1973). A companion case was Doe v. Bolton, 410 U.S. 179 (1973). The opinion by Justice Blackman was concurred in by Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Chief Justice Burger. Justices White and Rehnquist dissented, id. at 171, 221, arguing that the Court should follow the traditional due process test of determining whether a law has a rational relation to a valid state objective and that so judged the statute was valid. Justice Rehnquist was willing to consider an absolute ban on abortions even when the mother's life is in jeopardy to be a denial of due process, id. at 173, while Justice White left the issue open. Id. at 223.

regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[202]

A lengthy history of the medical and legal views of abortion apparently convinced the Court that the prohibition of abortion lacked the solid foundation necessary to preserve such prohibitions from constitutional review.[203] Similarly, a review of the concept of "person" as protected in the due process clause and in other provisions of the Constitution established to the Court's satisfaction that the word "person" did not include the unborn, and therefore that the unborn lacked federal constitutional protection.[204] Without treating the question in more than summary fashion, the Court announced that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist in the Constitution" and that it is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[205] "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[206] Moreover, this right of privacy is "fundamental" and, drawing upon the strict standard of review in equal protection litigation, the Court held that the due process clause required that the regulations limiting this fundamental right may be justified only by a "compelling state interest" and must be narrowly drawn to express only the legitimate state interests at stake.[207] Assessing the possible interests of the States, the Court rejected as unsupported in the record and ill-served by the laws in question justifications relating to the promotion of morality and the protection of women from the medical hazards of abortions. The state interest in protecting the life of the fetus was held to be limited by the lack of a social consensus with regard to the issue when life begins. Two valid state interests were recognized, however. "[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"[208]

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[202] Roe v. Wade, 410 U.S. 113, 164–65 (1973).

[203] Id. at 129–47.

[204] Id. at 156–59.

[205] Id. at 152–53.

[206] Id.

[207] Id. at 152, 155–56. The "compelling state interest" test in equal protection cases is reviewed infra, pp. 1809–14.

[208] 410 U.S. at 147–52, 159–63.

This approach led to the three-stage concept quoted above. Because medical data indicated that abortion prior to the end of the first trimester is relatively safe, the mortality rate being lower than the rates for normal childbirth, and because the fetus has no capability of meaningful life outside the mother's womb, the State has no "compelling interest" in the first trimester and "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[209] In the intermediate trimester, the danger to the woman increases and the State may therefore regulate the abortion procedure "to the extent that the regulation reasonably relates to the preservation and protection of maternal health," but the fetus is still not able to survive outside the womb, and consequently the actual decision to have an abortion cannot be otherwise impeded.[210] "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[211]

In a companion case, the Court struck down three procedural provisions of a permissive state abortion statute.[212] These required that the abortion be performed in a hospital accredited by a private accrediting organization, that the operation be approved by the hospital staff abortion committee, and that the performing physician's judgment be confirmed by the independent examination of the patient by two other licensed physicians. These provisions were held not to be justified by the State's interest in maternal health because they were not reasonably related to that interest.[213] And a residency provision was struck down as violating the privileges and immunities clause.[214] But a clause making the performance of an abortion a crime except when it is based upon the doctor's "best clinical judgment that an abortion is necessary" was upheld against vagueness attack and was further held to benefit women seeking

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[209] Id. at 163.

[210] Id.

[211] Id. at 163–164. A fetus becomes "viable" when it is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id. at 160 (footnotes omitted).

[212] Doe v. Bolton, 410 U.S. 179 (1973).

[213] Id. at 192–200.

[214] Id. at 200. The clause is Article IV, § 2. *See* supra, pp. 867–77.

abortions inasmuch as the doctor could utilize his best clinical judgment in light of all the attendant circumstances.[215]

These decisions were reaffirmed and extended when the Court was faced with a restrictive state statute enacted after *Roe* making access to abortions contingent upon spousal or parental consent and imposing restraints upon methods.[216] Striking down all the substantial limitations, the Court held (1) that the spousal consent provision was an attempt by the State to delegate a veto power over the decision of the woman and her doctor that the State itself could not exercise,[217] (2) that no significant state interests justified the imposition of a blanket parental consent requirement as a condition of the obtaining of an abortion by an unmarried minor during the first 12 weeks of pregnancy,[218] and (3) that a criminal pro-

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[215] 410 U.S. at 191–92. "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Id. at 192. Presumably this discussion applies to the Court's ruling in *Roe* holding that even in the third trimester the woman may not be forbidden to have an abortion if it is necessary to preserve her health as well as her life, 410 U.S. at 163–64, a holding which is unelaborated in the opinion. *See also* United States v. Vuitch, 402 U.S. 62 (1971).

[216] Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See also* Bellotti v. Baird, 443 U.S. 622 (1979) (parental consent to minor's abortion); Colautti v. Franklin, 439 U.S. 379 (1979) (imposition on doctor determination of viability of fetus and obligation to take life-saving steps); Singleton v. Wulff, 428 U.S. 106 (1976) (standing of doctors to litigate right of patients to Medicaid-financed abortions); Bigelow v. Virginia, 421 U.S. 809 (1975) (ban on newspaper ads for abortions); Connecticut v. Menillo, 423 U.S. 9 (1975) (state ban on performance of abortion by "any person" may constitutionally be applied to prosecute nonphysicians performing abortions).

[217] Planned Parenthood v. Danforth, 428 U.S. 52, 67–72 (1976). The Court recognized the husband's interests and the state interest in promoting marital harmony. But the latter was deemed not served by the requirement, and, since when the spouses disagree on the abortion decision one has to prevail, the Court thought the person who bears the child and who is the more directly affected should be the one to prevail. Justices White and Rehnquist and Chief Justice Burger dissented. Id. at 92.

[218] Id. at 72–75. Minors have rights protected by the Constitution, but the States have broader authority to regulate their activities than those of adults. Here, the Court perceived no state interest served by the requirement that overcomes the woman's right to make her own decision; it emphasized that it was not holding that every minor, regardless of age or maturity, could give effective consent for an abortion. Justice Stevens joined the other dissenters on this part of the holding. Id. at 101. In Bellotti v. Baird, 443 U.S. 622 (1979), eight Justices agreed that a parental consent law, applied to a mature minor, found to be capable of making, and having made, an informed and reasonable decision to have an abortion, was void but split on the reasoning. Four Justices would hold that neither parents nor a court could be given an absolute veto over a mature minor's decision, while four others would hold that if parental consent is required the State must afford an expeditious access to court to review the parental determination and set it aside in appropriate cases. In H. L. v. Matheson, 450 U.S. 398 (1981), the Court upheld, as applied to an unemancipated minor living at home and dependent on her parents, a statute requiring a physician, "if possible," to notify the parents or guardians of a minor seeking an abortion. The decisions leave open a variety of questions, addressed by some concurring and dissenting Justices, dealing with when it would not be in the minor's

vision requiring the attending physician to exercise all care and diligence to preserve the life and health of the fetus without regard to the stage of viability was inconsistent with *Roe*.[219] Sustained were provisions that required the woman's written consent to an abortion with assurances that it is informed and freely given, and provisions mandating reporting and recordkeeping for public health purposes with adequate assurances of confidentiality. A provision that barred the use of the most commonly used method of abortion after the first 12 weeks of pregnancy was declared unconstitutional since in the absence of another comparably safe technique it did not qualify as a reasonble protection of maternal health and it instead operated to deny the vast majority of abortions after the first 12 weeks.[220]

In other rulings applying *Roe*, the Court struck down some requirements and upheld others. A requirement that all abortions performed after the first trimester be performed in a hospital was invalidated as imposing "a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and [at least during the first few weeks of the second trimester] safe abortion procedure."[221] A state may, however, require that abortions be performed in hospitals *or* licensed outpatient clinics, as long as licensing standards do not "depart from accepted medical practice."[222] Various "informed consent" requirements were struck down as intruding upon the discretion of the physician, and as being aimed at discouraging abortions rather than at informing the pregnant woman's decision;[223] while the state has a legitimate in-

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best interest to avoid notifying her parents and with the alternatives to parental notification and consent. In two 1983 cases the Court applied the *Bellotti v. Baird* standard for determining whether judicial substitutes for parental consent requirements permit a pregnant minor to demonstrate that she is sufficiently mature to make her own decision on abortion. *Compare* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (no opportunity for case-by-case determinations); *with* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) (adequate individualized consideration).

[219] Planned Parenthood v. Danforth, 428 U.S. 52, 81–84 (1976). A law requiring a doctor, subject to penal sanction, to determine if a fetus is viable or may be viable and to take steps to preserve the life and health of viable fetuses was held to be unconstitutionally vague. Colautti v. Franklin, 439 U.S. 379 (1979).

[220] Planned Parenthood v. Danforth, 428 U.S. 52, 75–79 (1976).

[221] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 438 (1983); *Accord*, Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983). The Court in *Akron* relied on evidence that "dilation and evacuation" (D&E) abortions performed in clinics cost less than half as much as hospital abortions, and that common use of the D&E procedure had "increased dramatically" the safety of second trimester abortions in the 10 years since *Roe v. Wade*. 462 U.S. at 435–36.

[222] Simopoulos v. Virginia, 462 U.S. 506, 516 (1983).

[223] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444–45 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

terest in ensuring that the woman's consent is informed, the Court explained, it may not demand of the physician "a recitation of an inflexible list of information" unrelated to the particular patient's health, and, for that matter, may not demand that the physician rather than some other qualified person render the counseling.[224] The Court also invalidated a 24-hour waiting period following a woman's written, informed consent.[225] On the other hand, the Court upheld a requirement that tissue removed in clinic abortions be submitted to a pathologist for examination, since the same requirements were imposed for in-hospital abortions and for almost all other in-hospital surgery.[226] Also, the Court upheld a requirement that a second physician be present at abortions performed after viability in order to assist in saving the life of the fetus.[227]

The Court refused to extend *Roe* to the area of public funding to pay for abortions for the pregnant indigent, holding that neither due process nor equal protection requires government to use public funds for this purpose.[228] Due process, the Court held, does not obligate the States to pay the pregnancy-related medical expenses of indigent women, even though both abortion and the right to bear the child to birth are "fundamental" rights.[229] But the more critical question was the equal protection restraint imposed when government does provide public funds for medical care to indigents; may it accord differential treatment to abortion and childbirth and prefer the latter? The States may do so, the Court continued, because it is rationally related to a lawful purpose to encourage normal childbirth. The use of the rational basis test required a rejection of the compelling state interest test in the following manner. First, the more severe test was not activated by a classification impacting on a suspect class, neither wealth nor indigency being such a class. Second, and most significant for abortion adjudication, the Court held that state refusal to pay for abortions did not impinge upon a fundamental right. Prior state restrictions which had been invalidated, the Court continued, had created absolute obstacles to the

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[224] City of Akron, 462 U.S. 416, 448–49 (1983).

[225] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 450–51 (1983). *But see* Hodgson v. Minnesota, 497 U.S. 417 (1990) (upholding a 48-hour waiting period following notification of parents by a minor).

[226] Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 486–90 (1983).

[227] Id. at 482–86, 505.

[228] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980). *See also* Beal v. Doe, 432 U.S. 438 (1977) (states are not required by federal law to fund abortions); Harris v. McRae, supra, at 306–11 (same). The state restriction in *Maher* supra at 466, applied to nontheraputic abortions, whereas the federal law barred funding for most medically necessary abortions as well, a distinction the Court deemed irrelevant, *Harris*, at supra, 323, although it provided Justice Stevens with the basis for reaching different results. Id. at 349 (dissenting).

[229] Maher, 432 U.S. at 469 & n.5; Harris, 448 U.S. at 312–18.

obtaining of an abortion. While a state-created obstacle need not be absolute to be impermissible, it must at a minimum "unduly burden" the right to terminate a pregnancy. To allocate public funds so as to further a state interest in normal childbirth does not create an absolute obstacle to obtaining an abortion nor does it unduly burden the right. The condition—indigency—that is the barrier to getting an abortion was not created by government nor does the State add to the burden that exists already. "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there."[230] Applying the same principles, the Court held that a municipal hospital could constitutionally provide hospital services for indigent women for childbirth but deny services for abortion.[231]

In 1983 the Court expressly reaffirmed *Roe v. Wade*,[232] and continued to apply its principles to a variety of state statutes attempting to regulate the circumstances of abortions. The Court's 1989 decision in *Webster v. Reproductive Health Services*,[233] however, signalled a break with the past even though *Roe v. Wade* was not overruled.

Webster upheld two aspects of Missouri's statute regulating abortions: a prohibition on the use of public facilities and employees to perform abortions not necessary to save the life of the mother; and a requirement that a physician, before performing an abortion on a fetus she has reason to believe has reached a gestational

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[230] Maher, 432 U.S. at 469–74 (the quoted sentence is at 474); Harris, 448 U.S. at 321–26. Justices Brennan, Marshall, and Blackmun dissented in both cases and Justice Stevens joined them in *Harris*.

[231] Poelker v. Doe, 432 U.S. 519 (1977).

[232] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419–20 (1983). In refusing to overrule *Roe v. Wade*, the Court merely cited the principle of *stare decisis*. Justice Powell's opinion of the Court was joined by Chief Justice Burger, and by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, joined by Justices White and Rehnquist, dissented, voicing disagreement with the trimester approach and suggesting instead that throughout pregnancy the test should be the same: whether state regulation constitutes "unduly burdensome interference with [a woman's] freedom to decide whether to terminate her pregnancy." 462 U.S. at 452, 461. In the 1986 case of Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), Justice White, joined by Justice Rehnquist, advocated overruling of *Roe v. Wade*, Chief Justice Burger thought *Roe v. Wade* had been extended to the point where it should be reexamined, and Justice O'Connor repeated misgivings expressed in her *Akron* dissent.

[233] 492 U.S. 490 (1989).

age of 20 weeks, make an actual viability determination.[234] In two 1990 cases the Court then upheld parental notification requirements. Ohio's requirement that one parent be notified of a minor's intent to obtain an abortion, or that the minor use a judicial bypass procedure to obtain the approval of a juvenile court, was approved.[235] And, while the Court ruled that Minnesota's requirement that both parents be notified was invalid standing alone, the statute was saved by a judicial bypass alternative.[236]

The *Webster* Court was split in its approach to Missouri's viability determination requirement, and in its approach to *Roe v. Wade*. The plurality opinion by Chief Justice Rehnquist, joined in that part by Justices White and Kennedy, was highly critical of *Roe*, but found no occasion to overrule it. Instead, the plurality's approach would water down *Roe* by applying a less stringent standard of review. The viability testing requirement is valid, the plurality contended, because it "permissibly furthers the State's interest in protecting potential human life."[237] Justice O'Connor concurred in the result because in her view the requirement did not impose "an undue burden" on a woman's right to an abortion, and Justice Scalia concurred in the result while urging that *Roe* be overruled outright. That *Webster* may have changed the focus of debate was illustrated by the Court's approach to the parental notification issue. A Court majority in *Hodgson* invalidated Minnesota's alternative procedure requiring notification of both parents without judicial bypass, not because it burdened a fundamental right, but because it did "not reasonably further any legitimate state interest."[238]

Roe was not confronted more directly in *Webster* because the viability testing requirement, as characterized by the plurality, merely asserted a state interest in protecting potential human life from the point of viability, and hence did not challenge *Roe's* trimester framework.[239] Nonetheless, a majority of Justices appeared

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[234] The Court declined to rule on several other aspects of Missouri's law, including a preamble stating that life begins at conception, and a prohibition on the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion.

[235] Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990).

[236] Hodgson v. Minnesota, 497 U.S. 417 (1990).

[237] 492 U.S. at 519–20. Dissenting Justice Blackmun, joined by Justices Brennan and Marshall, argued that this "permissibly furthers" standard "completely disregards the irreducible minimum of *Roe* . . . that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy," and instead balances "a lead weight" (the State's interest in fetal life) against a "feather" (a woman's liberty interest). Id. at 555, 556 n.11.

[238] 497 U.S. at 450.

[239] 492 U.S. at 521. Concurring Justice O'Connor agreed that "no decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible." Id. at 528.

ready to reject a strict trimester approach. The plurality asserted a compelling state interest in protecting human life throughout pregnancy, rejecting the notion that the state interest "should come into existence only at the point of viability;"[240] Justice O'Connor repeated her view that the trimester approach is "problematic;"[241] and, as mentioned, Justice Scalia would do away with *Roe* altogether.

Three years later the Court, invoking principles of *stare decisis*, reaffirmed *Roe's* "essential holding," but restated that holding in terms of undue burden and also abandoned *Roe's* reliance on the trimester approach. *Roe's* "essential holding," said the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[242] has three parts. "First is a recognition of the right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."

This restatement of *Roe's* essentials, recognizing a legitimate state interest in protecting fetal life throughout pregnancy, necessarily eliminated the rigid trimester analysis permitting almost no regulation in the first trimester. Viability still marked "the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions,"[243] but less burdensome regulations could be applied before viability. "What is at stake," the three-Justice plurality asserted, "is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's ex-

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[240] Id. at 519.

[241] Id. at 529. Previously, dissenting in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983), Justice O'Connor had suggested that the *Roe* trimester framework "is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."

[242] 112 S. Ct. 2791, 2804 (1992).

[243] Id. at 2811.

ercise of the right to choose." Thus, unless an undue burden is imposed, states may adopt measures "designed to persuade [a woman] to choose childbirth over abortion."[244]

Application of these principles led the Court to uphold several aspects of Pennslyvania's abortion control law, in the process overruling precedent, but to invalidate what was arguably the most restrictive provision. Four challenged provisions of the law were upheld: a definition of "medical emergency" controlling exemptions from the Act's other limitations; recordkeeping and reporting requirements imposed on facilities that perform abortions; an informed consent and 24-hour waiting period requirement; and a parental consent requirment, with possibility for judicial bypass, applicable to minors. Invalidated as an undue burden on a woman's right to an abortion was a spousal notification requirement.

It was a new alignment of Justices that restated and preserved *Roe*. Joining Justice O'Connor in a jointly authored opinion adopting and applying Justice O'Connor's "undue burden" analysis were Justices Kennedy and Souter. Justices Blackmun and Stevens joined parts of the plurality opinion, but dissented from other parts. Justice Stevens would not have abandoned trimester analysis, and would have invalidated the 24-hour waiting period and aspects of the informed consent requirement. Justice Blackmun, author of the Court's opinion in *Roe*, asserted that "the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster*,"[245] and would have invalidated all of the challenged provisions. Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, would have overruled *Roe* and upheld all challenged aspects of the Pennsylvania law.

Overruled in *Casey* were earlier decisions that had struck down informed consent and 24-hour waiting periods.[246] Given the state's legitimate interests in protecting the life of the unborn and the health of the potential mother, and applying "undue burden" analysis, the three-Justice plurality found these requirements permissible. Requiring informed consent for medical procedures is both commonplace and reasonable, and, in the absence of any evidence of burden, the state could require that information relevant to informed consent be provided by a physician rather than an assistant. The 24-hour waiting period was approved both in theory (it

[244] Id. at 2821.

[245] Id. at 2844.

[246] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (invalidating "informed consent" and 24-hour waiting period); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (invalidating informed consent requirement).

being reasonable to assume "that important decisions will be more informed and deliberate if they follow some period of reflection") and in practice (in spite of "troubling" findings of increased burdens on poorer women who must travel significant distances to obtain abortions, and on all women who must twice rather than once brave harassment by anti-abortion protesters).[247] The Court also upheld application of an additional requirement that women under age 18 obtain the consent of one parent or avail themselves of a judicial bypass alternative.

On the other hand, the Court[248] distinguished Pennsylvania's spousal notification provision as constituting an undue burden on a woman's right to choose an abortion. "A State may not give to a man the kind of dominion over his wife that parents exercise over their children" (and that men exercised over their wives at common law).[249] Although there was an exception for a woman who believed that notifying her husband would subject her to bodily injury, this exception was not broad enough to cover other forms of abusive retaliation, e.g., psychological intimidation, bodily harm to children, or financial deprivation. To require a wife to notify her husband in spite of her fear of such abuse would unduly burden the wife's liberty interest as an individual to decide whether to bear a child.

Privacy: Its Constitutional Dimensions.—*Roe v. Wade* and its progeny could have had significant effect outside the abortion area in the general area of personal liberties, inasmuch as the revitalization of substantive due process in the noneconomic regulation area, overlaid with the compelling state interest test, could call into question many governmental restraints upon the person. *Roe's* emphasis upon the privacy rationale seemed to presage an active judicial role in defining and protecting the interests of persons "to be let alone." Those developments have not occurred, however, and the cases reflect the intention of the Court to curb the expansion of any doctrinal ramifications flowing beyond the abortion cases.

Privacy has in a number of cases been identified as a core value of the Bill of Rights,[250] but it was not until *Griswold v. Connecticut*[251] that an independent right of privacy, derived from the confluence of several provisions of the Bill of Rights or discovered in the "penumbras" of these provisions, was expounded by the

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[247] 112 S. Ct. at 2835.

[248] The plurality Justices were joined in this part of their opinion by Justices Blackmun and Stevens.

[249] Id. at 2831.

[250] E.g., the Fourth Amendment.

[251] 381 U.S. 479 (1965).

Court and actually used to strike down a governmental restraint. The abortion cases extended *Griswold* many degrees in several respects. First, the cases removed any lingering possibility that the right is a marital one that depends upon that relationship.[252] Second, the right of privacy was denominated a liberty which found its source and its protection in the due process clause of the Fourteenth Amendment.[253] Third, by designating the right as a "fundamental" right, the Court required a governmental restraint to be justified by a "compelling state interest." Necessary to assessment of the effect of this development is a close analysis of the limits of the right thus protected as well as of its contents.

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. at 453–54; id. at 460, 463–65 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska*, supra."[254] In the pornography cases decided later in the same Term, the Court denied the existence of any privacy right of customers to view unprotected material in commercial establishments, repeating the above descriptive language from *Roe*, and saying further: "the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved."[255]

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[252] In Eisenstadt v. Baird, 405 U.S. 438 (1972), the court had declined to extend the *Griswold* principle to the unmarried on privacy grounds, relying on an equal protection analysis instead.

[253] Roe v. Wade, 410 U.S. 113, 153 (1973). *See* id. at 167–71 (Justice Stewart concurring). Justice Douglas continued to deny that substantive due process is the basis of the decisions. Doe v. Bolton, 410 U.S. 179, 209, 212 n.4 (1973) (concurring).

[254] Roe v. Wade, 410 U.S. 113, 152 (1973).

[255] Paris Adult Theatre v. Slaton, 413 U.S. 49, 66 n.13 (1973).

What is apparent from the Court's approach in these cases is that its concept of privacy is descriptive rather than analytical, making difficult an assessment of the potential of the doctrine. Privacy as a concept appears to encompass at least two different but related aspects. First, it relates to the right or the ability of individuals to determine how much and what information about themselves is to be revealed to others. Second, it relates to the idea of autonomy, the freedom of individuals to perform or not perform certain acts or subject themselves to certain experiences.[256] Governmental commands to do or not to do something may well implicate one or the other or both of these aspects, and judicial decision about the validity of such governmental commands must necessarily be informed by use of an analytical framework balancing the governmental interests against the individual interests in maintaining freedom in one or both aspects of privacy. That framework cannot now be constructed on the basis of the Court's decided cases.

Griswold v. Connecticut,[257] voiding a state statute proscribing the use of contraceptives, seems primarily to be based upon a judicial concept of privacy flowing from the first aspect of privacy described above. That is, the predominant concern flowing through the several opinions is the threat of forced disclosure about the private and intimate lives of persons through the pervasive surveillance and investigative efforts that would be needed to enforce such a law; moreover, the concern was not limited to the outward pressures upon the confines of such provisions as the Fourth Amendment's search and seizure clause, but extended to techniques that would have been within the range of permissible investigation. Subsequent cases, however, have returned to Fourth and Fifth Amendment principles to regulate official invasions of privacy.[258]

For example, in *United States v. Miller*,[259] the Court evaluated in Fourth Amendment terms the right of privacy of depositors in restricting Government access to their cancelled checks maintained by the bank as required by the Bank Secrecy Act. The cancelled checks, the Court held, were business records of the bank in which the depositors had no expectation of privacy and therefore no

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[256] Whalen v. Roe, 429 U.S. 589, 598–600 (1977).

[257] 381 U.S. 479 (1965).

[258] E.g., California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974). *See also* Laird v. Tatum, 408 U.S. 1 (1972); United States v. United States District Court, 407 U.S. 297 (1972); United States v. Dionisio, 410 U.S. 1 (1973); Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

[259] 425 U.S. 435 (1976). *See also* Fisher v. United States, 425 U.S. 391, 401 (1976); Paul v. Davis, 424 U.S. 693, 712–13 (1976); United States v. Bisceglia, 420 U.S. 141 (1975).

Fourth Amendment standing to challenge government legal process directed to the bank, and this status was unchanged by the fact that the banks kept the records under government mandate in the first place. And in *Fisher v. United States*,[260] the Court denied that the Fifth Amendment's self-incrimination clause operated in any way to prevent the IRS from obtaining by summons income tax records prepared by accountants and in the hands of either the taxpayer or his attorney, no matter how incriminating, because the Amendment only protects against compelled testimonial self-incrimination. "[T]he Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort."[261] Further, "[w]e cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment."[262] The First Amendment itself affords some limitation upon governmental acquisition of information but here again the gravamen is a violation of speech or association or the like concomitant with exposure of personal information, and not exposure itself.[263]

A cryptic opinion in *Whalen v. Roe*[264] may indicate the Court's willingness to recognize privacy interests as independent constitutional rights. At issue was a state's pervasive regulation of prescription drugs that could be abused, and the centralized recordkeeping through computers of all such prescriptions identifying the patients. The scheme was attacked on the basis that it invaded privacy interests against disclosure and privacy interests involving autonomy of persons in choosing whether to have the medication. The Court appeared to agree that both interests are protected, but because the scheme was surrounded with extensive security protection against disclosure beyond that necessary to achieve the purposes of the program it was not thought to "pose a sufficiently

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[260] 425 U.S. 391 (1976).

[261] Id. at 399.

[262] Id. at 401.

[263] *See* Buckley v. Valeo, 424 U.S. 1, 60–82 (1976); Whalen v. Roe, 429 U.S. 589, 601 n.27, 604 n.32 (1977); United States v. Miller, 425 U.S. 435, 444 n.6 (1976). The Court continues to reserve the question of the "[s]pecial problems of privacy which might be presented by subpoena of a personal diary." Fisher v. United States, 425 U.S. 391, 401 n.7 (1976).

[264] 429 U.S. 589 (1977).

grievous threat to either interest to establish a constitutional violation."[265]

Not the method of enforcement but the fact of enforcement was the issue in *Roe* and *Doe*. That is, the power of the State to deny women all access to abortions, the power to proscribe effectuation of the will and desire of women to terminate pregnancy, was at issue. Because the Court determined that the will and desire constituted a protected "liberty," the State was required to justify its proscription by a compelling interest. Once the question of the personhood of the fetus was resolved, the Court confronted in effect only two asserted state interests. Protecting the health of the mother was recognized as a valid interest, the Court thereby departing from a *laissez faire* "free will" approach to individual autonomy. A state interest in morality was mentioned by the Court, not because the State had raised it, but simply to defer deciding it; however, the noted morality issue involved not the morality of abortion, but instead the promotion of sexual morality through making abortion unavailable.[266]

Stanley v. Georgia,[267] holding that government may not make private possession of obscene materials for private use a crime, approached a judicial recognition of the autonomy aspect of privacy. True it is that the possession there was in Stanley's home, a fact heavily relied on by the Court, but the police had lawfully invaded his privacy upon the authority of a valid warrant and a subsidiary Fourth Amendment issue that was available for decision was passed over in favor of a broader resolution. Inasmuch as the materials were obscene, they were outside the scope of First Amendment protection. But the Court premised its decision upon one's protected right to receive what information and ideas he wished and upon one's protected "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's

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[265] Id. at 598–604. The Court cautioned that it had decided nothing about the privacy implications of the accumulation and disclosure of vast amounts of information in data banks. Safeguarding such information from disclosure "arguably has its roots in the Constitution," at least "in some circumstances," the Court seemed to indicate. Id. at 605. *Compare* id. at 606 (Justice Brennan concurring). What the Court's careful circumscription of the privacy issue through balancing does to the concept is unclear after Nixon v. Administrator of General Services, 433 U.S. 425, 455–65 (1977), but note the dissents. Id. at 504, 525–36 (Chief Justice Burger), and 545 n.1 (Justice Rehnquist).

[266] Roe v. Wade, 410 U.S. 113, 148 (1972). Additionally, if the purpose of the statute was to deter illicit sexual conduct, the law was overbroad since it included both unmarried and married women. This morality rationale also fell afoul of overinclusion and underinclusion in Eisenstadt v. Baird, 405 U.S. 438, 477–50 (1972).

[267] 394 U.S. 557 (1969).

privacy."[268] These rights were held superior to the interests Georgia asserted to override them. That is, first, the State was held to have no authority to protect an individual's mind from the effects of obscenity, to promote the moral content of one's thoughts. Second, the State's assertion that exposure to obscenity may lead to deviant sexual behavior was rejected on the basis of a lack of empirical support and, more important, on the basis that less intrusive deterrents were available. Thus, a right to be free of governmental regulation in this area was clearly recognized.

Stanley was quickly restricted to its facts, to possession of pornography in the home.[269] But in its important reconsideration of and reaffirmation of governmental interests in the control of pornography, the Court went beyond this restriction and recognized governmental interests that included the promotion of public morality, protection of the individual's psychological health, and improving the quality of life. "It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. . . . [Many laws are enacted] to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition." Furthermore, continued the Court: "Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always beyond state regulation is a step we are unable to take. . . . The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society.'"[270]

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[268] Id. at 564–65.

[269] United States v. Reidel, 402 U.S. 351, 354–56 (1971); United States v. Thirty-seven Photographs, 402 U.S. 363, 375–76 (1971).

[270] Paris Adult Theatre v. Slaton, 413 U.S. 49, 57–63, 63–64, 68–69 (1973); *and see* id. at 68 n.15.

Stanley was further distinguished in *Bowers v. Hardwick* as being "firmly grounded in the First Amendment."[271] Thus, the Court held in *Bowers*, there is no protected right to engage in homosexual sodomy in the privacy of the home, and *Stanley* did not implicitly create protection for "voluntary sexual conduct [in the home] between consenting adults."[272]

Evidently, then, the fundamental right of privacy that is protected by the due process clause is one functionally related to "family, marriage, motherhood, procreation, and child rearing."[273] Even so limited, the concept can have numerous significant aspects occasioning major constitutional decisions. Thus, in *Carey v. Population Services International*,[274] the *Griswold-Baird* line of cases was significantly extended so as to make the "decision whether or not to beget or bear a child" a "constitutionally protected right of privacy" interest that government may not forbid or burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to express only that interest or interests. This "constitutional protection of individual autonomy in matters of childbearing" led the Court to invalidate a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[275] The limitation of the number of outlets to adults "imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and was unjustified by any interest put forward by the State. The prohibition on sale to minors was judged not by the compelling state interest test, but instead by inquiring whether the restrictions serve "any significant state interest . . . that is not present in the case of an adult." This test is "apparently less rigorous" than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The at-

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[271] 478 U.S. 186, 195 (1986).

[272] 478 U.S. at 195–96. Dissenting Justice Blackmun challenged the Court's characterization of *Stanley*, suggesting that it had rested as much on the Fourth as on the First Amendment, and that "the right of an individual to conduct intimate relationships in . . . his or her own home [is] at the heart of the Constitution's protection of privacy." Id. at at 207–08.

[273] Id. at 66 n.13. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

[274] 431 U.S. 678 (1977).

[275] Id. at 684–91. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackmun, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court's general principles. Id. at 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id. at 703. Chief Justice Burger, id. at 702, and Justice Rehnquist, id. at 717, dissented.

tempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors' sexual activity, the Court even more doubted, because the State presented no evidence, that limiting access would deter minors from engaging in sexual activity.[276]

In *Bowers v. Hardwick*,[277] the Court by 5–4 vote roundly rejected the suggestion that the privacy cases protecting "family, marriage, or procreation" extend any protection for private consensual homosexual sodomy,[278] and also rejected the more comprehensive claim that the cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[279] Moreover, the Court refused to create any such fundamental right. Justice White's opinion for the Court in *Hardwick* sounded the same opposition to "announcing rights not readily identifiable in the Constitution's text" that underlay his dissents in the abortion cases.[280] In addition, the Court concluded that rationales relied upon in the earlier privacy cases do not extend "a fundamental right to homosexuals to engage in acts of consensual sodomy."[281] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibit the practices.[282] The privacy of the home does not immunize all behavior from state regulation, and the Court was "unwilling to start down [the] road" of im-

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[276] Id. at 691–99. This portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id. at 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id. at 702, 717.

[277] 478 U.S. 186 (1986). The Court's opinion was written by Justice White, and joined by Chief Justice Burger and by Justices Powell, Rehnquist, and O'Connor. The Chief Justice and Justice Powell added brief concurring opinions. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens, and Justice Stevens, joined by Justices Brennan and Marshall, added a separate dissenting opinion.

[278] "[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy." 478 U.S. at 190–91.

[279] Id. at 191. The Court asserted that Carey v. Population Services Int'l, 431 U.S. 678, 694 n.17 (1977), which had reserved decision on the issue, had established that the privacy right "did not reach so far."

[280] 478 U.S. at 191.

[281] In the Court's view, homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." Id. at at 191–92.

[282] Id. Chief Justice Burger's brief concurring opinion amplified on this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." Id. at at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). Id.

munizing "voluntary sexual conduct between consenting adults."[283] Justice Blackmun's dissent was critical of the Court's phrasing of the issue as one of homosexual sodomy,[284] and asserted that the basic issue was the individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he asserted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy.[285]

Similarly, the extent to which governmental regulation of the sexual activities of minors is subject to constitutional scrutiny is of great and continuing importance.[286] Analysis of these questions is hampered because the Court has not told us what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty and what does not, and how indeed these factors vary significantly enough from other human relationships to result in differing constitutional treatment. The Court's observation in the abortion cases "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[287] little elucidates the answers inasmuch as in the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests—"compelling" interest justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is whether it is "explicitly or implicitly guaranteed by the Constitution."[288]

Whether an independent, discrete concept of privacy, in either of its major aspects, emerges from developing judicial doctrines is largely problematical. There appears to be a tendency to designate

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[283] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." Id. at 195–96. Dissenting Justices Blackmun (id. at 209 n.4) and Stevens (id. at 217–18) suggested that these crimes are readily distinguishable.

[284] Id. at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. *See* Id. at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomous acts by married couples, and that Georgia had not justified selective application to homosexuals. Id. at 219.

[285] Id. at 204–06.

[286] The Court reserved this question in *Carey*, 431 U.S., 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

[287] Roe v. Wade, 410 U.S. 113, 152 (1973). The language is quoted in full in *Carey*, supra, 431 U.S. 684–85.

[288] San Antonio School District v. Rodriguez, 411 U.S. 1, 33–34 (1973). That this restriction is not holding with respect to equal protection analysis or due process analysis can be discerned easily. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), *with* id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).

as a right of privacy a right or interest which extensions of precedent or applications of logical analysis have led the Court to conclude to protect. Because this protection is now settled to be a "liberty" which the due process clause includes, the analytical validity of denominating the particular right or interest as an element of privacy rather than as an element of "liberty" seems open to question.

Family Relationships.—While the "privacy" basis of autonomy seems to be definitionally based, the Court's drawing on the line of cases since *Meyer* and *Pierce*[289] has "established that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[290] Recognition of the protected "liberty" of the familial relationship affords the Court a principled and doctrinal basis of review of governmental regulations that adversely impact upon the ability to enter into the relationship, to maintain it, to terminate it, and to resolve conflicts within the relationship. This liberty, unlike the interest in property which has its source in statutory law, springs from the base of "intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'"[291] Being of fundamental importance, the familial relationship is ordinarily subject only to regulation that can survive rigorous judicial scrutiny, although "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."[292] Recent decisions cast light in all areas of the family relationship.

Because the right to marry is a fundamental right protected by the due process clause,[293] a state may not deny the right to marry to someone who has failed to meet a child support obligation, there being no legitimate state interest compelling enough to justify the prohibition.[294] There is a constitutional right to live together as a

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[289] Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1928).

[290] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality). Continuing the limitation of the right of privacy to family-related activities is Bowers v. Hardwick, 478 U.S. 186 (1986).

[291] Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977).

[292] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[293] Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Cleveland Bd. of Education v. LaFleur, 414 U.S. 632, 639–40 (1974); Zablocki v. Redhail, 434 U.S. 374, 383–87 (1978).

[294] Zablocki v. Redhail, 434 U.S. 374 (1978). The majority of the Court deemed the statute to fail under equal protection, whereas Justices Stewart and Powell found the due process clause to be violated. Id. at 391, 396. *Compare* Califano v. Jobst, 434 U.S. 47 (1977).

family,[295] one not limited to the nuclear family. Thus, a city ordinance which zoned for single family occupancy and so defined "family" as to bar extended family relationships was found to violate the due process clause as applied to prevent a grandmother from having in her household two grandchildren of different children.[296] And the concept of "family" may extend beyond the biological, blood relationship of extended families to the situation of foster families, although the Court has acknowledged that such a claim to constitutionally protected liberty interests raises complex and novel questions.[297] In the conflict between natural and foster families, other difficult questions inhere and it may well be that a properly constituted process under state law of determining the best interests of the child will be deferred to.[298] On the other hand, the Court has held, the presumption of legitimacy accorded to a child born to a married woman living with her husband is valid even to defeat the right of the child's biological father to establish paternity and visitation rights.[299]

The Court has merely touched upon but not dealt definitively with the complex and novel questions raised by possible conflicts between parental rights and children's rights.[300]

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[295] "If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'" Smith v. Organization of Foster Families, 431 U.S. 816, 862–63 (1977) (Justice Stewart concurring), *cited with approval in* Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

[296] Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion). The fifth vote, decisive to the invalidity of the ordinance, was on other grounds. Id. at 513.

[297] Smith v. Organization of Foster Families, 431 U.S. 816 (1977). The natural family, the Court observed, did not have its source in statutory law, whereas the ties that develop between foster parent and foster child have their origins in an arrangement which the State brought about. But some liberty interests do arise from positive law, although the expectations and entitlements are thereby limited as well by state law. And such a liberty interest may not be recognized without derogating from the substantive liberty interests of the natural parents. Thus, the interest of foster parents must be quite limited and attenuated, but *Smith* does not define what it is. Id. at 842–47.

[298] *See* Quilloin v. Walcott, 434 U.S. 246 (1978).

[299] Michael H. v. Gerald D., 491 U.S. 110 (1989). There was no opinion of the Court. A majority of Justices (Brennan, Marshall, Blackmun, Stevens, White) was willing to recognize that the biological father has a liberty interest in a relationship with his child, but Justice Stevens voted with the plurality (Scalia, Rehnquist, O'Connor, Kennedy) because he believed that the statute at issue adequately protected that interest.

[300] The clearest conflict presented to date raised the issue of giving a veto to parents over their minor children's right to have an abortion. Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). *See also* Parham v. J. R., 442 U.S. 584 (1979) (parental role in commitment of child for treatment of mental illness).

Liberty Interests of Retarded and Mentally Ill: Commitment and Treatment.—Potentially a major development in substantive due process is the formulation of a liberty right of those retarded or handicapped individuals who are involuntarily committed or who voluntarily seek commitment to public institutions. The States pursuant to their *parens patriae* power have a substantial interest in institutionalizing persons in need of care, both for their own protection and for the protection of others.[301] Each individual, on the other hand, has a due process protected interest in freedom from confinement and personal restraint; an interest in reducing the degree of confinement continues even for those individuals who are properly committed.[302] Little controversy has attended the gradual accretion of case law, now confirmed by the Supreme Court, that due process guarantees freedom from undue physical restraint and from unsafe conditions of confinement.[303] Whether it also guarantees a considerable right to treatment, to "habilitation,"[304] is the focus of the cases now being litigated, and while the right has been strongly recognized by a number of influential lower court decisions[305] its treatment in the Supreme Court is as yet tentative. Thus, *Youngberg v. Romeo* recognized a liberty right to "minimally adequate or reasonable training to ensure safety and

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[301] These principles have no application to persons not held in custody by the state. DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (no Due Process violation for failure of state to protect an abused child from his parent, even when the social service agency had been notified of possible abuse, and possibility had been substantiated through visits by social worker).

[302] Youngberg v. Romeo, 457 U.S. 307, 314–16 (1982). *See* Jackson v. Indiana, 406 U.S. 715 (1972); O'Connor v. Donaldson, 422 U.S. 563 (1975); Vitek v. Jones, 445 U.S. 480, 491–94 (1980).

[303] Youngberg v. Romeo, 457 U.S. 307, 314–316 (1982). Thus, personal security constitutes a "historic liberty interest" protected substantively by the due process clause. Ingraham v. Wright, 430 U.S. 651, 673 (1977) (liberty interest in being free from undeserved corporal punishment in school); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Justice Powell concurring) ("Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental actions").

[304] "The word 'habilitation' is commonly used to refer to programs for the mentally retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. [T]he principal focus of habilitation is upon training and development of needed skills." Youngberg v. Romeo, 457 U.S. 307, 309 n.1 (1982) (quoting amicus brief for American Psychiatric Association).

[305] In Jackson v. Indiana, 406 U.S. 715, 738 (1972), the Court had said that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Reasoning that if commitment is for treatment and betterment of individuals, it must be accompanied by adequate treatment, several lower courts recognized a due process right. E.g., Wyatt v. Stickney, 325 F. Supp. 781 (M.D.Ala), enforced, 334 F. Supp. 1341 (1971), supplemented, 334 F. Supp. 373 and 344 F. Supp. 387 (M.D.Ala. 1972), aff'd in part, reserved in part, and remanded, sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), vacated on other grounds, 432 U.S. 563 (1975).

freedom from undue restraint."[306] While the lower court had passed upon and agreed with plaintiff's theory of entitlement to "such treatment as will afford a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as [his] capacities permit,"[307] the Supreme Court thought that before it plaintiff had reduced his theory to one of "training related to safety and freedom from restraint."[308] But the Court's concern for federalism, its reluctance to approve judicial activism in supervising institutions, its recognition that budgetary constraints interfered with state provision of services caused it to require the lower federal courts to defer to professional decisionmaking in determining what care was adequate. Professional decisions are presumptively valid and liability can be imposed "only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[309] Presumably, however, the difference between liability for damages and injunctive relief will still afford federal courts considerable latitude in enjoining institutions to better their services in the future, even if they cannot award damages for past failures.[310]

Still other issues await plumbing. The whole area of the rights of committed individuals will likely be explored under a sub-

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[306] Youngberg v. Romeo, 457 U.S. 307, 319 (1982).

[307] Id. at 318 n.23.

[308] Id. at 317–18. Concurring, Justices Blackmun, Brennan, and O'Connor, argued that due process guaranteed patients at least that training necessary to prevent them from losing the skills they entered the institution with and probably more. Id. at 325. Chief Justice Burger rejected any protected interest in training. Id. at 329. The Court had also avoided a decision on a right to treatment in O'Connor v. Donaldson, 422 U.S. 563, 573 (1975), vacating and remanding a decision recognizing the right and thus depriving the decision of precedential value. Chief Justice Burger expressly rejected the right there also. Id. at 578. But just four days later the Court denied certiorari to another panel decision from the same circuit relying on its *Donaldson* decision to establish such a right, leaving the principle alive in that circuit. Burnham v. Department of Public Health, 503 F.2d 1319 (5th Cir. 1974), cert. denied, 422 U.S. 1057 (1975). *See also* Allen v. Illinois, 478 U.S. 364, 373 (1986) (dictum that person civilly committed as "sexually dangerous person" might be entitled to protection under the self-incrimination clause if he could show that his confinement "is essentially identical to that imposed upon felons with no need for psychiatric care").

[309] Id. at 323.

[310] E.g., Ohlinger v. Watson, 652 F. 2d 775, 779 (9th Cir. 1980); Welsch v. Likins, 550 F.2d 1122, 1132 (8th Cir. 1977). Of course, lack of funding will create problems with respect to injunctive relief as well. *Cf.* New York State Ass'n for Retarded Children v. Carey, 631 F.2d 162, 163 (2d Cir. 1980). It should be noted that the Supreme Court has limited the injunctive powers of the federal courts in similar situations also.

stantive and procedural due process analysis.[311] Additionally, federal legislation is becoming extensive,[312] and state legislative and judicial development of law is highly important because the Supreme Court looks to this law as one source of the interests which the due process clause protects.[313]

"Right to Die".—In *Cruzan v. Director, Missouri Dep't of Health*,[314] the Court upheld Missouri's requirement that, before nutrition and hydration may be withdrawn from a person in a persistent vegetative state, it must be demonstrated by "clear and convincing evidence" that such action is consistent with the patient's previously manifested wishes. The Due Process Clause does not require that the state rely on the judgment of the family, the guardian, or "anyone but the patient herself" in making this decision, the Court concluded.[315] Thus, in the absence of clear and convincing evidence that the patient herself had expressed an interest not to be sustained in a persistent vegetative state, or that she had expressed a desire to have a surrogate make such a decision for her, the state may refuse to allow withdrawal of nutrition and hydration. "A State is entitled to guard against potential abuses" that can occur if family members do not protect a patient's best interests, and "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and [instead] simply assert an unqualified interest in the preservation of human life to be weighed against the . . . interests of the individual."[316]

The Court's opinion in *Cruzan* "assume[d]" that a competent person has a constitutionally protected right to refuse lifesaving hydration and nutrition.[317] More important, however, a majority of Justices separately declared that such a liberty interest exists.[318] Thus, the Court appears committed to the position that the right

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[311] *See Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974). In Mills v. Rogers, 457 U.S. 291 (1982), the Court had before it the issue of the due process right of committed mental patients at state hospitals to refuse administration of antipsychotic drugs. An intervening decision of the State's highest court had measurably strengthened the patients' rights under both state and federal law and the Court remanded for reconsideration in light of the state court decision. *See also* Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981).

[312] Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94–103, 89 Stat. 486, as amended, 42 U.S.C. §§ 6000 et seq., as to which see Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981); Mental Health Systems Act, 94 Stat. 1565, 42 U.S.C. § 9401 et seq.

[313] *See, e.g.*, Mills v. Rogers, 457 U.S. 291, 299–300 (1982). *And see* infra, pp. 1723–32 (procedural due process).

[314] 497 U.S. 261 (1990).

[315] Id. at 286.

[316] Id. at 281–82.

[317] Id. at 279.

[318] *See* 497 U.S. at 287 (O'Connor, concurring); id. at 304–05 (Brennan, joined by Marshall and Blackmun, dissenting); id. at 331 (Stevens, dissenting).

to refuse nutrition and hydration is subsumed in the broader right to refuse medical treatment. Also blurred in the Court's analysis was any distinction between terminally ill patients and those whose condition has stabilized; there was testimony that the patient in *Cruzan* could be kept "alive" for about 30 years if nutrition and hydration were continued.

PROCEDURAL DUE PROCESS: CIVIL

Some General Criteria

What due process of law means in the procedural context depends on the circumstances. It varies with the subject matter and the necessities of the situation. Due process of law is a process which, following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law.[1]

Ancient Use and Uniformity.—The requirements of due process may be ascertained in part by an examination of those settled usages and modes of proceedings existing in the common and statutory law of England during colonial times, and not unsuited to the civil and political conditions in this country. A process of law not otherwise forbidden may be taken to be due process of law if it has been sanctioned by settled usage both in England and in this country. In other words, the antiquity of a procedure is a fact of weight in its behalf. However, it does not follow that a procedure settled in English law and adopted in this country is, or remains, an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment. Fortunately, the States are not tied down by any provision of the Constitution to the practice and procedure which existed at the common law, but may avail

[1] Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884); Hurtado v. California, 110 U.S. 516, 537 (1884).

themselves of the wisdom gathered by the experience of the country to make changes deemed to be necessary.[2]

Equality.—If due process is to be secured, the laws must operate alike upon all and not subject the individual to the arbitrary exercise of governmental power unrestrained by established principles of private rights and distributive justice. Where a litigant has the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result.[3]

Due Process, Judicial Process, and Separation of Powers.—Due process of law does not always mean a proceeding in court.[4] Proceedings to raise revenue by levying and collecting taxes are not necessarily judicial, nor are administrative and executive proceedings, yet their validity is not thereby impaired.[5] Moreover, the due process clause does not require *de novo* judicial review of the factual conclusions of state regulatory agencies.[6]

Nor does the Fourteenth Amendment prohibit a State from conferring upon nonjudicial bodies certain functions that may be called judicial, or from delegating to a court powers that are legislative in nature. For example, state statutes vesting in a parole board certain judicial functions,[7] or conferring discretionary power upon administrative boards to grant or withhold permission to carry on a trade,[8] or vesting in a probate court authority to appoint park commissioners and establish park districts[9] are not in conflict with the due process clause and present no federal question. Whether legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether they should in some particulars be merged, is for the determination of the State.[10]

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[2] Brown v. New Jersey, 175 U.S. 172, 175 (1899); Hurtado v. California, 110 U.S. 516, 529 (1884); Twining v. New Jersey, 211 U.S. 78, 101 (1908); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 244 (1944).

[3] Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).

[4] Ballard v. Hunter, 204 U.S. 241, 255 (1907); Palmer v. McMahon, 133 U.S. 660, 668 (1890).

[5] McMillen v. Anderson, 95 U.S. 37, 41 (1877).

[6] Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941) (oil field proration order). *See also* Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940) (courts should not second-guess regulatory commissions in evaluating expert testimony).

[7] Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902).

[8] New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552, 562, (1905).

[9] Ohio ex rel. Bryant v. Akron Park Dist., 281 U.S. 74, 79 (1930).

[10] Carfer v. Caldwell, 200 U.S. 293, 297 (1906).

Power of the States to Regulate Procedure

Generally.—The due process clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein.[11] A State "is free to regulate procedure of its courts in accordance with it own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[12] Pursuant to such power, the States have regulated the manner in which rights may be enforced and wrongs remedied,[13] and in connection therewith have created courts and endowed them with such jurisdiction as, in the judgment of their legislatures, seemed appropriate.[14] Whether legislative action in such matters is deemed to be wise or proves efficient, whether it works a particular hardship on a particular litigant, or perpetuates or supplants ancient forms of procedure, are issues which can ordinarily give rise to no conflict with the Fourteenth Amendment, inasmuch as its function is negative rather than affirmative and in no way obligates the States to adopt specific measures of reform.[15] More recent decisions, however, have imposed some restrictions on state procedures that require substantial reorientation of process.[16]

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[11] Holmes v. Conway, 241 U.S. 624, 631 (1916); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900).

[12] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897); Jordan v. Massachusetts, 225 U.S. 167, 176 (1912). *See* Boddie v. Connecticut, 401 U.S. 371 (1971), for one recent limitation. The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts is also subject to restrictions imposed by the contract, full faith and credit, and privileges and immunities clauses of the Constitution. Angel v. Bullington, 330 U.S. 183 (1947).

[13] Insurance Co. v. Glidden Co., 284 U.S. 151, 158 (1931); Iowa Central Ry. v. Iowa, 160 U.S. 389, 393 (1896): Honeyman v. Hanan, 302 U.S. 375 (1937). *See also* Lindsey v. Normet, 405 U.S. 56 (1972).

[14] Cincinnati Street Ry. v. Snell, 193 U.S. 30, 36 (1904).

[15] Ownbey v. Morgan, 256 U.S. 94, 112 (1921). Thus the Fourteenth Amendment does not constrain the States to accept modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammelled liberty to amend pleadings. Note that the Supreme Court did once grant review to determine whether due process required the States to provide some form of post-conviction remedy to assert federal constitutional violations, a review which was mooted when the State enacted such a process. Case v. Nebraska, 381 U.S. 336 (1965). When a State, however, through its legal system exerts a monopoly over the pacific settlement of private disputes, as with the dissolution of marriage, due process may well impose affirmative obligations on that State. Boddie v. Connecticut, 401 U.S. 371, 374–77 (1971).

[16] While this statement is more generally true in the context of criminal cases, in which the appellate process and post-conviction remedial process have been subject to considerable revision in the treatment of indigents, some requirements have also been imposed in civil cases. Boddie v. Connecticut, 401 U.S. 371 (1971); Lindsey v. Normet, 405 U.S. 56, 74–79 (1972); Santosky v. Kramer, 455 U.S. 745 (1982). Re-

Commencement of Actions.—A state may impose certain conditions on the right to institute litigation. Access to the courts has been denied to persons instituting stockholders' derivative actions unless reasonable security for the costs and fees incurred by the corporation is first tendered.[17] But, at least in those situations in which the State has monopolized the avenues of settlement of disputes between persons by prescribing judicial resolution, and where the dispute involves such a fundamental interest as marriage and its dissolution, no State may deny to those persons unable to pay its fees access to those judicial avenues.[18] It must be considered, then, that foreclosure of all access to the courts, at least through financial barriers and perhaps through other means as well, is subject to federal constitutional scrutiny and must be justified by reference to a state interest of suitable importance. In older cases, not questioned by the more recent ones, it was held that a State, as the price of opening its tribunals to a nonresident plaintiff, may exact the condition that the nonresident stand ready to answer all cross actions filed and accept any *in personam* judgments obtained by a resident defendant through service of process or appropriate pleading upon the plaintiff's attorney of record.[19] and for similar reasons, a requirement, without excluding other evidence, of a chemical analysis as a condition precedent to a suit to recover for damages resulting to crops from allegedly deficient fertilizers is not deemed to be arbitrary or unreasonable.[20]

Pleas in Abatement.—State legislation which forbids a defendant to come into court and challenge the validity of service upon him in a personal action without thereby surrendering himself to the jurisdiction of the court, but which does not restrain him from protecting his substantive rights against enforcement of a judgment rendered without service of process is constitutional and does not deprive him of property without due process of law. Such a defendant, if he pleases, may ignore the proceedings as wholly ineffective, and set up the invalidity of the judgment if and when an

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view has, however, been restrained with regard to details. *See, e.g.,* Lindsey v. Normet, supra, 64–69.

[17] Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). Nor was the retroactive application of this statutory requirement to actions pending at the time of its adoption violative of due process as long as no new liability for expenses incurred before enactment was imposed thereby and the only effect thereof was to stay such proceedings until the security was furnished.

[18] Boddie v. Connecticut, 401 U.S. 371 (1971). *See also* Little v. Streater, 452 U.S. 1 (1981) (state-mandated paternity suit); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (parental status termination proceeding); Santosky v. Kramer, 455 U.S. 745 (1982) (permanent termination of parental custody).

[19] Young Co. v. McNeal-Edwards Co., 283 U.S. 398 (1931); Adam v. Saenger, 303 U.S. 59 (1938).

[20] Jones v. Union Guano Co., 264 U.S. 171 (1924).

attempt is made to take his property thereunder. However, if he desires to contest the validity of the proceedings in the court in which it is instituted, so as to avoid even a semblance of a judgment against him, it is within the power of a State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised by him as to its jurisdiction over his person shall be overruled.[21]

Defenses.—Just as a State may condition the right to institute litigation, so may it establish terms for the interposition of certain defenses. It may validly provide that one sued in a possessory action cannot bring an action to try title until after judgment is rendered and after he has paid that judgment, if it so provides.[22] A State may limit the defense in an action to evict tenants for nonpayment of rent to the issue of payment and leave the tenants to other remedial actions at law on a claim that the landlord had failed to maintain the premises.[23] A State may also provide that the doctrines of contributory negligence, assumption of risk, and fellow servant do not bar recovery in certain employment-related accidents. No person has a vested right in such defenses.[24]

Similarly, a nonresident defendant in a suit begun by foreign attachment, even though he has no resources or credit other than the property attached, cannot challenge the validity of a statute which requires him to give bail or security for the discharge of the seized property before permitting him an opportunity to appear and defend.[25]

Amendments and Continuances.—Amendment of pleadings is largely within the discretion of the trial court, and unless a gross abuse of discretion is shown, there is no ground for reversal. Accordingly, where the defense sought to be interposed is without merit, a claim that due process would be denied by rendition of a foreclosure decree without leave to file a supplementary answer is utterly without foundation.[26]

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[21] York v. Texas, 137 U.S. 15 (1890); Kauffman v. Wootters, 138 U.S. 285, 287 (1891).

[22] Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915).

[23] Lindsey v. Normet, 405 U.S. 56, 64–69 (1972). *See also* Bianchi v. Morales, 262 U.S. 170 (1923) (upholding mortgage law providing for summary foreclosure of a mortgage without allowing any defense except payment).

[24] Bowersock v. Smith, 243 U.S. 29, 34, (1917); Chicago, R.I. & P. Ry. v. Cole, 251 U.S. 54, 55 (1919); Herron v. Southern Pacific Co., 283 U.S. 91 (1931). *See also* Martinez v. California, 444 U.S. 277, 280–83 (1980) (State interest in fashioning its own tort law permits it to provide immunity defenses for its employees and thus defeat recovery).

[25] Ownbey v. Morgan, 256 U.S. 94 (1921).

[26] Sawyer v. Piper, 189 U.S. 154 (1903).

Costs, Damages, and Penalties.—What costs are allowed by law is for the court to determine; an erroneous judgment of what the law allows does not deprive a party of his property without due process of law.[27] Nor does a statute providing for the recovery of reasonable attorney's fees in actions on small claims subject unsuccessful defendants to any unconstitutional deprivation.[28] Congress may severely restrict attorney's fees in an effort to keep an administrative claims proceeding informal.[29] Equally consistent with the requirements of due process is a statutory procedure whereby a prosecutor of a case is adjudged liable for costs, and committed to jail in default of payment thereof, whenever the court or jury, after according him an opportunity to present evidence of good faith, finds that he instituted the prosecution without probable cause and from malicious motives.[30] Also, as a reasonable incentive for prompt settlement without suit of just demands of a class receiving special legislative treatment, such as common carriers and insurance companies together with their patrons, a State may permit harassed litigants to recover penalties in the form of attorney's fees or damages.[31] To deter careless destruction of human life, a State by law may allow punitive damages to be assessed in actions against employers for deaths caused by the negligence of their employees,[32] and may also allow punitive damages for fraud perpetrated by employees.[33] Also constitutional is the traditional common law approach for measuring punitive damages, granting the jury wide but not unlimited discretion to consider the gravity of the offense and the need to deter similar offenses.[34]

By virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a State may provide that a public officer embezzling public

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[27] Ballard v. Hunter, 204 U.S. 241, 259 (1907).

[28] Missouri, Kansas & Texas Ry. v. Cade, 233 U.S. 642, 650 (1914).

[29] Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (limitation of attorneys' fees to $10 in veterans benefit proceedings does not violate claimants' Fifth Amendment due process rights absent a showing of probability of error in the proceedings that presence of attorneys would sharply diminish). *See also* United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990) (upholding regulations under the Black Lung Benefits Act prohibiting contractual fee arrangements).

[30] Lowe v. Kansas, 163 U.S. 81 (1896). Consider, however, the possible bearing of Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (statute allowing jury to impose costs on acquitted defendant, but containing no standards to guide discretion, violates due process).

[31] Yazoo & Miss. R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); Chicago & Northwestern Ry. v. Nye Schneider Fowler Co., 260 U.S. 35, 43–44 (1922); Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 139 (1921); Life & Casualty Co. v. McCray, 291 U.S. 566 (1934).

[32] Pizitz Co. v. Yeldell, 274 U.S. 112, 114 (1927).

[33] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

[34] Id. (finding sufficient constraints on jury discretion in jury instructions and in post-verdict review).

money shall, notwithstanding that he has made restitution, suffer not only imprisonment but also pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons whose money was embezzled. Whatever this fine is called, whether a penalty, or punishment, or civil judgment, it comes to the convict as the result of his crime.[35] On the other hand, when appellant, by its refusal to surrender certain assets, was adjudged in contempt for frustrating enforcement of a judgment obtained against it, dismissal of its appeal from the first judgment was not a penalty imposed for the contempt, but merely a reasonable method for sustaining the effectiveness of the State's judicial process.[36]

Statutes of Limitation.—A statute of limitations does not deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce the right by suit. By the same token, a State may shorten an existing period of limitation, provided a reasonable time is allowed for bringing an action after the passage of the statute and before the bar takes effect. What is a reasonable period, however, is dependent on the nature of the right and particular circumstances.[37]

Thus, an interval of only one year is not so unreasonable as to be wanting in due process when applied to bar actions relative to the property of an absentee in instances when the receiver for such property has not been appointed until 13 years after the former's disappearance.[38] When a State, by law, suddenly prohibits, unless brought within six months after its passage, all actions to contest tax deeds which have been of record for two years, no unconstitutional deprivation is effected.[39] No less valid is a statute, applicable to wild lands, which provides that when a person has been in possession under a recorded deed continuously for 20 years and had paid taxes thereon during the same, the former owner in that interval paying nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provi-

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[35] Coffey v. Harlan County, 204 U.S. 659, 663, 665 (1907).

[36] National Union v. Arnold, 348 U.S. 37 (1954) (the judgment debtor had refused to post a supersedeas bond or to comply with reasonable orders designed to safeguard the value of the judgment pending decision on appeal).

[37] Wheeler v. Jackson, 137 U.S. 245, 258 (1890); Kentucky Union Co. v. Kentucky, 219 U.S. 140, 156 (1911). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (discussing discretion of States in erecting reasonable procedural requirements for triggering or foreclosing the right to an adjudication).

[38] Blinn v. Nelson, 222 U.S. 1 (1911).

[39] Turner v. New York, 168 U.S. 90, 94 (1897).

sion.[40] Similarly, an amendment to a workmen's compensation act, limiting to three years the time within which a case may be reopened for readjustment of compensation on account of aggravation of a disability, does not deny due process to one who sustained his injury at a time when the statute contained no limitation. A limitation is deemed to affect the remedy only, and the period of its operation in this instance was viewed as neither arbitrary nor oppressive.[41]

Moreover, as long as no agreement of the parties is violated, a State may extend as well as shorten the time in which suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. As applied to actions for personal debts, a repeal or extension of a statute of limitations affects no unconstitutional deprivation of property of a debtor-defendant in whose favor such statute had already become a defense. "A right to defeat a just debt by the statute of limitation . . . [not being] a vested right," such as is protected by the Constitution, accordingly no offense against the Fourteenth Amendment is committed by revival, through an extension or repeal, of an action on an implied obligation to pay a child for the use of her property,[42] or a suit to recover the purchase price of securities sold in violation of a Blue Sky Law,[43] or a right of an employee to seek, on account of the aggravation of a former injury, an additional award out of a state-administered fund.[44] However, as respects suits to recover real and personal property, when the right of action has been barred by a statute of limitations and title as well as real ownership have become vested in the defendant, any later act removing or repealing the bar would be void as attempting an arbitrary transfer of title.[45] Also unconstitutional is the application of a statute of limitation to extend a period that parties to a contract have agreed should limit their right to remedies under the contract. "When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates . . . [said] agreement and directs enforcement of the contract after . . . [the agreed] time has expired" unconstitutionally imposes a burden in excess of that contracted.[46]

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[40] Soper v. Lawrence Brothers, 201 U.S. 359 (1906). Nor is a former owner who had not been in possession for five years after and fifteen years before said enactment thereby deprived of any property without due process.

[41] Mattson v. Department of Labor, 293 U.S. 151, 154 (1934).

[42] Campbell v. Holt, 115 U.S. 620, 623, 628 (1885).

[43] Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

[44] Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945).

[45] Campbell v. Holt, 115 U.S. 620, 623 (1885). *See also* Stewart v. Keyes, 295 U.S. 403, 417 (1935).

[46] Home Ins. Co. v. Dick, 281 U.S. 397, 398 (1930).

Evidence and Presumptions.—The establishment of presumptions and rules respecting the burden of proof is clearly within the domain of the legislative branch of government.[47] Nonetheless, the due process clause does impose limitations upon the power to provide for the deprivation of liberty or property by a standard of proof too lax to make reasonable assurance of accurate factfinding. Thus, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[48] Applying the formula it has worked out for determining what process is due in a particular situation,[49] the Court has held that in a civil proceeding to commit an individual involuntarily to a state mental hospital for an indefinite period, a standard at least as stringent as clear and convincing evidence is required.[50] Because the interest of parents in retaining custody of their children is fundamental, the State may not terminate parental rights through reliance on a standard of preponderance of the evidence—the proof necessary to award money damages in an ordinary civil action—but must prove by clear and convincing evidence that the parents are unfit.[51] Unfitness of a parent may not simply be presumed because of some purported assumption about general characteristics, but must be established.[52]

As long as a presumption is not unreasonable and is not conclusive of the rights of the person against whom raised, however, it does not violate the due process clause. Legislative fiat may not take the place of fact, though, in the determination of issues involv-

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[47] Hawkins v. Bleakly, 243 U.S. 210, 214 (1917); James-Dickinson Co. v. Harry, 273 U.S. 119, 124 (1927). Congress' power to provide rules of evidence and standards of proof in the federal courts stems from its power to create such courts. Vance v. Terrazas, 444 U.S. 252, 264–67 (1980); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1976). In the absence of congressional guidance, the Court has determined the evidentiary standard in certain statutory actions. Nishikawa v. Dulles, 356 U.S. 129 (1958); Woodby v. INS, 385 U.S. 276 (1966).

[48] Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting In re Winship, 397 U.S. 358, 370 (1970) (Justice Harlan concurring)).

[49] Mathews v. Eldridge, 424 U.S. 319 (1976).

[50] Addington v. Texas, 441 U.S. 418 (1979).

[51] Santosky v. Kramer, 455 U.S. 745 (1982). Four Justices dissented, arguing that considered as a whole the statutory scheme comported with due process. Id. at 770 (Justices Rehnquist, White, O'Connor, and Chief Justice Burger). Application of the traditional preponderance of the evidence standard is permissible in paternity actions. Rivera v. Minnich, 483 U.S. 574 (1987).

[52] Stanley v. Illinois, 405 U.S. 645 (1972) (presumption that unwed fathers are unfit parents). *But see* Michael H. v. Gerald D., 491 U.S. 110 (1989) (statutory presumption of legitimacy accorded to a child born to a married woman living with her husband defeats the right of the child's biological father to establish paternity and visitation rights).

ing life, liberty, or property, and a statute creating a presumption which is entirely arbitrary and which operates to deny a fair opportunity to repel it or to present facts pertinent to one's defense is void.[53] On the other hand, if there is a rational connection between what is proved and what is inferred, legislation declaring that the proof of one fact or group of facts shall constitute prima facie evidence of a main or ultimate fact will be sustained.[54]

For a brief period, the Court utilized what it called the "irrebuttable presumption doctrine" to curb the legislative tendency to confer a benefit or to impose a detriment, depending for its application upon the establishment of certain characteristics from which the existence of other characteristics are presumed.[55] Thus, as noted, in *Stanley v. Illinois*,[56] the Court found invalid a construction of the state statute that presumed illegitimate fathers to be unfit parents and that prevented them from objecting to state wardship. Mandatory maternity leave rules of school boards requiring pregnant teachers to take unpaid maternity leave five and four months respectively prior to the date of the expected births of their babies were voided as creating a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of teaching.[57] Major controversy developed over application of the doctrine in benefits cases. Thus, while a State may require that nonresidents must pay higher tuition charges at state colleges than residents, and while the Court assumed that a durational residency requirement would be permissible as a prerequisite to qualify for the lower tuition, it was held impermissible for the State to presume conclusively that because

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[53] Presumptions were voided in Bailey v. Alabama, 219 U.S. 219 (1911) (anyone breaching personal services contract guilty of fraud); Manley v. Georgia, 279 U.S. 1 (1929) (every bank insolvency deemed fraudulent); Western & Atlantic R.R. v. Henderson, 279 U.S. 639 (1929) (collision between train and auto at grade crossing constitutes negligence by railway company); Carella v. California, 491 U.S. 263 (1989) (conclusive presumption of theft and embezzlement upon proof of failure to return a rental vehicle).

[54] Presumptions sustained include Hawker v. New York, 170 U.S. 189 (1898) (person convicted of felony unfit to practice medicine); Hawes v. Georgia, 258 U.S. 1 (1922) (person occupying property presumed to have knowledge of still found on property); Bandini Co. v. Superior Court, 284 U.S. 8 (1931) (release of natural gas into the air from well presumed wasteful); Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933) (rebuttable presumption of railroad negligence for accident at grade crossing). *See also* Morrison v. California, 291 U.S. 82 (1934).

[55] The approach was not unprecedented, some older cases having voided tax legislation that presumed conclusively an ultimate fact. Schlesinger v. Wisconsin, 270 U.S. 230 (1926) (deeming any gift made by decedent within six years of death to be a part of estate denies estate's right to prove gift was not made in contemplation of death); Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm'n, 284 U.S. 206 (1931).

[56] 405 U.S. 645 (1972).

[57] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

the legal address of a student was outside the State at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student. The due process clause required that the student be afforded the opportunity to show that he is or has become a bona fide resident entitled to the lower tuition.[58]

Moreover, a food stamp program provision making ineligible any household that contained a member age 18 or over who was claimed as a dependent for federal income tax purposes the prior tax year by a person not himself eligible for stamps was voided on the ground that it created a conclusive presumption that fairly often could be shown to be false if evidence could be presented.[59] The rule which emerged for subjecting persons to detriment or qualifying them for benefits was that the legislature may not presume the existence of the decisive characteristic upon a given set of facts, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that it was the purpose of the legislature to reach. The doctrine in effect afforded the Court the opportunity to choose between resort to the equal protection clause or to the due process clause in judging the validity of certain classifications,[60] and it precluded Congress and legislatures from making general classifications that avoided the administrative costs of individualization in many areas.

Utilization of the doctrine was curbed, if not halted, in *Weinberger v. Salfi*,[61] in which the Court upheld the validity of a Social Security provision requiring as a qualification of receipt of benefits as a spouse of a covered wage earner that one must have been married to the wage earner for at least nine months prior to his death. Purporting to approve but to distinguish the prior cases in the line,[62] the Court rather imported traditional equal protection analysis into considerations of due process challenges to statutory classifications.[63] "Extensions" of the prior cases to government entitlement classifications, such as the Social Security Act qualification

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[58] Vlandis v. Kline, 412 U.S. 441 (1973).

[59] Department of Agriculture v. Murry, 413 U.S. 508 (1973).

[60] Thus, on the some day *Murry* was decided, a similar food stamp qualification was struck down on equal protection grounds. Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

[61] 422 U.S. 749 (1975).

[62] *Stanley* and *LaFleur* were distinguished as involving fundamental rights of family and childbearing, id. at 771, and *Murry* was distinguished as involving an irrational classification. Id. at 772. *Vlandis*, said Justice Rehnquist for the Court, meant no more than that when a State fixes residency as the qualification it may not deny to one meeting the test of residency the opportunity so to establish it. Id. at 771. *But see* id. at 802–03 (Justice Brennan dissenting).

[63] Id. at 768–70, 775–77, 785 (utilizing Dandridge v. Williams, 397 U.S. 471 (1970), Richardson v. Belcher, 404 U.S. 78 (1971), and similar cases).

standard before it, would, said the Court, "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution."[64] Whether the Court will now limit the doctrine to the detriment area only, exclusive of benefit programs, whether it will limit it to those areas which involve fundamental rights or suspect classifications, in the equal protection sense of those expressions,[65] or whether it will simply permit the doctrine to pass from the scene remains unsettled, but it is noteworthy that it now rarely appears on the Court's docket.[66]

Jury Trials.—Trial by jury in civil trials, unlike the case in criminal trials, has not been deemed essential to due process, and the Fourteenth Amendment has not been held to restrain the States in retaining or abolishing civil juries.[67] Thus, abolition of juries in proceedings to enforce liens,[68] mandamus[69] and quo warranto[70] actions, and in eminent domain[71] and equity[72] proceedings has been approved. States are free to adopt innovations respecting selection and number of jurors. Verdicts rendered by ten out of twelve jurors may be substituted for the requirement of unanimity,[73] and petit juries containing eight rather than the conventional number of twelve members may be established.[74]

Appeals.—If a full and fair trial on the merits is provided, due process does not require a State to provide appellate review.[75] But

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[64] Weinberger v. Salfi, 422 U.S. 749, 772 (1975).

[65] *Vlandis*, which was approved but distinguished, is only marginally in this doctrinal area, involving as it does a right to travel feature, but it is like *Salfi* and *Murry* in its benefit context and order of presumption. The Court has avoided deciding whether to overrule, retain, or further limit *Vlandis*. Elkins v. Moreno, 435 U.S. 647, 658–62 (1978).

[66] In Turner v. Department of Employment Security, 423 U.S. 44 (1975), decided after *Salfi*, the Court voided under the doctrine a statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before the expected birth until six weeks after childbirth. *But see* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1977) (provision granting benefits to miners "irrebuttably presumed" to be disabled is merely a way of giving benefits to all those with the condition triggering the presumption); Califano v. Boles, 443 U.S. 282, 284–85 (1979) (Congress must fix general categorization; case-by-case determination would be prohibitively costly).

[67] Walker v. Sauvinet, 92 U.S. 90 (1876); New York Central R.R. v. White, 243 U.S. 188, 208 (1917).

[68] Marvin v. Trout, 199 U.S. 212, 226 (1905).

[69] In re Delgado, 140 U.S. 586, 588 (1891).

[70] Wilson v. North Carolina, 169 U.S. 586 (1898); Foster v. Kansas, 112 U.S. 201, 206 (1884).

[71] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 694 (1897).

[72] Montana Co. v. St. Louis M. & M. Co., 152 U.S. 160, 171 (1894).

[73] *See* Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

[74] *See* Maxwell v. Dow, 176 U.S. 581, 602 (1900).

[75] Lindsey v. Normet, 405 U.S. 56, 77 (1972) (citing cases).

if an appeal is afforded, the State must not so structure it as to arbitrarily deny to some persons the right or privilege available to others.[76]

Jurisdiction

Generally.—Jurisdiction may be defined as the power to create legal interests. In the famous case of *Pennoyer v. Neff*,[77] the Court enunciated two principles of jurisdiction respecting the States in a federal system. First, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and, second, "no State can exercise direct jurisdiction and authority over persons or property without its territory."[78] Although these two principles were drawn from the writings of Joseph Story refining the theories of continental jurists,[79] the constitutional basis for them was deemed to be in the due process clause of the Fourteenth Amendment.[80] From these beginnings, the Court developed a complex set of rules defining when jurisdiction—physical power—could be exerted over persons through *in personam* actions and over things, generally, through actions *in rem*.[81]

In proceedings *in personam* to determine liability of a defendant, no property having been subjected by such litigation to the control of the court, jurisdiction over the defendant's person is a condition prerequisite to the rendering of any effective decree.[82] That condition is fulfilled, that is, a State is deemed capable of exerting jurisdiction over an individual if he is physically present within the territory of the State, if he is domiciled in the State although temporarily absent therefrom, or if he has consented to the

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[76] Id. at 74–79 (conditioning appeal in eviction action upon tenant posting bond, with two sureties, in twice the amount of rent expected to accrue pending appeal, is invalid when no similar provision is applied to other cases). *Cf.* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) (assessment of 15% penalty on party who unsuccessfully appeals from money judgment meets rational basis test under equal protection challenge, since it applies to plaintiffs and defendants alike and does not single out one class of appellants).

[77] 95 U.S. 714 (1878).

[78] Id. at 722.

[79] Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252–62.

[80] Pennoyer v. Neff, 95 U.S. 714, 733–35 (1878). The due process clause and the remainder of the Fourteenth Amendment had not been ratified at the time of the entry of the state-court judgment giving rise to the case. This inconvenient fact does not detract from the subsequent settled utilization of this constitutional foundation. *Pennoyer* denied full faith and credit to the judgment because the state lacked jurisdiction.

[81] Pennoyer v. Neff, 95 U.S. 714, 733 (1878); Scott v. McNeal, 154 U.S. 34, 64 (1894).

[82] National Exchange Bank v. Wiley, 195 U.S. 257, 270 (1904); Iron Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463, 471 (1905).

exercise of jurisdiction over him. In actions *in rem*, however, a State could validly proceed to settle controversies with regard to rights or claims against property within its borders, notwithstanding that control of the defendant was never obtained. Accordingly, by reason of its inherent authority over titles to land within its territorial confines, a State could proceed through its courts to judgment respecting the ownership of such property, even though it lacked a constitutional competence to reach claimants of title who resided beyond its borders.[83] By the same token, probate[84] and garnishment of foreign attachment[85] proceedings, being in the nature of *in rem* actions for the disposition of property, or *quasi in rem*, might be prosecuted to conclusion without requiring the presence of all parties in interest.[86]

Over a long period of time, the mobility of American society and the increasing complexity of commerce led to attenuation of the second principle of *Pennoyer*,[87] and beginning with *International Shoe Co. v. Washington*,[88] the Court established the modern standard of obtaining *in personam* jurisdiction based upon the nature and the quality of contacts that individuals and corporations have with a State; this "minimum contacts" test permits the courts of a State through process to obtain power over out-of-state defendants. In recent cases, the "minimum contacts" test has been held applicable to all assertions of jurisdiction, so that *in rem* and *quasi-in-rem* proceedings must now be evaluated in the context of the defendant's relationship to the State in which the suit is being brought.[89]

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[83] Arndt v. Griggs, 134 U.S. 316, 321 (1890); Grannis v. Ordean, 234 U.S. 385 (1914); Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917).

[84] Goodrich v. Ferris, 214 U.S. 71, 80 (1909).

[85] Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917); Harris v. Balk, 198 U.S. 215 (1905).

[86] The jurisdictional requirements for rendering a valid divorce decree are considered under the full faith and credit clause. *Supra*, pp. 840–50.

[87] The first principle, that a State may assert jurisdiction over anyone or anything physically within its borders, no matter how briefly there—the so-called "transient" rule of jurisdiction—McDonald v. Mabee, 243 U.S. 90, 91 (1917), remains valid, although in Shaffer v. Heitner, 433 U.S. 186, 204 (1977), the Court's dicta appeared to assume it is not.

[88] 326 U.S. 310 (1945). As the Court explained in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), "[w]ith this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

[89] Shaffer v. Heitner, 433 U.S. 186 (1977); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Rush v. Savchuk, 444 U.S. 320 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978).

Basis for the territorial concept of jurisdiction promulgated in *Pennoyer* and modified over the years is a two-fold construction of due process: a concern for "fair play and substantial justice" involved in requiring defendants to litigate cases against them far from their "home" or place of business[90] and, more important, a concern for the preservation of federalism.[91] The Framers, the Court has asserted, while intending to tie the States together into a Nation, "also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."[92] Thus, the federalism principle is preeminent. "[T]he Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.' . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."[93]

In Personam *Proceedings Against Individuals*.—As has been noted, presence within the State with service of process is sufficient to create personal jurisdiction over an individual.[94] In the case of a resident, absence alone will not defeat the processes of courts in the State of his domicile; domicile alone is deemed to be sufficient to keep him within reach of the state courts for purposes of a personal judgment, whether obtained by means of appropriate, substituted service or by actual personal service on the resident

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[90] International Shoe Co. v. Washington, 326 U.S. 310, 316, 317 (1945); Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm., 339 U.S. 643, 649 (1950); Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

[91] International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); Hanson v. Denckla, 357 U.S. 235, 251 (1958).

[92] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

[93] Id. at 294 (internal quotation from International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

[94] McDonald v. Mabee, 243 U.S. 90, 91 (1917). *Cf.* Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913). The rule has been strongly criticized but persists. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956). But in Burnham v. Superior Court, 495 U.S. 604 (1990), the Court held that service of process on a nonresident physically present within the state satisfies due process regardless of the duration or purpose of the nonresident's visit.

outside the State.[95] However, if the defendant, although technically domiciled therein, has left the State with no intention to return, service by publication, as compared to a summons left at his last and usual place of abode where his family continued to reside, is inadequate, inasmuch as it is not reasonably calculated to give actual notice of the proceedings and opportunity to be heard.[96]

With respect to a nonresident, it is clearly established that no person can be deprived of property rights by a decree in a case in which he neither appeared nor was served or effectively made a party.[97] The early cases held that the process of a court of one State could not run into another and summon a party there domiciled to respond to proceedings against him, when neither his person nor his property was within the jurisdiction of the court rendering the judgment.[98] The attenuation of the rule proceeded in steps. Consent was, of course, sufficient to create jurisdiction, even in the absence of any other connection between the litigation and the forum, and for example, the appearance of the defendant for any purpose other than to challenge the jurisdiction of the court was deemed a voluntary submission to the court's power,[99] and even a special appearance may be treated as consensual submission to the court.[100] Constructive consent, therefore, was seized upon as a basis for obtaining jurisdiction, and, with the advent of the automobile, States were permitted, under the fiction of conditioning the use of their highways on receipt of consent to be sued in state courts for accidents or other transactions arising out of such use, to designate a state official as a proper person to receive service of process in such litigation, provided only that the official receiving notice is obligated to communicate it to the person sued.[101] Although the Court verbalized the result in consent terms, the basis was really the State's power to regulate local acts dangerous to life or property.[102] This extension was necessary in order

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[95] Milliken v. Meyer, 311 U.S. 457 (1940).

[96] McDonald v. Mabee, 243 U.S. 90 (1917).

[97] Rees v. Watertown, 86 U.S. (19 Wall.) 107 (1874); Coe v. Armour Fertilizer Works, 237 U.S. 413, 423 (1915); Griffin v. Griffin, 327 U.S. 220 (1946).

[98] Sugg v. Thornton, 132 U.S. 524 (1889); Riverside Mills v. Menefee, 237 U.S. 189, 193 (1915); Hess v. Pawloski, 274 U.S. 352, 355 (1927). *See also* Harkness v. Hyde, 98 U.S. 476 (1879); Wilson v. Seligman, 144 U.S. 41 (1892).

[99] Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230 (1900); Western Loan & Savings Co. v. Butte & Boston Min. Co., 210 U.S. 368 (1908); Houston v. Ormes, 252 U.S. 469 (1920). *See also* Adam v. Saenger, 303 U.S. 59 (1938) (plaintiff suing defendants deemed to have consented to jurisdiction with respect to counterclaims asserted against him).

[100] York v. Texas, 137 U.S. 15 (1890); Kauffman v. Wootters, 138 U.S. 285 (1891); Western Indemnity Co. v. Rupp, 235 U.S. 261 (1914).

[101] Hess v. Pawloski, 274 U.S. 352 (1927): Wuchter v. Pizzutti, 276 U.S. 13 (1928); Olberding v. Illinois Central R. Co., 346 U.S. 338, 341 (1953).

[102] Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).

to permit States to assume jurisdiction over individuals "doing business" within the State, inasmuch as the State could not withhold from nonresident individuals the right of doing business subject to consent to be sued.[103] Thus, the Court soon recognized that "doing business" within a State was itself a sufficient basis for jurisdiction over a nonresident individual, at least where the business done was exceptional enough to create a strong state interest in regulation, and service could be effectuated within the State on an agent appointed to carry out the business.[104]

Culmination of the trend was, of course, the promulgation in *International Shoe Co. v. Washington*,[105] a corporations case, of the "minimum contacts" test of jurisdiction. In the context of *in personam* jurisdiction over individuals, the test is illustrated by *Kulko v. Superior Court*,[106] in which the Court held that California could not obtain personal jurisdiction over a New York resident whose sole relevant contact with the State was to send his daughter to live with her mother in California.[107] "Like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."[108] Without deciding that the standard was relevant, the Court noted that the "effects" test of contacts, that Kulko had "caused an effect" in the State by availing himself of the benefits and protections of California's laws and by deriving an economic benefit in the lessened expense of maintaining the daughter in New York, was not applicable; it was deemed by the Court to involve wrongful activity outside a State which causes injury within the State or commercial activity affecting state residents, factors not present in this case. Any economic benefit to Kulko was derived in New York and not in California.[109] As with many such cases, the decision was narrowly limited to its facts and does little to clarify the standards applicable to state jurisdiction over nonresidents.

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[103] Id. at 355. *See* Flexner v. Farson, 248 U.S. 289, 293 (1919).

[104] Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[105] 326 U.S. 310, 316 (1945).

[106] 436 U.S. 84 (1978).

[107] Kulko had visited the State twice, seven and six years respectively before initiation of the present action, his marriage occurring in California on the second visit, but neither the visits nor the marriage was sufficient or relevant to jurisdiction. Id. at 92–93.

[108] Id. at 92.

[109] Id. at 96–98.

Suability of Foreign Corporations.—Because of the curious status of corporations in American law,[110] the basis of the assertion of jurisdiction of the courts of a State over a foreign corporation has been even more uncertain than that with respect to individuals, although the terms have been common. First, it was asserted that inasmuch as a corporation could not carry on business in a State without the State's permission, the State could condition its permission upon the corporation's consent to submit to the jurisdiction of the State's courts, either by appointment of someone to receive process or in the absence of such designation.[111] Second, the corporation by doing business in a State was deemed to be present there and thus subject to service of process and suit because it was present.[112] Presence conflicted with the prevailing idea of corporations as having no existence outside their State of incorporation, but the theory was nonetheless accepted that a corporation "doing business" in a State to a sufficient degree was "present" for service of process upon its agents in the State who carried out that business.[113] Generally, with rare exceptions, even continuous activity of some sort by a foreign corporation within a State did not suffice to render it amenable to suits therein unrelated to that activity. Without the protection of such a rule, it was maintained, foreign corporations would be exposed to the manifest hardship and inconvenience of defending, in any State in which they happened to be carrying on business, suits for torts wherever committed and claims on contracts wherever made.[114] And if the corporation stopped doing business in the forum State before suit against it was commenced, it might well escape jurisdiction alto-

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[110] *Cf.* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839) (corporation has no legal existence outside the boundaries of the State chartering it).

[111] Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); St. Clair v. Cox, 196 U.S. 350 (1882); Commercial Mutual Accident Co. v. Davis, 213 U.S. 245 (1909); Simon v. Southern Ry., 236 U.S. 115 (1915); Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917).

[112] Presence was first independently used to sustain jurisdiction in International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), although the possibility was suggested as early as St. Clair v. Cox, 106 U.S. 350 (1882). *See also* Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917) (Justice Brandeis for Court).

[113] E.g., Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); St. Louis S. W. Ry. v. Alexander, 227 U.S. 218 (1913).

[114] E.g., Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907); Simon v. Southern Railway, 236 U.S. 115, 129–130 (1915); Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907); Rosenberg Co. v. Curtis Brown Co., 260 U.S. 516 (1923); Davis v. Farmers Co-operative Co., 262 U.S. 312 (1923); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984). Continuous operations were sometimes sufficiently substantial and of a nature to warrant assertions of jurisdiction. St. Louis S. W. Ry. v. Alexander, 227 U.S. 218 (1913).

gether.[115] The issue of the degree of activity required, in particular the degree of solicitation necessary to constitute doing business by a foreign corporation, was much disputed and led to very particularistic holdings.[116] In the absence of enough activity to constitute doing business, the mere presence within its territorial limits of an agent, officer, or stockholder, upon whom service might readily be had, was not effective to enable a State to acquire jurisdiction over the foreign corporation.[117]

The rationales and premises of these cases were swept away in *International Shoe Co. v. Washington*,[118] although, of course, the results in many of them would stand on the basis of the "minimum contacts" analysis there adopted. International Shoe, a foreign corporation, had not been issued a license to do business in the State, but it systematically and continuously employed a force of salesmen, residents thereof, to canvass for orders therein, and was held suable in Washington for unpaid unemployment compensation contributions in respect to such salesmen. Service of the notice of assessment personally upon one of its local sales solicitors plus the forwarding of a copy thereof by registered mail to the corporation's principal office in Missouri was deemed sufficient to apprise the corporation of the proceeding.

To reach this conclusion the Court not only overturned prior holdings to the effect that mere solicitation of patronage does not constitute doing of business in a state sufficient to subject a foreign corporation to the jurisdiction thereof,[119] but also rejected the "presence" test as begging "the question to be decided. . . . The terms 'present' or 'presence,'" according to Chief Justice Stone, "are used merely to symbolize those activities of the corporation's agent within the State which courts will deem to be sufficient to satisfy the demands of due process. . . . Those demands may be met by

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[115] Robert Mitchell Furn. Co. v. Selden Breck Constr. Co., 257 U.S. 213 (1921): Chipman, Ltd. v. Thomas B. Jeffery Co., 251 U.S. 373, 379 (1920). On a consent theory, jurisdiction would continue. Washington ex rel Bond & Goodwin & Tucker v. Superior Court, 289 U.S. 361, 364 (1933).

[116] Solicitation of business alone was inadequate to constitute "doing business," Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907), but when connected with other activities would suffice to confer jurisdiction. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). *See* the survey of cases by Judge Hand in Hutchinson v. Chase and Gilbert, 45 F.2d 139, 141–42 (2d Cir. 1930).

[117] *E.g.* Goldey v. Morning News, 156 U.S. 518 (1895); Conley v. Mathieson Alkali Works, 190 U.S. 406 (1903); Riverside Mills v. Menefee, 237 U.S. 189, 195 (1915). *But see* Connecticut Mutual Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

[118] 326 U.S. 310 (1945).

[119] This departure was recognized by Justice Rutledge subsequently in Nippert v. City of Richmond, 327 U.S. 416, 422 (1946). Inasmuch as International Shoe, in addition to having its agents solicit orders, also permitted them to rent quarters for the display of merchandise, the Court could have utilized International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), to find it was "present" in the State.

such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system . . . , to require the corporation to defend the particular suit which is brought there; [and] . . . that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. . . . An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."[120] As to the scope of application to be accorded this "fair play and substantial justice" doctrine, the Court, at least verbally, concluded that "so far as . . . [corporate] obligations arise out of or are connected with activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."[121] Read literally, these statements coupled with the terms of the new doctrine lead to a reversal of former decisions which: (1) nullified the exercise of jurisdiction by the forum State over actions arising outside the State and brought by a resident plaintiff against a foreign corporation doing business therein without having been legally admitted and without having consented to service of process of a resident agent; and (2) exempted a foreign corporation, which has been licensed by the forum State to do business therein and has consented to the appointment of a local agent to accept process, from suit on an action not arising in the forum State and not related to activities pursued therein.

By an extended application of the logic of the position, a majority of the Court ruled that, notwithstanding that it solicited business in Virginia solely through recommendations of existing members and was represented therein by no agents whatsoever, a foreign mail order insurance company had through its policies developed such contacts and ties with Virginia residents that the State, by forwarding notice to the company by registered mail only, could institute enforcement proceedings under its Blue Sky Law leading to a decree ordering cessation of business pending compliance with that act.[122] The due process clause was declared not to "forbid a State to protect its citizens from such injustice" of having to file suits on their claims at a far distant home office of such company,

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[120] International Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

[121] Id. at 319.

[122] Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643 (1950). The decision was 5-to–4 with one of the majority Justices also contributing a concurring opinion. Id. at 651 (Justice Douglas). The possible significance of the concurrence is that it appears to disagree with the implication of the majority opinion, id. at 647–48, that a State's legislative jurisdiction and its judicial jurisdiction are coextensive. Id. at 652–53 (distinguishing between the use of the State's judicial power to enforce its legislative powers and the judicial jurisdiction when a private party is suing). *See id.* at 659 (dissent).

especially in view of the fact that such suits could be more conveniently tried in Virginia where claims of loss could be investigated.[123] Likewise, under a California statute, subjecting foreign mail order insurance companies to suit in California on insurance contracts with residents thereof, petitioner was enabled to obtain a valid judgment in a California court against a Texas insurer served only by registered mail.[124] The contract between the company and the insured specified that Austin, Texas, was the place of "making" and the place where liability should be deemed to arise. The company mailed premium notices to the insured in California, and he mailed his premium payments to the company in Texas. Acknowledging that the connection of the company with California was tenuous—it had no office or agents in the State, no evidence had been presented that it had solicited anyone other than this insured for business—the Court sustained jurisdiction on the basis that the suit was on a contract which had a substantial connection with California. "The contract was delivered in California, the premiums were mailed there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[125]

"Looking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state

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[123] Id. at 647–49. The holding in Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140 (1923), that a similar mail order insurance company could not be viewed as doing business in the forum State and that the circumstances under which its contracts with forum State citizens, executed and to be performed in its State of incorporation, were consummated could not support an implication that the foreign company had consented to be sued in the forum State, was distinguished rather than formally overruled. 339 U.S. at 647. In any event, *Benn*, although unmentioned in the opinion, could not survive McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[124] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[125] Id. at 223. The Court also noticed the proposition that the insured could not bear the cost of litigation away from home as well as the insurer. *See also* Perkins v. Benguet Consolidating Mining Co., 342 U.S. 437 (1952), a case too atypical on its facts to permit much generalization but which does appear to verify the implication of *International Shoe* that *in personam* jurisdiction may attach to a corporation even where the cause of action does not arise out of the business done by defendant in the forum State, as well as to state, in dictum, that the mere presence of a corporate official within the State on business of the corporation would suffice to create jurisdiction if the claim arose out of that business and service were made on him within the State. Id. at 444–45. The Court held that the State could, but was not required to, assert jurisdiction over a corporation owning gold and silver mines in the Philippines but temporarily (because of the Japanese occupation) carrying on a part of its general business in the forum State, including directors' meetings, business correspondence, banking, and the like, although it owned no mining properties in the State.

jurisdiction over foreign corporations and other nonresidents."[126] However, during the same Term, the Court found *in personam* jurisdiction lacking for the first time since *International Shoe*, and after a long period of declining to review the exercise of state court jurisdiction the Court pronounced firm due process limitations. Thus, in *Hanson v. Denckla*,[127] the issue was whether Florida courts obtained through use of ordinary mail and publication jurisdiction over corporate trustees of property the subject of a contest over a will; the will had been entered into and probated in Florida, the trustees were resident in Delaware and were indispensable parties with claimants who were resident in Florida and who had been personally served. Noting the trend in enlarging the ability of the States to obtain *in personam* jurisdiction over absent defendants, the Court denied that the States could exercise nationwide *in personam* jurisdiction and said that "it would be a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[128] The Court recognized that Florida law was the most appropriate law to be applied in determining the validity of the will and that the corporate defendants might be little inconvenienced by having to appear in Florida courts, but it denied that either circumstance satisfied the due process clause. The due process restrictions did more than guarantee immunity from inconvenient or distant litigation. "They are consequences of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimum contacts' with that State that are a prerequisite to its exercise of power over him." The only contacts the corporate defendants had in Florida consisted of a relationship with the individual defendants. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails himself of the

[126] McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957). An exception exists with respect to *in personam* jurisdiction in domestic relations cases, at least in some instances. E.g., Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957) (holding that sufficient contacts afforded Nevada in personam jurisdiction over a New York resident wife for purposes of dissolving the marriage but Nevada did not have jurisdiction to terminate the wife's claims for support).

[127] 357 U.S. 235 (1958). The decision was 5-to–4. *See* id. at 256 (Justice Black dissenting), 262 (Justice Douglas dissenting).

[128] Id. at 251. In dissent, Justice Black observed that "of course we have not reached the point where state boundaries are without significance and I do not mean to suggest such a view here." Id. at 260.

privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . . The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case."[129]

In *World-Wide Volkswagen Corp. v. Woodson*,[130] the Court applied its "minimum contacts" test to preclude the assertion of jurisdiction over two foreign corporations that did no business in the forum State. Plaintiffs sustained personal injuries in Oklahoma in an accident involving an alleged defect in their automobile, which they had purchased the previous year in New York, while they were New York residents, and which they were driving through Oklahoma on their way to a new residence in Arizona. Defendants were the automobile retailer and its wholesaler, New York corporations that did no business in Oklahoma. The Court found no circumstances justifying assertion by Oklahoma courts of jurisdiction over defendants. They (1) carried on no activity in Oklahoma, (2) closed no sales and performed no services there, (3) availed themselves of none of the benefits of the State's laws, (4) solicited no business there either through salespersons or through advertising reasonably calculated to reach the State, and (5) sold no cars to Oklahoma residents or indirectly served or sought to serve the Oklahoma market. The unilateral action of the purchasers in driving the car to Oklahoma was insufficient to create the kinds of requisite contacts. While it might have been foreseeable that the automobile would travel to Oklahoma, foreseeability is relevant only insofar as "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[131] Further, "whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them."[132] Thus, a defendant must, as the Court said in *Denckla*, "purposefully [avail] itself of the privilege of conducting activities within the

[129] Id. at 251, 253–54. Justice Black argued that the relationship of the nonresident defendants, of the subject of the litigation to the forum State, upon an analogy of choice of law and *forum non conveniens*, made Florida the natural and constitutional basis for asserting jurisdiction. Id. at 258–59. The Court has numerous times asserted that contacts sufficient for the purpose of designating a particular State's law as appropriate may be insufficient for the purpose of asserting jurisdiction. *See* Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Kulko v. Superior Court, 436 U.S. 84, 98 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294–95 (1980). On the due process limits on choice of law decisions, *see* Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981).

[130] 444 U.S. 286 (1980).

[131] Id. at 297.

[132] Id. at 299.

forum State,"[133] if not by carrying on business there within the constitutional sense, at least by delivering "its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[134]

The Court has applied *International Shoe* principles in several more situations. Circulation of a magazine in the forum state is an adequate basis for jurisdiction over the corporate magazine publisher in a libel action; the fact that the plaintiff has no contact with the forum state is not dispositive since the inquiry focuses on the relations among the defendant, the forum, and the litigation.[135] On the other hand, damage done to the plaintiff's reputation in his home state caused by circulation of a defamatory magazine article there may justify assertion of jurisdiction that would otherwise be absent.[136] While there is no *per se* rule that a contract with an out-of-state party automatically establishes jurisdiction to enforce the contract in the other party's forum, a franchisee who has entered into a franchise contract with an out-of-state corporation may be subject to suit in the corporation's home state where the overall circumstances (contract terms themselves, course of dealings) demonstrate a deliberate reaching out to establish contacts with the franchisor in the franchisor's home state.[137]

***Actions* in Rem: *Proceedings Against Land*.**—The basis of *in rem* jurisdiction is the power of a State to determine title to all property, whether tangible or intangible, located within its bor-

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[133] Hanson v. Denckla, 357 U.S. 235, 253 (1985), *quoted in* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[134] Id. at 298. Of the three dissenters, Justice Brennan argued that the "minimum contacts" test was obsolete and that jurisdiction should be predicated upon the balancing of the interests of the forum State and plaintiffs against the actual burden imposed on defendant, id. at 299, while Justices Marshall and Blackmun applied the test and found jurisdiction because of the foreseeability of defendants that a defective product of theirs might cause injury in a distant State and because the defendants had entered into an interstate economic network. Id. at 313. The balancing of interests test was applied in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987), holding unreasonable exercise of jurisdiction by a California court over an indemnity action by a Taiwan tire manufacturer against a Japanese manufacturer of tire valves, the underlying damage action by a California motorist having been settled.

[135] Keeton v. Hustler Magazine, 465 U.S. 770 (1984) (holding as well that the forum state may apply "single publication rule" making defendant liable for nationwide damages).

[136] Calder v. Jones, 465 U.S. 783 (1984) (jurisdiction over reporter and editor responsible for defamatory article which they knew would be circulated in subject's home state).

[137] Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). *But cf.* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984) (purchases and training within state, both unrelated to cause of action, are insufficient to justify general *in personam* jurisdiction).

ders.[138] Unlike jurisdiction *in personam*, a judgment entered by a court with *in rem* jurisdiction does not bind the defendant personally but determines the title to or status of only the property in question.[139] Proceedings brought to register title to land,[140] to condemn[141] or confiscate[142] real or personal property, or to administer a decedent's estate[143] are typical *in rem* actions. Due process is satisfied by seizure of the *res* and notice to all who have or may have interests therein.[144] It was formally the case that in *in rem* actions a court could acquire jurisdiction over nonresidents by mere constructive service of process,[145] under the theory that property was always in possession of its owners and that seizure would afford them notice, inasmuch as they would keep themselves apprised of the state of their property. That this was a fiction not satisfying the requirements of due process has been established and, whatever the nature of the proceeding, notice must be given in a manner that actually notifies the person being sought or that has a reasonable certainty of resulting in such notice.[146]

Although the Court's holding in *Shaffer v. Heitner*[147] "that all assertions of state-court jurisdiction must be evaluated according to the ['minimum contacts'] standards set forth in *International Shoe*"[148] requires an assessment of all decided cases based upon now disavowed tests, it does not appear that the results will appreciably change for *in rem* jurisdiction over property. "[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that

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[138] Arndt v. Griggs, 134 U.S. 316, 320–21, 323 (1890); Pennoyer v. Neff, 95 U.S. 714 (1878).

[139] Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 348 (1850).

[140] American Land Co. v. Zeiss, 219 U.S. 47 (1911); Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76, 55 N.E. 812, 814 (Chief Justice Holmes), appeal dismissed, 179 U.S. 405 (1900).

[141] Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559 (1889).

[142] The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874).

[143] Clarke v. Clarke, 178 U.S. 186 (1900); Riley v. New York Trust Co., 315 U.S. 343 (1942).

[144] Pennoyer v. Neff, 95 U.S. 714 (1878).

[145] Arndt v. Griggs, 134 U.S. 316 (1890); Ballard v. Hunter, 204 U.S. 241 (1907); Security Savings Bank v. California, 263 U.S. 282 (1923).

[146] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962); Robinson v. Hanrahan, 409 U.S. 38 (1972).

[147] 433 U.S. 186 (1977).

[148] Id. at 212.

he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State."[149] Thus, for "true" *in rem* actions, the old results likely still prevail.

***Actions* in Rem: *Attachment Proceedings*.**—Although the practice of attachment goes back to colonial times, *Pennoyer v. Neff*[150] was also the most relevant case for a long time respecting the power of a State to permit an attachment of real and personal property situated within its borders belonging to a nonresident to satisfy a debt owed by the nonresident to one of its citizens or to settle a claim for damages founded upon a wrong inflicted on the citizen by the nonresident. Being neither present within the State nor domiciled therein, the nonresident defendant could not be served personally, and any judgment in money obtained against him would be unenforceable. The solution was a form of *in rem* proceeding, sometimes called "*quasi in rem*," involving a levy of a writ of attachment on the local property of the defendant, of which proceeding the non-resident need be notified merely by publication,[151] and satisfaction of the judgment from the property attached; if the attached property was insufficient to satisfy the claim, the plaintiff could go no further.

This form of proceeding raised many questions. Of course, there were always instances in which it was fair to subject a person to suit on his property located in the forum State, as where the property was related to the matter sued over.[152] In others, the question was more disputed, as in the famous case in which the property subject to attachment was the obligation of the defendant's insurance company to defend and pay the judgment.[153] But

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[149] Id. at 207–08 (footnote citations omitted). The Court also suggested that the State would usually have jurisdiction in cases such as those arising from injuries suffered on the property of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that controversy. Id.

[150] 95 U.S. 714 (1878). *Cf.* Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917); Corn Exch. Bank v. Commissioner, 280 U.S. 218, 222 (1930); Endicott Co. v. Encyclopedia Press, 266 U.S. 285, 288 (1924).

[151] This theory of notice was disavowed sooner than the theory of jurisdiction. Supra, p. 1716.

[152] Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P. 2d 960 (1957), *appeal dismissed*, 357 U.S. 569 (1958) (debt seized in California was owed to a New Yorker, but it had arisen out of transactions in California involving the New Yorker and the California plaintiff).

[153] Seider v. Roth, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312 (1966).

the extension of the principle in *Harris v. Balk*[154] squarely raised the issue of fairness and territoriality. The claimant was a Maryland resident who was owed a debt by Balk, a North Carolina resident. Apparently adventitiously, Harris, also a North Carolina resident and owing Balk an amount of money, was found passing through Maryland by the Maryland resident and his debt to Balk was attached to satisfy the debt owed to the Marylander. Balk had no notice of the action and a default judgment was entered, after which Harris paid over the judgment to the Marylander. When Balk later sued Harris in North Carolina to recover on his debt, Harris defended that he had been relieved of any further obligation by satisfying the judgment in Maryland, and the Supreme Court sustained his defense, ruling that jurisdiction had been properly obtained and the Maryland judgment was thus valid.[155]

Harris v. Balk was overruled in *Shaffer v. Heitner*,[156] in which the Court held that the "minimum contacts" test of *International Shoe* applied to all *in rem* and *quasi in rem* actions. The case arose under a Delaware sequestration statute under which plaintiffs were authorized to bring actions against nonresident defendants by attaching their "property" within Delaware, the property consisting of shares of corporate stock and options to stock in the defendant corporation, the stock being considered to be in Delaware because of the incorporation in Delaware, although none of the certificates representing the seized stocks was physically present in Delaware. The reason for applying the same test as is applied in *in personam* cases, the Court said, "is simple and straightforward. It is premised on recognition that '[t]he phrase "judicial jurisdiction over a thing," is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.'"[157] Thus, "[t]he recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.'"[158]

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[154] 198 U.S. 215 (1905).

[155] *Compare* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916) (action purportedly against property within State, proceeds of an insurance policy, was really an *in personam* action against claimant and, claimant not having been served, the judgment is void). *But see* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961).

[156] 433 U.S. 186 (1977).

[157] Id. at 207 (internal quotation from RESTATEMENT (SECOND) OF CONFLICT OF LAWS 56, Introductory Note (1971)).

[158] Id. The characterization of actions *in rem* as being not actions against a *res* but against persons with interests merely reflects Justice Holmes' insight in Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76–77, 55 N.E., 812, 814, *appeal dismissed*, 179 U.S. 405 (1900).

A further tightening of jurisdictional standards occurred in *Rush v. Savchuk.*[159] The plaintiff was injured in a one-automobile accident in Indiana while a passenger in an automobile driven by defendant. Plaintiff later moved to Minnesota and sued defendant, still resident in Indiana, in state court in Minnesota. There were no contacts between the defendant and Minnesota, but defendant's insurance company did business there and plaintiff garnished the insurance contract, signed in Indiana, under which the company was obligated to defend defendant in litigation and indemnify him to the extent of the policy limits. The Court refused to permit jurisdiction to be grounded on the contract; the contacts justifying jurisdiction must be those of the defendant engaging in purposeful activity related to the forum.[160] *Rush* thus resulted in the demise of the controversial *Seider v. Roth* doctrine, which lower courts had struggled to save after *Shaffer v. Heitner.*[161]

***Actions* in Rem: *Estates, Trusts, Corporations*.**—Probate administration, being in the nature of a proceeding *in rem*, is one to which all the world is charged with notice.[162] Generally, probate will be opened in the proper court of the decedent's domicile, and as to the assets in that State the probate judgment is *in rem* and determinative as to all; insofar as it affects property, land or personalty, beyond the State, the judgment is *in personam* and can bind only parties thereto or their privies.[163] That is, the full faith and credit clause and statute would not prevent an attack in the forum of the situs of the property on the first court's finding of domicile as a predicate to deciding the disposition of the property.[164] The difficulty of characterization of the existence of the *res* in a particular jurisdiction is illustrated by the *in rem* aspects of

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[159] 444 U.S. 320 (1980).

[160] Id. 328–30. In dissent, Justices Brennan and Stevens argued that what the state courts had done was the functional equivalent of direct-action statutes. Id. at 333 (Justice Stevens); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Justice Brennan). The Court, however, refused so to view the Minnesota garnishment action, saying that "[t]he State's ability to exert its power over the 'nominal defendant' is analytically prerequisite to the insurer's entry into the case as a garnishee." Id. at 330–31. Presumably, the comment is not meant to undermine the validity of such direct-action statutes, which was upheld in Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), a choice-of-law case rather than a jurisdiction case.

[161] Supra, p. 1718 n.153. *See* O'Conner v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

[162] Goodrich v. Ferris, 214 U.S. 71, 80 (1909); McCaughey v. Lyall, 224 U.S. 558 (1912).

[163] Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917); Riley v. New York Trust Co., 315 U.S. 343 (1942).

[164] Id. at 353.

Hanson v. Denckla.[165] There, the decedent, while a resident of Pennsylvania, created a trust with a Delaware corporation as trustee. She reserved the power to appoint the remainder, after her reserved life estate, either by testamentary disposition or by *inter vivos* instrument. After she moved to Florida, she executed a new will and a new power of appointment under the trust, which did not satisfy the requirements for testamentary disposition under Florida law. Upon her death, dispute arose as to whether the property passed pursuant to the terms of the power of appointment or in accordance with the residuary clause of the will. While the Florida courts had *in personam* jurisdiction over individual defendants, they attempted to assert *in rem* jurisdiction over the Delaware corporation. Asserting the old theory that a court's *in rem* jurisdiction "is limited by the extent of its power and by the coordinate authority of sister States,"[166] i.e., whether the court has jurisdiction over the thing, the Court thought it clear that the trust assets that were the subject of the suit were located in Delaware and thus the Florida courts had no *in rem* jurisdiction. The Court did not expressly consider whether the *International Shoe* test should apply to such *in rem* jurisdiction, as it has now held it generally must, but it did briefly consider whether Florida's interests arising from its authority to probate and construe its domiciliary's will, under which the foreign assets might pass, were a sufficient basis of *in rem* jurisdiction and decided they were not.[167] The effort of *International Shoe* in this area is still to be discerned.

The old *Pennoyer* rule, that seizure of property was sufficient to give notice to nonresident or absent defendants, was likewise applied in statutory proceedings for the forfeiture of abandoned property. Judgments in proceedings to determine succession to property in escheat were held binding on all when personal service of summons was made on all known claimants and constructive notice by publication to all claimants who were unknown or nonresident.[168] But in *Mullane v. Central Hanover Bank & Trust Co.*,[169] the Court held that the characterization of an action as *in rem* or *in personam* did not determine what process was due in a statutory proce-

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[165] 357 U.S. 235 (1957). The *in personam* aspect of this decision is considered supra, p. 1714.

[166] Id. at 246.

[167] Id. at 247–50. The four dissenters, Justices Black, Burton, Brennan, and Douglas, believed that the transfer in Florida of $400,000 made by a domiciliary and affecting beneficiaries, almost all of whom lived in that State, gave rise to a sufficient connection with Florida to support an adjudication by its courts of the effectiveness of the transfer. Id. at 256, 262.

[168] Hamilton v. Brown, 161 U.S. 256 (1896); Security Savings Bank v. California, 263 U.S. 282 (1923). *See also* Voeller v. Neilston Co., 311 U.S. 531 (1941).

[169] 339 U.S. 306 (1950).

dure whereby a bank managing a common trust fund in favor of nonresident as well as resident beneficiaries could obtain a judicial settlement of accounts which was conclusive on all, with the only notice being publication in a local paper. Such notice by publication was necessarily sufficient as to beneficiaries whose interests or addresses were unknown to the bank, the Court held, but as to those, resident and nonresident alike, whose whereabouts were known, it was feasible to make serious efforts to notify them at least by mail to their addresses on record with the bank. The rule has been applied in the escheat situation, and the Court finding that a "contacts" test would not be workable in this field has held that, inasmuch as due process would prevent more than one State from escheating a given item of property, because of ease of administration rather than logic and jurisdiction, the State of residence shown by the last known address on a company's books would have the authority to take by escheat the uncollected claims against a corporation located in a particular State.[170]

Notice: Service of Process.—It is not enough, however, that a State be potentially capable of exercising control over persons and property. Before a State legitimately can exercise such power to alter private interests, its jurisdiction must be perfected by the employment of an appropriate mode of serving process deemed effective to acquaint all parties of the institution of proceedings calculated to affect their rights.[171] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[172] Personal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person, and has traditionally been deemed necessary in actions styled *in personam*.[173] But less rigorous notice procedures have been accepted, in light of history and of the practical obstacles to providing personal service in every instance, and these procedures do not carry with them the same certainty of actual notice that inheres in personal service.[174] But, whether the action be *in rem* or *in personam*, there is a constitu-

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[170] Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961); Texas v. New Jersey, 379 U.S. 674 (1965).

[171] "There . . . must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant." Omni Capital Int'l v. Rudolph Wolff & Co., 484 U.S. 97 (1987).

[172] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[173] McDonald v. Mabee, 243 U.S. 90, 92 (1971).

[174] Greene v. Lindsey, 456 U.S. 444, 449 (1982).

tional minimum; if it be shown that the notice used was not reasonably calculated to provide the necessary information, its age and history will not sustain it.[175]

The function of mail, indeed, as conveying sufficient notice, has become quite established,[176] and the development of the ability of States, quite contrary to the *Pennoyer* theory, to assert *in personam* jurisdiction extraterritorially upon individuals and corporations having "minimum contacts" with the forum State, resulted in the passage of "long-arm" jurisdictional statutes under which notice was practically always by mail.[177] In a class action, due process is satisfied by notification by mail of out-of-state class members, with opportunity to "opt out" but with no requirement that inclusion in the class be contingent upon affirmative response.[178] Other service devices, and substitutions, have been pursued and show some promise of further loosening of the concept of territoriality even while complying with minimum due process standards of notice.[179]

The Procedure Which Is Due Process

The Interests Protected: Entitlements and Positivist Recognition.—"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due

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[175] In Greene v. Lindsey, 456 U.S. 444 (1982), the Court held that in light of substantial evidence that notices posted on the doors of apartments in a housing project in an eviction proceeding were often torn down by children and others before tenants ever saw them, service by posting did not comport with due process. Without requiring it, the Court observed that the mails provided an efficient and inexpensive means of communication upon which prudent men could rely and that notice by mail would provide a reasonable assurance of notice. Id. at 455. *See also* Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (personal service or notice by mail is required for mortgagee of real property subject to tax sale); Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988) (notice by mail or other appropriate means to reasonably ascertainable creditors of probated estate).

[176] *E.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n ex rel. State Corp. Comm'n, 339 U.S. 643 (1950).

[177] *See, e.g.*, G.D. Searle & Co. v. Cohn, 455 U.S. 404, 409–12 (1982) (discussing New Jersey's "long-arm" rule, under which a plaintiff must make every effort to serve process upon someone within the State and then only if "after diligent inquiry and effort personal service cannot be made" within the State, then "service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office."). *Cf.* Velmohos v. Maren Engineering Corp., 83 N.J. 282, 416 A.2d 372 (1980), *vacated and remanded*, 455 U.S. 985 (1982).

[178] Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

[179] *E.g.*, Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) (authorizing direct action against insurance carrier rather than against the insured).

process is not infinite."[180] Whether any procedural protections are due depends upon an analysis which of "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[181] Traditionally, the Court has accorded due process recognition to one's "life, liberty, or property" as determined by reference to common understanding, as embodied in the development of the common law. One's right of life existed independently of any formal guarantee of it and could be taken away only by the state pursuant to the formal processes of law for offenses against law deemed by a legislative body to be particularly heinous. One's liberty, one's freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures. One's ownership of lands, chattels, and other properties, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally understood in Anglo-American countries.

Expansion of the understanding embodied in the "liberty and property" aspects of the clause began in the 1960s and followed an inconsistent path of acceleration and reining-in to the present. It has previously been noted that the Court's construction of "liberty" has long been much broader than would be encompassed within freedom from bodily restraint; while liberty of contract met its demise, the rise of rights of privacy, which included marital and intimate relationships, interests in one's dignity and reputational concerns, and the like, continues to lead to enlargement of the compass of the doctrine. A widening of the "property" concept in the 1960s occurred with respect to according protection to such public benefits as welfare assistance and other benefits and privileges that government conferred and that it could withdraw altogether for everyone, but as to which individual recipients and claimants had to be accorded proper procedures before they could lose their entitlement. Similarly, other kinds of conditional property rights, such as the interest of an installment buyer of goods in retaining control until it could be shown he was in default, were accorded greater protection.

The key to this expansion may be found in the intertwined doctrinal strands of jurisprudential theory under which the "right-privilege" distinction was abandoned and a positivist conception of entitlements arose. The former principle, discussed previously in

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[180] Board of Regents v. Roth, 408 U.S. 564, 569–70 (1972). Developments under the Fifth Amendment's due process clause have been interchangeable. *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974).

[181] Morrissey v. Brewer, 408 U.S. 471, 481 (1982).

the First Amendment context,[182] was pithily summarized by Justice Holmes years ago in dismissing a suit by a policeman protesting the dismissal from his job. "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[183] Most often, the assertion that one had no "vested property interest" in something was made to justify the taking of that interest or the disregarding of that interest without substantive restraints being relevant, but it was also true that it was said that if something was "only" a privilege, such as government employment[184] or some form of public assistance,[185] procedural due process guarantees were also inapplicable.[186] In other words, if government need not provide something, it could provide it with any attached conditions it might choose. This line of thought was always opposed by the "unconstitutional conditions" doctrine, under which it was said that "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, it may not do so on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[187] Nonetheless, the two doctrines coexisted in an unstable relationship, until, in the 1960s and thereafter, the right-privilege distinction was largely shelved.[188]

Concurrently with the virtual demise of the "right-privilege" distinction, there arose the "entitlement" doctrine, under which the Court erected a barrier of procedural—but not substantive—protections against erroneous governmental deprivation of something it might within its discretion have bestowed.[189] Thus, the Court found protected interests created by positive state enactments or

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[182] Supra, pp. 1084–90.

[183] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 2d 517, 522 (1892).

[184] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 314 U.S. 918 (1951); Adler v. Board of Educ., 342 U.S. 485 (1952).

[185] Flemming v. Nestor, 363 U.S. 603 (1960).

[186] Barsky v. Board of Regents, 347 U.S. 442 (1954).

[187] Perry v. Sinderman, 408 U.S. 593, 597 (1972). *See* Speiser v. Randall, 357 U.S. 513 (1958).

[188] *See* William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). Much of the old fight had to do with imposition of conditions on admitting corporations into a State. *Cf.* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656–68 (1981) (reviewing the cases). That the right-privilege distinction is not totally moribund is evident. *See* Buckley v. Valeo, 424 U.S. 1, 108–09 (1976) (sustaining as qualification for public financing of campaign agreement to abide by expenditure limitations otherwise unconstitutional); Wyman v. James, 400 U.S. 309 (1971).

[189] That is, Congress or a state legislature could simply take away part or all of the benefit. Richardson v. Belcher, 404 U.S. 78 (1971); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982).

practices; that is, the source of a right was ascertained not from tradition or the common law or "natural rights," but rather a property or liberty interest was discerned in the governmental statute or practice that gave rise to it. Indeed, for a time it appeared that this positivist conception of rights was going to displace the previous traditional sources.

That advent of the new doctrine may be placed in *Goldberg v. Kelly*.[190] The Court held that, inasmuch as termination of welfare assistance pending resolution of a controversy over eligibility may deprive an eligible recipient of the means of livelihood, government must provide a pre-termination evidentiary hearing in which an initial determination of the validity of the dispensing agency's grounds for discontinuance of payment could be made. It was observed that the state agency did "not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them."[191] Provisions for loss of some benefit or privilege upon the establishing of some ground for taking it away was perceived as giving the holder a property interest entitling him to proper procedure before termination or revocation.

Therefore, a wage garnishment statute which failed to provide for notice to the garnishee and an opportunity for the making of some form of determination that the garnisher is likely to prevail before the garnishee is deprived of the use of his money, even temporarily, was held not to accord due process.[192] Similarly voided was a repleven statute which authorized the authorities to seize goods simply upon the filing of an *ex parte* application and the posting of bond and the allegation that the possessor of the property was in arrears on payment on the goods and that they reverted to the seller.[193] A state motor vehicle financial responsibility law which provided that the registration and license of an uninsured motorist involved in an accident was to be suspended unless he posted security for the amount of damages claimed by an aggrieved party without affording the driver any opportunity to raise the issue of liability prior to suspension violated the due process clause.[194]

The Court's emphasis in these cases upon the importance to the claimant of retention of the rights led some lower courts to de-

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[190] 397 U.S. 254 (1970).

[191] Id. at 261–62. *See also* Mathews v. Eldridge, 424 U.S. 319 (1976) (Social Security benefits).

[192] Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[193] Fuentes v. Shevin, 407 U.S. 67 (1972).

[194] Bell v. Burson, 402 U.S. 535 (1971). *Compare* Dixon v. Love, 431 U.S. 105 (1977) *with* Mackey v. Montrym, 443 U.S. 1 (1979).

termine the application of the due process clause by assessing the weights of the interests involved and the harm done to one who lost what he was claiming. This approach, the Court held, was inappropriate. "[W]e must look not to the 'weight' but to the *nature* of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[195] To have a property interest in the constitutional sense, the Court held, it was not enough that one have an abstract need or desire for a benefit, that one have only a unilateral expectation. He must rather "have a legitimate claim of entitlement" to the benefit. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[196] Thus, in *Roth*, the Court held that the refusal to renew a teacher's contract upon expiration of his one-year term implicated no due process values because there was nothing in the public university's contract, regulations, or policies that "created any legitimate claim" to reemployment.[197] On the other hand, in *Perry v. Sindermann*,[198] while there was no contract with a tenure provision nor any statutory assurance of it, the "existing rules or understandings" were deemed to provide a legitimate expectation independent of any contract provision, so that a professor employed for several years at a public college, in which the actual practice had the characteristics of tenure, had a protected interest. A statutory assurance was found in *Arnett v. Kennedy*,[199] in which the civil service laws and regulations made the continued employment subject to defeasance "only for such cause as would promote the efficiency of the service." On the other hand, a policeman who was a "permanent employee" under an ordinance which appeared to afford him a continuing position subject to conditions subsequent was held not to be protected by the due process clause because the federal district court had interpreted the ordinance as providing only

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[195] Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972).

[196] Id. at 577.

[197] Id. at 576–78. The Court also held that no liberty interest was implicated, because in declining to rehire Roth the State had not made any charges against him or taken any actions that would damage his reputation or stigmatize him. Id. at 572–75. For an instance of protection accorded a claimant on the basis of such an action, *see* Codd v. Vegler, 429 U.S. 624 (1977). *See also* Bishop v. Wood, 426 U.S. 341, 347–50 (1976); Vitek v. Jones, 445 U.S. 480, 491–494 (1980); Board of Curators v. Horowitz, 435 U.S. 78, 82–84 (1978).

[198] 408 U.S. 593 (1972). *See* Leis v. Flynt, 439 U.S. 438 (1979) (finding no practice or mutually explicit understanding creating interest).

[199] 416 U.S. 134 (1974).

employment at the will and pleasure of the city and the Supreme Court chose not to disturb that interpretation.[200]

Beyond employment the Court found "legitimate entitlements" in a variety of situations. Thus, because Ohio included within its statutes a provision for free education to all residents between five and 21 years of age and a compulsory-attendance at school requirement, the State was deemed to have obligated itself to accord students some due process hearing rights prior to suspending them, even for such a short period as ten days.[201] "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."[202] The Court is highly deferential, however, to dismissal decisions based on academic grounds.[203]

The most striking application of such due process analysis, to date, is *Logan v. Zimmerman Brush Co.*,[204] in which a state anti-discrimination law required the enforcing agency to convene a fact-finding conference within 120 days of the filing of the complaint. Inadvertently, the Commission scheduled the hearing after the expiration of the 120 days and the state courts held the requirement to be jurisdictional, necessitating dismissal of the complaint. The Court held that Logan had been denied due process. His cause of action was a property interest; older cases had clearly established causes of action as property and, in any event, Logan's claim was an entitlement grounded in state law and it could be removed only

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[200] Bishop v. Wood, 426 U.S. 341 (1976). "On its face," the Court noted, "the ordinance on which [claimant relied] may fairly be read as conferring" both "a property interest in employment . . . [and] an enforceable expectation of continued public employment." Id. at 344–45. The district court's decision had been affirmed by an equally divided appeals court and the Supreme Court deferred to the presumed greater expertise of the lower court judges in reading the ordinance. Id. at 345.

[201] Goss v. Lopez, 419 U.S. 565 (1975). *Cf.* Carey v. Piphus, 435 U.S. 247 (1978) (measure of damages for violation of procedural due process in school suspension context). *And see* Board of Curators v. Horowitz, 435 U.S. 78 (1978) (whether liberty or property interest implicated in academic dismissals and discipline, as contrasted to disciplinary actions).

[202] Goss v. Lopez, 419 U.S. 565, 574 (1975). *See also* Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license); O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) (statutory entitlement of nursing home residents protecting them in the enjoyment of assistance and care.)

[203] Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985). Although the Court "assume[d] the existence of a constitutionally protectible property interest in . . . continued enrollment" in a state university, this limited constitutional right is violated only by a showing that dismissal resulted from "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." 474 U.S. at 225.

[204] 455 U.S. 422 (1982). A different majority of the Court also found an equal protection denial. Id. at 438, 443.

"for cause." That property interest existed independently of the 120-day time period and could not simply be taken away by agency action or inaction.[205] Beyond statutory entitlements, the Court has looked to state decisional law to find that private utilities may not terminate service at will but only for cause, for nonpayment of charges, so that when there was a dispute about payment or the accuracy of charges, due process required the utility to follow procedures to resolve the dispute prior to terminating service.[206]

With respect to liberty, the Court has followed a somewhat more meandering path, but it has arrived at the same place. In *Wisconsin v. Constantineau*,[207] it invalidated a statutory scheme by which a person, without any opportunity for a hearing and rebuttal, could be labeled an "excessive drinker" and barred from places where alcohol was served; without discussing the source of the entitlement, the Court noted that governmental action was stigmatizing the individual's reputation, honor, and integrity. But, in *Paul v. Davis*,[208] the Court looked exclusively to positive statutory enactments to determine whether a liberty interest was entitled to protection. Davis involved official defamation of someone—the police included plaintiff's photograph and name on a list of "active shoplifters" circulated to merchants—but the Court held that damage to reputation alone did not constitute a deprivation of any interest that the due process clause protected.[209] "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interest by means of damage actions."[210]

A number of liberty interest cases involve prisoner rights and are dealt with in the section on criminal due process. But in terms of the emphasis upon positive entitlements, it is useful to treat

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[205] Id. at 428–33.

[206] Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

[207] 400 U.S. 433 (1971).

[208] 424 U.S. 693 (1976).

[209] The Court, id. at 701–10, distinguished *Constantineau* as being a "reputation-plus" case. That is, it involved not only the stigmatizing of one posted but it also "deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry." Id. at 708. How the state law positively did this the Court did not explain. But, of course, the reputation-plus concept is now well-settled. Supra, p. 1727 n.197. *And see* Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Siegert v. Gilley, 500 U.S. 226 (1991).

[210] Paul v. Davis, 424 U.S. 693, 711–12 (1976). In a subsequent case, the Court looked to decisional law and the existence of common-law remedies as establishing a protected property interest. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9–12 (1978).

them briefly here. In *Meachum v. Fano,*[211] the Court held that a state prisoner was not entitled to a factfinding hearing when he is transferred to a different prison in which the conditions were substantially less favorable to him, because (1) the due process clause liberty interest by itself is satisfied by the initial valid conviction which had deprived him of liberty, and (2) no state law guaranteed him the right to remain in the prison to which he was initially assigned, subject to transfer for cause of some sort. Under state law, a prisoner could be transferred for any reason or for no reason, and the due process clause did not mandate a different result. The decision of prison officials, therefore, was not dependent upon any state of facts that would be found upon a hearing. But in *Vitek v. Jones,*[212] a protected entitlement interest was found. The state statute at issue permitted transfer of a prisoner to a state mental hospital for treatment, but the transfer could be effectuated only upon a finding, by a designated physician or psychologist, that the prisoner "suffers from a mental disease or defect" and "cannot be given treatment in that facility." Because the transfer was conditioned upon a "cause," the establishment of the facts necessary to show the cause had to be done through fair procedures.

However, the *Vitek* Court also held that, independent of the statutory entitlement, the prisoner had a "residuum of liberty" in being free from the different confinement and from the stigma of involuntary commitment for mental disease that the due process clause protected. Thus, the Court has recognized, in this case and in the cases involving revocation of parole or probation,[213] a liberty interest that is separate from a positivist entitlement and that can be taken away only through proper procedures. But with respect to the possibility of parole or commutation or otherwise more rapid release, no matter how much the expectancy matters to a prisoner, in the absence of some form of positive entitlement, the prisoner may be turned down without observance of procedures.[214] Summarizing its prior holdings, the Court recently concluded that two requirements must be present before a liberty interest is created in the prison context: the statute or regulation must contain "substantive predicates" limiting the exercise of discretion, and there

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[211] 427 U.S. 215 (1976). *See also* Montanye v. Haymes, 427 U.S. 236 (1976).

[212] 445 U.S. 480 (1980).

[213] Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[214] Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Jago v. Van Curen, 454 U.S. 14 (1981). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (due process applies to forfeiture of good-time credits and other positivist granted privileges of prisoners).

must be explicit "mandatory language" requiring a particular outcome if substantive predicates are found.[215]

In *Ingraham v. Wright*,[216] the Court, unanimously, agreed that freedom from wrongfully or excessively administered corporal punishment was a liberty interest of school children protected by the due process clause irrespective of positive state protection. "The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."[217]

In *Arnett v. Kennedy*,[218] three Justices sought to qualify the principle laid down in the entitlement cases and to restore in effect much of the right-privilege distinction in a new formulation. Dealing with a federal law conferring upon employees the right not to be discharged except for cause, the Justices acknowledged the prior formulation that recognized that due process rights could be created through statutory grants of entitlements, but they went on to observe that the same law withheld the procedural provisions now contended for; in other words, "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest."[219] Congress (and state legislatures) could qualify the conferral of an interest the due process clause might otherwise require.

But the other six Justices, while disagreeing among themselves in other respects, rejected this attempt so to formulate the issue. "This view misconceives the origin of the right to procedural due process," Justice Powell wrote. "That right is conferred not by legislative grace but by constitutional guarantee. While the legislature

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[215] Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459–63 (1989) (prison regulations listing categories of visitors who may be excluded, but not creating a right to have a visitor admitted, contain "substantive predicates" but lack mandatory language).

[216] 430 U.S. 651 (1977).

[217] Id. at 673. The family-related liberties discussed under substantive due process, as well as the associational and privacy ones, no doubt provide a fertile source of liberty interests for procedural protection. *See* Armstrong v. Manzo, 380 U.S. 545 (1965) (natural father, with visitation rights, must be given notice and opportunity to be heard with respect to impending adoption proceedings); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father could not simply be presumed unfit to have custody of his children because his interest in his children warrants deference and protection). *See also* Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Little v. Streater, 452 U.S. 1 (1981); Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Santosky v. Kramer, 455 U.S. 745 (1982).

[218] 416 U.S. 134 (1974).

[219] Id. at 155 (Justices Rehnquist and Stewart and Chief Justice Burger).

may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[220] Yet, in *Bishop v. Wood*,[221] the Court appeared to come close to adopting the three-Justice *Arnett* position, the dissenters accusing the majority of having repudiated the majority position in *Arnett*, and in *Goss v. Lopez*,[222] while the opinion of the Court stated the expressed formulation of Justice Powell in *Arnett*, the Justice himself dissented, using language quite similar to the Rehnquist *Arnett* language. More recently, however, first in a liberty interest case and then in a property interest case, the Court has squarely held that because "'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse action.' . . . Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest."[223] Substantive entitlements, therefore, may owe their existence to positive enactment, but the procedural protections are found in the judiciary's reading of the due process clause.

Proceedings in Which Procedural Due Process Must Be Observed.—While due notice and a reasonable opportunity to be heard to present one's claim or defense have been declared to be two fundamental conditions almost universally prescribed in all systems of law established by civilized countries,[224] there are certain proceedings appropriate for the determination of various rights in which the enjoyment of these two conditions has not been deemed to be constitutionally necessary. Thus, persons adversely affected by a specific law cannot challenge its validity on the ground that the legislative body or one of its committees gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no consideration to particular points of view. "Where a rule of conduct applies to more

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[220] Id. at 167 (Justices Powell and Blackmun concurring). *See* id. at 177 (Justice White concurring and dissenting), 203 (Justice Douglas dissenting), 206 (Justices Marshall, Douglas, and Brennan dissenting).

[221] 426 U.S. 341 (1976). A five-to-four decision, the opinion was written by Justice Stevens, replacing Justice Douglas, and was joined by Justice Powell, who had disagreed with the theory in *Arnett*. *See* id. at 350, 353 n.4, 355 (dissenting opinions). The language is ambiguous and appears at different points to adopt both positions. *But see* id. at 345, 347.

[222] 419 U.S. 565, 573–74 (1975). *See* id. at 584, 586–87 (Justice Powell dissenting).

[223] Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980)).

[224] Twining v. New Jersey, 211 U.S. 78, 110 (1908); Jacob v. Roberts, 223 U.S. 261, 265 (1912).

than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."[225] Similarly, when an administrative agency engages in a legislative function, as, for example, when in pursuance of statutory authorization it drafts regulations of general application affecting an unknown number of persons, it need not, any more than does a legislative assembly, afford a hearing prior to promulgation.[226] On the other hand, if a regulation, sometimes denominated an "order," is of limited application, that is, affects the property or interests of specific named or nameable individuals or an identifiable class of persons, the question whether notice and hearing is required and, if so, whether it must precede such action becomes a matter of greater urgency and must be determined by evaluation of the factors discussed herein.[227]

"It is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights which, by later resort to the courts, secures to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process."[228] In one of the initial decisions construing the due process clause (this of the Fifth Amendment), the Court upheld the actions of the Secretary of the Treasury, acting pursuant to statute, to obtain from a collector of customs a substantial amount of money on which it was claimed he was in arrears. The Treasury simply issued a distress warrant and seized the collector's property, affording him no opportunity for a hearing, and remitting him to suit (the statute waiving the immunity of the United States) for recovery of his property upon proof that he had not withheld funds from the Treasury. While acknowledging that history and settled practice required proceedings in which pleas,

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[225] Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915). *See also* Bragg v. Weaver, 251 U.S. 57, 58 (1919). *And cf.* Logan v. Zimmerman Brush Co., 445 U.S. 422, 432–33 (1982).

[226] United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

[227] Id. at 245 (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at issue, requiring a hearing in latter proceedings but not in the former). *See* Londoner v. City of Denver, 210 U.S. 373 (1908).

[228] Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246–47 (1944).

answers, and trials were requisite before property could be taken, the Court observed that the distress collection of debts due the crown had been the exception to the rule in England and was of long usage in the United States, and was thus sustainable.[229] In more modern times, the Court upheld a procedure under which a state banking superintendent, after having taken over a closed bank and issued notices to stockholders of their assessment, could issue execution for the amounts due, subject to the right of each stockholder, by affidavit of illegality, to contest his liability for such an assessment. The fact that the execution was issued in the first instance by a governmental officer and not from a court, followed by personal notice and a right to take the case into court, was seen as unobjectionable.[230]

A State may not, consistent with the due process clause, enforce a judgment against a party named in the proceeding without having given him an opportunity to be heard sometime before final judgment is entered.[231] With regard to the presentation of every available defense, however, the requirements of due process do not necessarily entail affording an opportunity to do so before entry of judgment. The person may be remitted to other actions initiated by him[232] or an appeal may suffice. Accordingly, a surety company, objecting to the entry of a judgment against it on a supersedeas bond, without notice and an opportunity to be heard on the issue of liability, was not denied due process where the state practice provided the opportunity for such a hearing by an appeal from the judgment so entered. Nor could the company found its claim of denial of due process upon the fact that it lost this opportunity for a hearing by inadvertently pursuing the wrong procedure in the state courts.[233] On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was

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[229] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[230] Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928).

[231] Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 476 (1918); Baker v. Baker, Eccles & Co., 242 U.S. 294, 403 (1917); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900).

[232] Lindsey v. Normet, 405 U.S. 56, 65–69 (1972). However, if one would suffer too severe an injury between the doing and the undoing, he may avoid the alternative means. Stanley v. Illinois, 405 U.S. 645, 647 (1972).

[233] American Surety Co. v. Baldwin, 287 U.S. 156 (1932). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429–30, 432–33 (1982).

held to have been deprived of his rights without due process of law.[234]

When Is Process Due.—"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[235] "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[236] Due process application, as has been noted, depends upon the nature of the interest; the form of the due process to be applied is determined by the weight of that interest balanced against the opposing interests. The currently prevailing standard is that formulated in *Mathews v. Eldridge.*[237] "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

Whereas, in *Goldberg v. Kelly,*[238] the effect of termination of welfare benefits could be "devastating," a matter of loss of food and shelter, thus mandating a pre-deprivation hearing, the termination of Social Security benefits would be considerably different, inasmuch as they are not based on financial need and a terminated recipient would be able to apply for welfare if need be. Moreover, the determination of ineligibility for Social Security benefits more often turns upon routine and uncomplicated evaluations of data, reducing the likelihood of error, a likelihood found significant in *Goldberg*. Finally, the administrative burden and other societal costs involved in giving Social Security recipients a pre-termination hearing would be high. Therefore, a post-termination hearing, with full retroactive restoration of benefits, if the claimant prevails, was found satisfactory.[239]

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[234] Saunders v. Shaw, 244 U.S. 317 (1917).

[235] Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970), (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Justice Frankfurter concurring)).

[236] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894–95 (1961).

[237] 424 U.S. 319, 335 (1976).

[238] 397 U.S. 254, 264 (1970).

[239] Mathews v. Eldridge, 424 U.S. 319, 339–49 (1976).

Application of the standard and other considerations brought some noteworthy changes to the process accorded debtors and installment buyers. For example, the previous cases had focused upon the interests of the holders of the property in not being unjustly deprived of the goods and funds in their possession, in requiring pre-deprivation hearings. The newer cases looked to the interests of creditors as well. "The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."[240]

Thus, *Sniadach v. Family Finance Corp.*,[241] mandating a pre-deprivation hearing before wages may be garnished, is apparently to be limited to instances when wages, and perhaps certain other basic necessities, are in issue and the consequences of deprivation would be severe.[242] *Fuentes*, which extended the *Sniadach* principle to all "significant property interests" and thus mandated pre-deprivation hearings, has been limited, so that when government provides certain procedural protections in structuring the *ex parte* judicial determinations that seizure should take place and provides for a prompt and adequate post-deprivation (but pre-judgment) hearing, the due process clause is satisfied.[243] To be valid, laws authorizing sequestration, garnishment, or other seizure of property of an alleged defaulting debtor must require that (1) the creditor furnish adequate security to protect the debtor's interest, (2) the creditor make a specific factual showing before a neutral officer or magistrate, not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) an op-

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[240] Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1975). *See also* id. at 623 (Justice Powell concurring), 629 (Justices Stewart, Douglas, and Marshall dissenting). Justice White, who wrote *Mitchell* and included the balancing language in his dissent in Fuentes v. Shevin, 407 U.S. 67, 99–100 (1972), did not repeat it in North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975), but it presumably underlies the reconciliation of *Fuentes* and *Mitchell* in the latter case and the application of *Di-Chem*.

[241] 395 U.S. 337 (1969).

[242] North Georgia Finishing v. Di-Chem, 419 U.S. 601, 611 n.2 (1975) (Justice Powell concurring). The majority opinion draws no such express distinction, see id. at 605–06, rather emphasizing that *Sniadach-Fuentes* do require observance of *some* due process procedural guarantees. *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 614 (1974) (opinion of the Court by Justice White emphasizing the wages aspect of the earlier case).

[243] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975). *Fuentes* was a decision of uncertain viability from the beginning, inasmuch as it was four-to-three; argument had been heard prior to the date Justices Powell and Rehnquist joined the Court, hence neither participated in the decision. *See Di-Chem*, supra, 616–19 (Justice Blackmun dissenting); *Mitchell*, supra, 635–36 (Justice Stewart dissenting).

portunity be assured for an adversary hearing promptly after seizure to determine the merits of the controversy, with the burden of proof on the creditor.[244] Efforts to litigate challenges to seizures in actions involving two private parties can be thwarted by findings of "no state action," but there often is sufficient participation by state officials to constitute state action and implicate due process.[245]

Similarly, applying the tripartite test of *Mathews v. Eldridge* in the context of government employment, the Court has held, albeit by a combination of divergent opinions, that the interest of the employee in retaining his job, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination require the provision of some minimum pre-termination notice and opportunity to respond, although there need not be a formal adversary hearing, followed by a full post-termination hearing, complete with all the procedures normally accorded and back pay if the employee is successful.[246] In other cases, hearings of even minimum procedures have been dispensed with when what is to be estab-

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[244] Mitchell v. W.T. Grant Co., 416 U.S. 600, 615–18 (1974), and id. at 623 (Justice Powell concurring). *And see* Arnett v. Kennedy, 416 U.S. 134, 188 (1974) (Justice White concurring in part and dissenting in part). More recently, the Court has applied a variant of the *Mathews v. Eldridge* formula in holding that Connecticut's prejudgment attachment statute, which "fail[ed] to provide a preattachment hearing without at least requiring a showing of some exigent circumstance," operated to deny equal protection. Connecticut v. Doehr, 501 U.S. 1, 18 (1991). "[T]he relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." Id. at 11.

[245] *Compare* Flagg Brothers v. Brooks, 436 U.S. 149 (1978) (no state action in warehouseman's sale of goods for nonpayment of storage, as authorized by state law), *with* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (state officials' joint participation with private party in effecting prejudgment attachment of property); *and* Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988) (probate court was sufficiently involved with actions activating time bar in "nonclaim" statute).

[246] Arnett v. Kennedy, 416 U.S. 134, 170–71 (1974) (Justice Powell concurring), and id. at 195–96 (Justice White concurring in part and dissenting in part); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (discharge of state government employee). In Barry v. Barchi, 443 U.S. 55 (1979), the Court held that the state interest in assuring the integrity of horse racing carried on under its auspices justified an interim suspension without a hearing once it established the existence of certain facts, provided that a prompt judicial or administrative hearing would follow suspension at which the issues could be determined was assured. FDIC v. Mallen, 486 U.S. 230 (1988) (strong public interest in the integrity of the banking industry justifies suspension of indicted bank official with no pre-suspension hearing, and with 90-day delay before decision resulting from post-suspension hearing).

lished is so pro forma or routine that the likelihood of error is very small.[247] In the case dealing with the negligent state failure to observe a procedural deadline, the Court held that the claimant was entitled to a hearing with the agency to pass upon the merits of his claim prior to dismissal of his action.[248]

In *Brock v. Roadway Express, Inc.*, a Court plurality applied similar analysis to governmental regulation of private employment, determining that a full evidentiary hearing is not required to safeguard the interests of an employer prior to the ordered reinstatement of an employee dismissed for cause, but that the employer is entitled to be informed of the substance of the employee's charges, and to have an opportunity for informal rebuttal.[249] The principal difference with the *Mathews v. Eldridge* test was that here the Court acknowledged two conflicting private interests to weigh in the equation: that of the employer "in controlling the makeup of its workforce" and that of the employee in not being discharged for whistleblowing. Whether the case signals a shift away from evidentiary hearing requirements in the context of regulatory adjudication will depend on future developments.[250]

In another respect, the balancing standard has resulted in an alteration of previously existing law, requiring neither a pre- nor post-termination hearing in some instances when the State affords the claimant an alternative remedy, such as a judicial action for damages. Thus, passing on the infliction of corporal punishment in the public schools, a practice which implicated protected liberty interests, the Court held that the existence of common-law tort remedies for wrongful or excessive administration of punishment, plus the context in which it was administered (i.e., the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonableness in punishment), made reasonably assured the probability that a child would be not punished without cause or excessively. The Court did not inquire about the availability of judi-

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[247] *E.g.*, Dixon v. Love, 431 U.S. 105 (1977) (when suspension of drivers' license is automatic upon conviction of a certain number of offenses, no hearing is required because there can be no dispute about facts).

[248] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

[249] 481 U.S. 252 (1987). Justice Marshall's plurality opinion was joined by Justices Blackmun, Powell, and O'Connor; Chief Justice Rehnquist and Justice Scalia joined Justice White's opinion taking a somewhat narrower view of due process requirements but supporting the plurality's general approach. Justices Brennan and Stevens would have required confrontation and cross-examination.

[250] For analysis of the case's implications, see Rakoff, *Brock v. Roadway Express, Inc., and the New Law of Regulatory Due Process*, 1987 SUP. CT. REV. 157.

cial remedies for such violation in the State in which the case arose.[251]

More expressly adopting the tort remedy theory, the Court in *Parratt v. Taylor*[252] held that the loss of a prisoner's mail-ordered goods through the negligence of prison officials constituted a deprivation of property, but that the State's post-deprivation tort-claims procedure afforded adequate due process. When a state officer or employee acts negligently, the Court recognized, there is no way that the State can provide a pre-termination hearing; the real question, therefore, is what kind of post-deprivation hearing is sufficient. When the action complained of is the result of the unauthorized failure of agents to follow established procedures and there is no contention that the procedures themselves are inadequate, the due process clause is satisfied by the provision of a judicial remedy which the claimant must initiate.[253] Five years later, however, the Court overruled *Parratt*, holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property."[254] Hence, there is no requirement for procedural due process stemming from such negligent acts and no resulting basis for suit under 42 U.S.C. § 1983 for deprivation of rights deriving from the Constitution. Prisoners may resort to state tort law in such circumstances, but neither the Constitution nor § 1983 provides a federal remedy.

In *Logan v. Zimmerman Brush Co.*,[255] the Court had distinguished between property[256] deprivations resulting from random and unauthorized acts of state employees and those resulting from operation of established state procedures, and presumably this distinction still holds. Post deprivation procedures would not satisfy

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[251] Ingraham v. Wright, 430 U.S. 651, 680–82 (1977). In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19–22 (1987), involving cutoff of utility service for non-payment of bills, the Court rejected the argument that common-law remedies were sufficient to obviate the pre-termination hearing requirement.

[252] 451 U.S. 527 (1981).

[253] Id. at 541, 543–44.

[254] Daniels v. Williams, 474 U.S. 327, 328 (1986) (involving negligent acts by prison officials).

[255] 455 U.S. 422, 435–36 (1982). The Court also emphasized that a post-deprivation hearing in the context of this case would be inadequate. "That is particularly true where, as here, the State's only post-termination process comes in the form of an independent tort action. Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole." Id. at 436–37.

[256] *Parratt* was a property loss case and while *Ingraham* was a liberty case the holding there was not that, standing alone, a tort remedy was an adequate process. It is not clear, therefore, that a tort remedy could ever be an adequate substitute for some kind of hearing in a liberty loss situation.

due process deprivations if it is "the state system itself that destroys a complainant's property interest."

In "rare and extraordinary situations,"[257] where summary action is necessary to prevent imminent harm to the public, and the private interest infringed is reasonably deemed to be of less importance, government can take action with no notice and no opportunity to defend, subject to a full later hearing. Examples are seizure of contaminated foods or drugs or other such commodities to protect the consumer.[258] Other possibilities are the collection of governmental revenues[259] and the seizure of enemy property in wartime.[260] Citing national security interests, the Court upheld an order, issued without notice and an opportunity to be heard, excluding a short-order cook employed by a concessionaire from a Naval Gun Factory, but the basis of the five-to-four decision is unclear.[261] On the one hand, the Court was ambivalent about a right-privilege distinction;[262] on the other hand, it contrasted the limited interest of the cook—barred from the base, she was still free to work at a number of the concessionaire's other premises—with the Government's interest in conducting a high-security program.[263]

Finally, one may waive his due process rights, though as with other constitutional rights the waiver must be knowing and voluntary.[264]

The Requirements of Due Process.—Bearing in mind that due process tolerates variances in form "appropriate to the nature of the case,"[265] it is nonetheless possible to indicate generally the basic requirements. "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases."[266] "Procedural due process rules are meant to protect persons not from the deprivation, but from the

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[257] Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971). *See* Parratt v. Taylor, 451 U.S. 527, 538–40 (1981).

[258] North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950). *See also* Fahey v. Mallonee, 332 U.S. 245 (1948). *Cf.* Mackey v. Montrym, 443 U.S. 1, 17–18 (1979).

[259] Phillips v. Commissioner, 283 U.S. 589, 597 (1931).

[260] Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921). *See also* Bowles v. Willingham, 321 U.S. 503 (1944).

[261] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

[262] Id. at 894, 895, 896.

[263] Id. at 896–98. *See* Goldberg v. Kelly, 397 U.S. 254, 263 n.10 (1970); Board of Regents v. Roth, 408 U.S. 564, 575 (1972); Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (plurality opinion), and id. at 181–83 (Justice White concurring in part and dissenting in part).

[264] D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). *See also* Fuentes v. Shevin, 407 U.S. 67, 94–96 (1972).

[265] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

[266] Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

mistaken or unjustified deprivation of life, liberty, or property."[267] The rules "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.[268] Thus, after the determination of the existence of a protected interest at issue, it must still be determined what procedure is adequate.

(1) *Notice*. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[269] The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.[270] Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it.[271]

(2) *Hearing*. "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest."[272] "Parties whose rights are to be affected are entitled to be heard."[273] The notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[274] "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment. . . ."[275] The Court has in recent years developed a complex calculus to determine whether a hearing should precede the deprivation or whether a prompt post-deprivation hearing would be adequate. Generally, where the loss, even temporarily, would be severe or catastrophic, the hearing must come first;[276] where a temporary deprivation

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[267] Carey v. Piphus, 435 U.S. 247, 259 (1978).

[268] Fuentes v. Shevin, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. Carey v. Piphus, 435 U.S. 247, 266–67 (1978); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

[269] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950).

[270] Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

[271] Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Robinson v. Hanrahan, 409 U.S. 38 (1974); Greene v. Lindsey, 456 U.S. 444 (1982).

[272] Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[273] Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

[274] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[275] Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972). *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170–71 (1951) (Justice Frankfurter concurring).

[276] Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

would be less severe and the opposing interest is important, the hearing may come later,[277] so long as it is promptly assured.[278] Too, the nature of what must be shown will be taken into account. Where the showing to be established is largely formal or subject to substantial documentary evidence, a post-termination hearing may suffice,[279] while in cases in which the evidence is largely subjective and dependent upon the personal appearance of the claimant the hearing must ordinarily precede the loss and the circumstance may require a more highly structured proceeding.[280] Sometimes, because of the nature of the opposing interest and the circumstances of the determination, the hearing need involve only minimal formality.[281] The hearing requirement does not depend upon an advance showing that the claimant will prevail at such a hearing.[282] While written presentations may be acceptable in some situations, in others the issue of veracity may necessitate oral presentation or oral examination of witnesses, or the petitioner may not have the ability to present his case in writing.[283]

(3) *Impartial Tribunal.* Just as in criminal and quasi-criminal cases,[284] "an impartial decision maker" is an "essential" right in civil proceedings as well.[285] "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."[286] Thus, the conduct of deportation hearings by a person who, while he had not investigated the case heard, was also an investigator who must judge the results of others' investigations just as one of them would some day judge his, raised a substantial problem which was resolved through statutory construction.[287] But

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[277] Arnett v. Kennedy, 416 U.S. 134 (1974); Mathews v. Eldridge, 424 U.S. 319 (1976); Barry v. Barchi, 443 U.S. 55 (1979).

[278] Id. at 66.

[279] Mathews v. Eldridge, 424 U.S. 319, 343–45 (1976); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Mackey v. Montrym, 443 U.S. 1, 13–17 (1979); Barry v. Barchi, 443 U.S. 55, 65–66 (1979).

[280] Goldberg v. Kelly, 397 U.S. 254 (1970).

[281] Goss v. Lopez, 419 U.S. 565 (1975) (temporary suspension of student from school). *See also* Board of Curators v. Horowitz, 435 U.S. 78 (1978).

[282] Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915).

[283] Goldberg v. Kelly, 397 U.S. 254, 266–67 (1970); Mathews v. Eldridge, 424 U.S. 319, 343–45 (1976). *See also* FCC v. WJR, 337 U.S. 265, 275–77 (1949).

[284] Tumey v. Ohio, 273 U.S. 510 (1927); In re Murchison, 349 U.S. 133 (1955).

[285] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[286] Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Schweiker v. McClure, 456 U.S. 188, 195 (1982).

[287] Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

there is a "presumption of honesty and integrity in those serving as adjudicators,"[288] so that the burden is on the objecting party to show a conflict of interest or some other specific reason for disqualification of a specific officer or for disapproval of the system. It is not, without more, a violation of due process to combine investigating and adjudicating functions in the same agency,[289] although the question of combination of functions is a substantial one in administrative law.[290] A showing of bias or of strong implications of bias was deemed made in a case in which the state optometry board, which was made up only of private practitioners, was proceeding against other licensed optometrists for unprofessional conduct, because they were employed by corporations. Since success in the board's effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.[291] However, the Court held that school board members did not have such an official or personal stake in the decision as to disqualify them from making the decision whether to fire teachers who had engaged in a strike against the school system in violation of state law.[292] A lesser standard of impartiality applies to an administrative officer who acts in a prosecutorial role.[293]

(4) *Confrontation and Cross-Examination*. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[294] Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from ero-

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[288] Schweiker v. McClure, 456 U.S. 188, 195 (1982); Withrow v. Larkin, 421 U.S. 35, 47 (1975); United States v. Morgan, 313 U.S. 409, 421 (1941).

[289] Withrow v. Larkin, 421 U.S. 35 (1975).

[290] Id. at 51.

[291] Gibson v. Berryhill, 411 U.S. 564 (1973).

[292] Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976). *Compare* Arnett v. Kennedy, 416 U.S. 134, 170 n.5 (1974) (Justice Powell), *with* id. at 196–99 (Justice White), and 216 (Justice Marshall).

[293] Marshall v. Jerrico, 446 U.S. 238, 248–50 (1980) (regional administrator assessing fines for child labor violations, with penalties going into fund to reimburse cost of system of enforcing child labor laws). But "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." Id. at 249.

[294] Goldberg v. Kelly, 397 U.S. 254, 269 (1970). *See also* ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93–94 (1913); Willner v. Committee on Character, 373 U.S. 96, 103–04 (1963). *Cf.* § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d).

sion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."[295]

(5) *Discovery*. The Court has never directly confronted this issue, but in one case it did observe in dictum. "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[296] Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference has recommended that all do so.[297] There appear to be no cases, however, holding they must, and there is some authority that they cannot absent congressional authorization.[298]

(6) *Decision on the Record*. [T]he decisionmaker's conclusion as to a recipients' eligibility must rest solely on the legal rules and evidence adduced at the hearing. . . . To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law."[299]

(7) *Counsel*. In *Goldberg v. Kelly*,[300] the Court held that an agency must permit the recipient to be represented by and assisted by counsel. It did not, however, decide that the agency must provide counsel for one unable to afford his own and did not decide that the agency need not do so. In the years since, the right of civil litigants in court and persons before agencies who could not afford retained counsel has excited much controversy, and while quite recently the Court has applied its balancing standard to require a case-by-case determination with respect to the right to appointed

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[295] Greene v. McElroy, 360 U.S. 474, 496–97 (1959). *But see* Richardson v. Perales, 402 U.S. 389 (1971) (where authors of documentary evidence are known to petitioner and he did not subpoena them, he may not complain that agency relied on that evidence). *Cf.* Mathews v. Eldridge, 424 U.S. 319, 343–45 (1976).

[296] Greene v. McElroy, 360 U.S. 474, 496 (1959), *quoted with approval in* Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

[297] Recommendations and Reports of the Administrative Conference of the United States 571 (1968–1970).

[298] FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964); Fairbank v. Hardin, 429 F.2d 264, 268 (9th Cir.), cert. denied, 400 U.S. 943 (1970).

[299] Goldberg v. Kelly, 397 U.S. 254, 271 (1970). The exclusiveness of the record is fundamental in administrative law. *See* 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(e). However, one must show not only that the agency used *ex parte* evidence but that he was prejudiced thereby. Market Street Ry. v. Railroad Comm'n, 324 U.S. 548 (1945) (agency decision supported by evidence in record, its decision sustained, disregarding *ex parte* evidence).

[300] 397 U.S. 254, 270–71 (1970).

counsel, the matter seems far from settled. In a case involving a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized as "an extremely important one" the parent's interest, but observed that the State's interest in protecting the welfare of children was likewise very important. The interest in correct factfinding was strong on both sides, but, the Court thought, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no "specially troublesome" substantive or procedural issues had been raised.[301] But what tipped the scale in the Court's decision not to require counsel in this case was the "pre-eminent generalization it drew from its precedents that an indigent has an absolute right to appointed counsel only where he may lose his physical liberty if he loses the litigation.[302] Thus, in all other situations when liberty or property interests are present, the right of an indigent to appointed counsel is to be determined on a case-by-case basis, initially by the trial judge, subject to appellate review.[303] In other due process cases involving parental rights, the Court has held that due process requires special state attention to parental rights,[304] and it is to be supposed that the counsel issue will recur.

PROCEDURAL DUE PROCESS—CRIMINAL

Generally

The Supreme Court's guardianship of state criminal justice systems under the due process clause has never been subject to precise statement of metes and bounds. Rather, the Court in each case must ask whether the challenged practice or policy violates "a fundamental principle of liberty and justice which inheres in the

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[301] Lassiter v. Department of Social Services, 452 U.S. 18 (1981). The decision was a five-to-four one, Justices Stewart, White, Powell, and Rehnquist and Chief Justice Burger in the majority, Justices Blackmun, Brennan, Marshall, and Stevens in dissent. Id. at 35, 59.

[302] Id. at 25–27. The Court purported to draw the distinction from Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no *per se* right to counsel in probation revocation proceedings). To introduce this presumption into the balancing, however, appears to disregard the fact that the first factor of *Mathews v. Eldridge*, upon which the Court (and dissent) relied, relates to the importance of the interest to the person claiming the right, thus, at least in this context, reducing the value of the first *Eldridge* factor.

[303] Id. at 452 U.S., 31–32. The *Mathews v. Eldridge* standards were drafted in the context of the generality of cases and were not intended for case-by-case application *Cf.* 424 U.S. 319, 344 (1976).

[304] E.g., Little v. Streater, 452 U.S. 1 (1981) (indigent entitled to state-funded blood testing in a paternity action the State required to be instituted); Santosky v. Kramer, 455 U.S. 745 (1982) (imposition of higher standard of proof in case involving state termination of parental rights).

very idea of a free government and is the inalienable right of a citizen of such government."[1] The question is whether a claimed right is "implicit in the concept of ordered liberty," whether it partakes "of the very essence of a scheme of ordered liberty."[2] Inevitably, judgment expresses a determination that certain practices do or do not "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[3] More recently, the Court has eschewed as too abstract an inquiry as to whether some procedural safeguard was necessary before a system could be imagined which would be regarded as civilized without that safeguard. Rather, "[t]he recent cases . . . have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. . . . [Therefore the limitations imposed by the Court on the States are] not necessarily fundamental to fairness in every criminal system that might be imagined but [are] fundamental in the context of the criminal processes maintained by the American States."[4]

Applying this analysis the Court in recent years has held that practically all the criminal procedural guarantees of the Bill of Rights—the Fourth, Fifth, Sixth, and Eighth Amendments—contain limitations which are fundamental to state criminal justice systems and that the absence of one or the other particular guarantees denies a suspect or a defendant due process of law.[5] However, the due process clause of the Fourteenth Amendment is not limited to those specific guarantees spelled out in the Bill of Rights,[6] but rather contains protection against practices and policies which may fall short of fundamental fairness without running afoul of a specific provision.[7]

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[1] Twining v. New Jersey, 211 U.S. 78, 106 (1908).
[2] Palko v. Connecticut, 302 U.S. 319, 325 (1937).
[3] Rochin v. California, 342 U.S. 165, 169 (1952).
[4] Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).
[5] Supra, pp. 957–64.
[6] Justice Black thought the Fourteenth Amendment should be limited in this regard to the specific guarantees found elsewhere in the Bill of Rights. *See, e.g.*, In re Winship, 397 U.S. 358, 377 (1970) (dissenting). For Justice Harlan's response, see id. at 372 n.5 (concurring).
[7] In re Winship, 397 U.S. 358 (1970), held that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is a due process requirement. For other recurrences to general due process reasoning, as distinct from reliance on more specific Bill of Rights provisions,

The Elements of Due Process

Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine.—"Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."[8] Acts which are made criminal "must be defined with appropriate definiteness."[9] "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt."[10] Statutes which lack the requisite definiteness or specificity are commonly held "void for vagueness." Such a statute may be pronounced wholly unconstitutional (unconstitutional "on its face"),[11] or, if the statute could be applied to both prohibitable and to protected conduct and its valuable effects outweigh its potential general harm, it could be held unconstitutional as applied.[12] Generally, a vague statute that regulates in the area of First Amendment guarantees will be pronounced wholly void,[13] while one that does not reach such protected conduct will either be upheld because it is applied to clearly proscribable conduct, or voided as applied when the conduct is marginal and the proscription is unclear.[14]

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see, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973); Wardius v. Oregon, 412 U.S. 470 (1973); Mullaney v. Wilbur, 421 U.S. 684 (1975); Estelle v. Williams, 425 U.S. 501 (1976); Henderson v. Kibbe, 431 U.S. 145 (1977); Patterson v. New York, 432 U.S. 197 (1977); Taylor v. Kentucky, 436 U.S. 478 (1978); Kentucky v. Whorton, 441 U.S. 786 (1979); Sandstrom v. Montana, 442 U.S. 510 (1979); Hicks v. Oklahoma, 447 U.S. 343 (1980).

[8] Musser v. Utah, 333 U.S. 95, 97 (1948). "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972), *quoted in* Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 498 (1982).

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

[10] Winters v. New York, 333 U.S. 507, 515–16 (1948). *Cf.* Colten v. Kentucky, 407 U.S. 104, 110 (1972).

[11] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Goguen, 415 U.S. 566 (1974).

[12] Palmer v. City of Euclid, 402 U.S. 544 (1971); Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 494–95 (1982).

[13] Winters v. New York, 333 U.S. 507, 509–10 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

[14] E.g., United States v. National Dairy Corp., 372 U.S. 29 (1963).

The Court voided for vagueness a statute providing that any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who had been convicted at least three times of being a disorderly person, or who had been convicted of any crime in that or any other State, is to be considered a gangster and subject to fine or imprisonment. The Court observed that neither at the common law nor by statute are the words "gang" and "gangster" given definite meaning, that the enforcing agencies and courts were free to construe the terms broadly or narrowly, and that the phrase "known to be a member" was ambiguous. The statute was held void on its face, and the Court refused to allow specification of details in the particular indictment to save it because it was the statute, not the accusation, that prescribed the rule to govern conduct.[15]

Possibly concluding a controversy of long standing with regard to the validity of vagrancy laws as generally written,[16] a unanimous Court in *Papachristou v. City of Jacksonville*[17] struck down for vagueness an ordinance which punished "dissolute persons who go about begging, . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . persons neglecting all lawful business and habitually spending their time by frequenting house of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children. . . ." The ordinance was invalid, said Justice Douglas for the Court, because it did not give fair notice, did not require specific intent to commit an unlawful act, permitted and encouraged arbitrary and erratic arrests and convictions, committed too much discretion to policemen, and criminalized activities which by modern standards are normally innocent. Similarly, an ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by was impermissibly vague; because it encroached on the freedom of assembly it was void on its face.[18] But an ordinance

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[15] Lanzetta v. New Jersey, 306 U.S. 451 (1939); Edelman v. California, 344 U.S. 357 (1953).

[16] E.g., Winters v. New York, 333 U.S. 507, 540 (1948) (Justice Frankfurter dissenting); Edelman v. California, 344 U.S. 357, 362 (1953) (Justice Black dissenting); Hicks v. District of Columbia, 383 U.S. 252 (1966) (Justice Douglas dissenting).

[17] 405 U.S. 156 (1972).

[18] Coates v. City of Cincinnati, 402 U.S. 611 (1971). *See also* Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965). Bouie v. City of Columbia, 378 U.S. 347 (1964), voided conviction on trespass charges arising out of a sit-in at a drugstore lunch counter since the trespass statute did not give fair notice that it was a crime to refuse to leave private premises after being requested to do so. *And see* Kolender

punishing "suspicious persons" was void only as applied to a person engaging in ambiguous conduct which it was possible to fit within the ordinance's definition.[19] A statute authorizing conviction for disorderly conduct of any person who refuses to move on upon police request and who is intent on causing inconvenience, annoyance, or alarm was upheld against facial challenge and as applied to one interfering with police ticketing of a car for valid reasons.[20]

A state statute imposing severe, cumulative punishments upon contractors with the State who pay their workmen less than the "current rate of per diem wages in the locality where the work is performed" was held to be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[21] Similarly, a statute which allowed jurors to require an acquitted defendant to pay the costs of the prosecution, elucidated only by the judge's instruction to the jury that the defendant should only have to pay the costs if it thought him guilty of "some misconduct" though innocent of the crime with which he was charged, was found to fall short of the requirements of due process.[22] But the Court sustained as neither too vague nor indefinite a state law which provided for commitment of a psychopathic personality by probate action akin to a lunacy proceeding and which had been construed by the state court as applying to those persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The underlying conditions—habitual course of misconduct in sexual matters and lack of power to control impulses and likelihood of attack on others—were viewed as calling for evidence of past conduct pointing to probable consequences and as being as susceptible of proof as many of the criteria constantly applied in criminal proceedings.[23]

Other Aspects of Statutory Notice.—Conceptually related to the problem of definiteness in criminal statutes is the problem of the requisite notice a person must have that a statute commands that something not be done or alternatively that unless something is done criminal liability will result. Ordinarily, it can be said that ignorance of the law affords no excuse, that everyone is presumed to know that certain things may not be done. Moreover, in other

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v. Lawson, 461 U.S. 352 (1983) (requirement that person detained in valid *Terry* stop provide "credible and reliable" identification is facially void as encouraging arbitrary enforcement).

[19] Palmer v. City of Euclid, 402 U.S. 544 (1971).

[20] Colten v. Kentucky, 407 U.S. 104 (1972).

[21] Connally v. General Construction Co., 269 U.S. 385 (1926).

[22] Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

[23] Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940).

instances, the subject matter or conduct may be sufficient to alert one that there are regulatory laws which must be observed.[24] In still other instances, the requirement of "scienter" may take care of the problem in that there may be a statutory requirement of intent expressed through some form of the word "willful,"[25] but the Court has so far failed in dealing with those cases involving strict liability to develop the implications of the *mens rea* requirement.[26] There remains the case of *Lambert v. California*,[27] invalidating a municipal code that made it a crime for anyone who had ever been convicted of a felony to remain in the city for more than five days without registering. Emphasizing that the act of being in the city was not itself blameworthy, the Court voided the conviction, holding that the failure to register was quite "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."[28]

Entrapment.—Certain criminal offenses, because they are consensual actions taken between and among willing parties, present police with difficult investigative problems. Some of that difficulty may be alleviated through electronic and other surveillance, which is covered by the search and seizure provisions of the Fourth Amendment, and in other respects informers may be utilized, which may implicate several constitutional provisions. Sometimes, however, police agents may "encourage" persons to engage in criminal behavior, by seeking to buy from them or to sell to them narcotics or contraband or by seeking to determine if public employees or officers are corrupt by offering them bribes. The Court has dealt with this issue in terms of the "entrapment" defense, though it is unclear whether the basis of the defense is one of statutory construction—the legislature would not have intended to punish conduct induced by police agents—one of supervisory authority of the federal courts to deter wrongful police conduct, or one of due process command.[29]

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[24] E.g., United States v. Freed, 401 U.S. 601 (1971).

[25] E.g., Boyce Motor Lines v. United States, 342 U.S. 337 (1952); Colautti v. Franklin, 439 U.S. 379, 395 (1979). *Cf.* Screws v. United States, 325 U.S. 91, 101–03 (1945) (plurality opinion).

[26] E.g., Morissette v. United States, 342 U.S. 246 (1952).

[27] 355 U.S. 225 (1957).

[28] Id. at 228, 229–30.

[29] For a thorough evaluation of the basis for and the nature of the entrapment defense, see Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice*

The Court has employed the so-called "subjective approach" to evaluating the defense of entrapment. This subjective approach follows a two-pronged analysis. First, the question is asked whether the offense was induced by a government agent. Second, if the government has induced the defendant to break the law, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."[30] If the defendant can be shown to have been ready and willing to commit the crime whenever the opportunity presented itself, the defense of entrapment is unavailing, no matter the degree of inducement.[31] On the other hand, "[w]hen the Government's quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the courts should intervene."[32] An "objective approach," while rejected by the Supreme Court, has been advocated by some Justices and recommended for codification

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Dilemma, 1981 SUP. CT. REV. 111. The statutory basis was said to be the ground in the Court's first discussion of the issue, Sorrells v. United States, 287 U.S. 435, 446–49 (1932), and that basis remains the choice of some Justices. Hampton v. United States, 425 U.S. 484, 488–89 (1976) (plurality opinion of Justices Rehnquist and White and Chief Justice Burger). The supervisory power basis was argued by Justice Frankfurter in Sherman v. United States, 356 U.S. 369, 380 (1958) (concurring). Utilization of that power was rejected in United States v. Russell, 411 U.S. 423, 490 (1973), and by the plurality in *Hampton*, supra, 490. The *Hampton* plurality thought the due process clause would never be applicable, no matter what conduct government agents engaged in, unless they violated some protected right of the defendant, and that inducement and encouragement could never do that; Justices Powell and Blackmun, id. at 491, thought that police conduct, even in the case of a predisposed defendant, could be so outrageous as to violate due process. The *Russell* and *Hampton* dissenters did not clearly differentiate between the supervisory power and due process but seemed to believe that both were implicated. Id. at 495 (Justices Brennan, Stewart, and Marshall); *Russell*, supra, 439 (Justices Stewart, Brennan, and Marshall). The Court again failed to clarify the basis for the defense in Mathews v. United States, 485 U.S. 58 (1988), holding that a defendant in a federal criminal case who denies commission of the crime is entitled to assert an "inconsistent" entrapment defense where the evidence warrants, and in Jacobson v. United States, 112 S. Ct. 1535, 1540 (1992) (invalidating a conviction under the Child Protection Act of 1984 because government solicitation induced the defendant to purchase child pornography).

[30] Jacobson v. United States, 112 S. Ct. 1535, 1540 (1992). Here the Court held that the government had failed to prove that the defendant was initially predisposed to purchase child pornography, even though he had become so predisposed following solicitation through an undercover "sting" operation. For several years government agents had sent the defendant mailings soliciting his views on pornography and child pornography, and urging him to obtain materials in order to fight censorship and stand up for individual rights.

[31] Sorrells v. United States, 287 U.S. 435, 451–52 (1932); Sherman v. United States, 356 U.S. 369, 376–78 (1958); Masciale v. United States, 356 U.S. 386, 388 (1958); United States v. Russell, 411 U.S. 423, 432–36 (1973); Hampton v. United States, 425 U.S. 484, 488–489 (1976) (plurality opinion), and id. at 491 (Justices Powell and Blackmun concurring).

[32] Jacobson v. United States, 112 S. Ct. 1535, 1543 (1992).

by Congress and the state legislatures.[33] The objective approach disregards the defendant's predisposition and looks to the inducements used by government agents. If the government employed means of persuasion or inducement creating a substantial risk that the person tempted will engage in the conduct, the defense is available.[34] Typically, entrapment cases have risen in the narcotics area,[35] but more recently, as in the "Abscam" controversy, the focus has been on public corruption and the offering of bribes to public officials.[36]

Criminal Identification Process.—The conduct by police of identification processes seeking to identify the perpetrators of crimes—by lineups, showups, photographic displays, and the like—can raise due process problems. For postindictment lineups and showups conducted before June 12, 1967,[37] for preindictment lineups and showups,[38] and for identification processes at which the defendant is not present,[39] the question of the admissibility of an in-court identification or of testimony about an out-of-court identification is whether there is "a very substantial likelihood of misidentification," and that question must be determined "on the totality of the circumstances."[40]

"Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased

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[33] *See* American Law Institute, MODEL PENAL CODE § 2.13 (Official Draft, 1962); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (Final Draft, 1971).

[34] Sorrells v. United States, 287 U.S. 435, 458–59 (1932) (separate opinion of Justice Roberts); Sherman v. United States, 356 U.S. 369, 383 (1958) (Justice Frankfurter concurring); United States v. Russell, 411 U.S. 423, 441 (1973) (Justice Stewart dissenting); Hampton v. United States, 425 U.S. 484, 496–97 (1976) (Justice Brennan dissenting).

[35] Thus, in *Sorrells* and *Sherman* government agents solicited defendants, in *Russell* the agents supplied an ingredient, which was commonly available, and in *Hampton* the agents supplied an essential and difficult to obtain ingredient.

[36] The defense was rejected as to all the "Abscam" defendants. E.g., United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983); United States v. Williams, 705 F.2d 603 (2d Cir. 1983); United States v. Jannotti, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982).

[37] Stovall v. Denno, 388 U.S. 293 (1967).

[38] Kirby v. Illinois, 406 U.S. 682 (1972).

[39] United States v. Ash, 413 U.S. 300 (1973).

[40] Neil v. Biggers, 409 U.S. 188, 196–201 (1972); Manson v. Brathwaite, 432 U.S. 98, 114–17 (1977). The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *See also* Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969); Coleman v. Alabama, 399 U.S. 1 (1970).

chance of misidentification is gratuitous."[41] But, balancing the factors that it thought furnished the guidance for decision, the Court declined to lay down a *per se* rule of exclusion of an identification because it was obtained under conditions of unnecessary suggestiveness alone, feeling that the fairness standard of due process does not require an evidentiary rule of such severity.[42]

Initiation of the Prosecution.—Indictment by a grand jury is not a requirement of due process; a State may proceed instead by information.[43] Due process does require that, whatever the procedure, a defendant must be given adequate notice of the offense charged against him and for which he is to be tried,[44] even aside from the requirements of the Sixth Amendment. Where, of course, a grand jury is utilized, it must be fairly constituted and free from prejudicial influences.[45]

Fair Trial.—The provisions of the Bill of Rights now applicable to the States contain basic guarantees of a fair trial—right to counsel, right to speedy and public trial, right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the like. But this does not exhaust the requirements of fairness. "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."[46] Conversely, "as applied to a criminal trial, denial of due

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[41] Neil v. Biggers, 409 U.S. 188, 198 (1972).

[42] Manson v. Brathwaite, 432 U.S. 98, 107–14 (1977). The evaluative factors were what the *per se* rule and the less strict rule contributed to excluding unreliable eyewitness testimony from jury consideration, to deterrence of suggestive procedures, and to the administration of justice. The possibility of a *per se* rule in post-*Stovall* cases had been left open in Neil v. Biggers, 409 U.S. 188, 199 (1972). Due process does not require that the in-court hearing to determine whether to exclude a witness' identification as arrived at improperly be out of the presence of the jury. Watkins v. Sowders, 449 U.S. 341 (1981).

[43] Hurtado v. California, 110 U.S. 516 (1884).

[44] Smith v. O'Grady, 312 U.S. 329 (1941) (guilty plea of layman unrepresented by counsel to what prosecution represented as a charge of simple burglary but which was in fact a charge of "burglary with explosives" carrying a much lengthier sentence is void). *See also* Cole v. Arkansas, 333 U.S. 196 (1948) (affirmance by appellate court of conviction and sentence on ground that evidence showed defendant guilty under a section of the statute not charged violated due process); In re Ruffalo, 390 U.S. 544 (1968) (disbarment in proceeding on charge which was not made until after lawyer had testified denied due process); Rabe v. Washington, 405 U.S. 313 (1972) (affirmance of obscenity conviction because of the context in which a movie was shown—grounds neither covered in the statute nor listed in the charge—was invalid).

[45] Norris v. Alabama, 294 U.S. 587 (1935); Cassell v. Texas, 339 U.S. 282 (1950); Eubanks v. Louisiana, 356 U.S. 584 (1958); Hernandez v. Texas, 347 U.S. 475 (1954); Pierre v. Louisiana, 306 U.S. 354 (1939). *See* infra, pp. 1854–57. On prejudicial publicity, see Beck v. Washington, 369 U.S. 541 (1962).

[46] Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934). *See also* Buchalter v. New York, 319 U.S. 427, 429 (1943).

process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[47]

Bias or prejudice either inherent in the structure of the trial system or as imposed by external events will deny one's right to a fair trial. Thus, in *Tumey v. Ohio*[48] it was held to violate due process to vest trial of offenders in a judge who received, in addition to his salary, the costs imposed on a convicted defendant, and who was also mayor of the municipality which received part of the money collected in fines. The influence of contemptuous misbehavior in court upon the impartiality of the presiding judge who may cite for contempt and sentence contemnors has divided the Court.[49] Due process is also violated by the participation of a biased or otherwise partial juror, but there is no presumption that jurors who are potentially compromised are in fact prejudiced; ordinarily the proper avenue of relief is a hearing at which the juror may be questioned and the defense afforded an opportunity to prove actual bias.[50] Exposure to pretrial publicity does not necessarily bias jurors. Thus, a trial judge's refusal to question potential jurors about the contents of news reports to which they had been exposed did not violate the defendant's right to due process, it being sufficient that the judge on *voir dire* asked the jurors whether they could put aside what they had heard about the case, listen to the evidence with an open mind, and render an impartial verdict.[51] It is not a denial of due process for the prosecution to

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[47] Lisenba v. California, 314 U.S. 219, 236 (1941).

[48] 273 U.S. 510 (1927). *See also* Ward v. Village of Monroeville, 409 U.S. 57 (1972). *But see* Dugan v. Ohio, 277 U.S. 61 (1928). Bias or prejudice of an appellate judge can also deprive a litigant of due process. Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813 (1986) (failure of state supreme court judge with pecuniary interest—a pending suit on an indistinguishable claim—to recuse).

[49] E.g., Fisher v. Pace, 336 U.S. 155 (1949); Ungar v. Sarafite, 376 U.S. 575 (1964); Holt v. Virginia, 381 U.S. 131 (1965); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Johnson v. Mississippi, 403 U.S. 212 (1971); Taylor v. Hayes, 418 U.S. 488 (1974). *See generally* Illinois v. Allen, 397 U.S. 337 (1970). In the context of alleged contempt before a judge acting as a one-man grand jury, the Court reversed criminal contempt convictions, saying: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1955).

[50] Smith v. Phillips, 455 U.S. 209 (1982) (juror had job application pending with prosecutor's office during trial). *See also* Remmer v. United States, 347 U.S. 227 (1954) (bribe offer to sitting juror); Dennis v. United States, 339 U.S. 162, 167–72 (1950) (government employees on jury).

[51] Mu'Min v. Virginia, 500 U.S. 415 (1991). For discussion of the requirements of jury impartiality about capital punishment, see discussion under Sixth Amendment, supra p. 1415.

call the jury's attention to the defendant's prior criminal record when the object is to enable the jury, which has the sentencing function as well as the guilt-determination function, once it has determined guilt or innocence and if the former, to increase the sentence which would otherwise be given under a recidivist statute.[52]

Mob domination of a trial so as to rob the jury of its judgment on the evidence presented, is, of course, a classic due process violation.[53] More recently, concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the Court to instruct trial courts that they should be vigilant to guard against such prejudice and to curb both the publicity and the jury's exposure to it.[54] A state rule permitting the televising of certain trials was struck down on the grounds that the harmful potential effect on the jurors was substantial, that the testimony presented at trial may be distorted by the multifaceted influence of television upon the conduct of witnesses, that the judge's ability to preside over the trial and guarantee fairness is considerably encumbered to the possible detriment of fairness, and that the defendant is likely to be harassed by his television exposure.[55] Subsequently, however, in part because of improvements in technology which caused much less disruption of the trial process and in part because of the lack of empirical data showing that the mere presence of the broadcast media in the courtroom necessarily has an adverse effect on the process, the Court has held that due process does not altogether preclude the televising of state criminal trials.[56]

It is permissible for the State to require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, but due process requires reciprocal discovery in such circumstances, necessitating that the State give defendant pretrial notice of its rebuttal evidence on the alibi issue.[57] Because of the possible impairment of the presumption of innocence in the minds of the jurors, due process is violated when the accused is compelled to stand trial before a jury while

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[52] Spencer v. Texas, 385 U.S. 554 (1967).

[53] Frank v. Mangum, 237 U.S. 309 (1915); Moore v. Dempsey, 261 U.S. 86 (1923).

[54] Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); *But see* Stroble v. California, 343 U.S. 181 (1952); Murphy v. Florida, 421 U.S. 794 (1975).

[55] Estes v. Texas, 381 U.S. 532 (1965).

[56] Chandler v. Florida, 449 U.S. 560 (1981). The decision was unanimous but Justices Stewart and White concurred on the basis that *Estes* had established a per se constitutional rule which had to be overruled, id. at 583, 586, contrary to the Court's position. Id. at 570–74.

[57] Wardius v. Oregon, 412 U.S. 470 (1973).

dressed in identifiable prison clothes.[58] Ordinary evidentiary rules of criminal trials may in some instances deny a defendant due process. Thus, the combination in a trial of two rules (1) that denied defendant the right to cross-examine his own witness, whom he had called because the prosecution would not, in order to elicit evidence exculpatory to defendant and (2) that denied defendant the right to introduce the testimony of witnesses about matters told them out of court on the ground the testimony would be hearsay, under all the circumstances, denied defendant his constitutional right to present his own defense in a meaningful way.[59] Basic to due process is the right to testify in one's own defense; this right may not be restricted, the Court has held, by a state's *per se* rule excluding all hypnotically refreshed testimony.[60] Even though the burden on defendant is heavy to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction, under some circumstances it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence.[61] It does not deny a de-

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[58] Estelle v. Williams, 425 U.S. 501 (1976). The convicted defendant was denied *habeas* relief, however, because of failure to object at trial. *But cf.* Holbrook v. Flynn, 475 U.S. 560 (1986) (presence in courtroom of uniformed state troopers serving as security guards was not the same sort of inherently prejudicial situation).

[59] Chambers v. Mississippi, 410 U.S. 284 (1973). *See also* Davis v. Alaska, 415 U.S. 786 (1974) (refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, in order to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid); Crane v. Kentucky, 476 U.S. 683 (1986) (exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession).

[60] Rock v. Arkansas, 483 U.S. 44 (1987).

[61] Taylor v. Kentucky, 436 U.S. 478 (1978). However, an instruction on the presumption of innocence need not be given in every case, Kentucky v. Whorton, 441 U.S. 786 (1979), the Court reiterating that the totality of the circumstances must be looked to in order to determine if failure to so instruct denied due process. The circumstances emphasized in *Taylor* included the skeletal instruction on burden of proof combined with the prosecutor's remarks in his opening and closing statements inviting the jury to consider the defendant's prior record and his indictment in the present case as indicating guilt. *See also* Sandstrom v. Montana, 442 U.S. 510 (1979) (instructing jury trying person charged with "purposely or knowingly" causing victim's death that "law presumes that a person intends the ordinary consequences of his voluntary acts" denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event State would not have carried its burden of proving guilt). *And see* Cupp v. Naughten, 414 U.S. 141 (1973); Henderson v. Kibbe, 431 U.S. 145, 154–55 (1973). For other cases applying *Sandstrom*, *see* Francis v. Franklin, 471 U.S. 307 (1985) (contradictory but ambiguous instruction not clearly explaining state's burden of persuasion on intent does not erase *Sandstrom* error in earlier part of charge); Rose v. Clark, 478 U.S. 570 (1986) (*Sandstrom* error can in some circumstances constitute harmless error under principles of Chapman v. California, 386 U.S. 18 (1967)). Similarly, improper arguments by a prosecutor do not necessarily constitute "plain error," and a reviewing court may consider in the context of the entire record of the

fendant due process to subject him initially to trial before a nonlawyer police court judge when there is a later trial *de novo* available under the State's court system.[62]

Guilty Pleas.—A defendant may plead guilty instead of insisting that the prosecution prove him guilty. There are a number of different reasons why a defendant may be willing to plead guilty, perhaps because of overwhelming evidence against him, perhaps because, while the evidence leaves the outcome in doubt, should he go to trial and be convicted his sentence will be more severe than if he pleads guilty, perhaps to secure some other advantage. Often the defendant and his attorney engage in "plea bargaining" with the prosecution so that he is guaranteed a light sentence or is allowed to plead to a lesser offense. While the government may not structure its system so as to coerce a guilty plea,[63] a guilty plea that is entered voluntarily, knowingly, and understandingly, even to obtain an advantage, is sufficient to overcome constitutional objections.[64] The guilty plea and the often concomitant plea bargain are important and necessary components of the criminal justice system,[65] and it is not impermissible for a prosecutor during such plea bargains to put a defendant to a hard choice, requiring him to forego his right to go to trial in return for escaping what is likely to be a much more severe penalty if he does elect to go to trial.[66]

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trial the trial court's failure to redress such error in the absence of contemporaneous objection. United States v. Young, 470 U.S. 1 (1985).

[62] North v. Russell, 427 U.S. 328 (1976).

[63] United States v. Jackson, 390 U.S. 570 (1968).

[64] North Carolina v. Alford, 400 U.S. 25 (1971); Parker v. North Carolina, 397 U.S. 790 (1970). *See also* Brady v. United States, 397 U.S. 742 (1970). A guilty plea will ordinarily waive challenges to alleged unconstitutional police practices occurring prior to the plea, unless the defendant can show that the plea resulted from incompetent counsel. Tollett v. Henderson, 411 U.S. 258 (1973); Davis v. United States, 411 U.S. 233 (1973). *But see* Blackledge v. Perry, 417 U.S. 21 (1974). The State can permit pleas of guilty in which the defendant reserves the right to raise constitutional questions on appeal, and federal *habeas* courts will honor that arrangement. Lefkowitz v. Newsome, 420 U.S. 283 (1975). Release-dismissal agreements, pursuant to which the prosecution agrees to dismiss criminal charges in exchange for the defendant's agreement to release his right to file a civil action for alleged police or prosecutorial misconduct, are not *per se* invalid. Town of Newton v. Rumery, 480 U.S. 386 (1987).

[65] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[66] Bordenkircher v. Hayes, 434 U.S. 357 (1978). Charged with forgery, Hayes was informed during plea negotiations that if he would plead guilty the prosecutor would recommend a five-year sentence; if he did not plead guilty, the prosecutor would also seek an indictment under the habitual criminal statute under which Hayes, because of two prior felony convictions, would receive a mandatory life sentence if convicted. Hayes refused to plead, was reindicted, and upon conviction was sentenced to life. Four Justices dissented, id. at 365, 368, contending that the Court had watered down North Carolina v. Pearce, 395 U.S. 711 (1969). *See also* United States v. Goodwin, 457 U.S. 368 (1982).

The court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly,[67] and "the adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[68]

Prosecutorial Misconduct.—When a conviction is obtained by the presentation of testimony known to the prosecuting authorities to have been perjured, due process is violated. The clause "cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."[69] The quoted language was dictum in the case in which it was uttered,[70] but the principle enunciated has been utilized to require state officials to controvert allegations of convicted persons that knowingly false tes-

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[67] Boykin v. Alabama, 395 U.S. 238 (1969). In Henderson v. Morgan, 426 U.S. 637 (1976), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily, in the constitutional sense, entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt in the second degree; consequently no showing was made that he knowingly was admitting such intent. "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Id. at 645 n.13. *See also* Blackledge v. Allison, 431 U.S. 63 (1977).

[68] Santobello v. New York, 404 U.S. 257, 262 (1971). Defendant and a prosecutor reached agreement on a guilty plea in return for no sentence recommendation by the prosecution. At the sentencing hearing months later, a different prosecutor recommended the maximum sentence, and that sentence was imposed. The Court vacated the judgment, holding that the prosecutor's entire staff was bound by the promise. Prior to the plea, however, the prosecutor may withdraw his first offer, and a defendant who later pled guilty after accepting a second, less attractive offer has no right to enforcement of the first agreement. Mabry v. Johnson, 467 U.S. 504 (1984).

[69] Mooney v. Holahan, 294 U.S. 103, 112 (1935).

[70] The Court dismissed the petitioner's suit on the ground that adequate process existed in the state courts to correct any wrong and that petitioner had not availed himself of it. A state court subsequently appraised the evidence and ruled that the allegations had not been proved in Ex parte Mooney, 10 Cal. 2d 1, 73 P.2d 554 (1937), *cert. denied* 305 U.S. 598 (1938).

timony had been used to convict,[71] and to upset convictions found to have been so procured.[72] Extending the principle, the Court in *Miller v. Pate*[73] upset a conviction obtained after the prosecution had represented to the jury that a pair of men's shorts found near the scene of a sex attack belonged to the defendant and that they were stained with blood; the defendant showed in a *habeas corpus* proceeding that no evidence connected him with the shorts and furthermore that the shorts were not in fact bloodstained, and that the prosecution had known these facts.

Furthermore, in *Brady v. Maryland*,[74] the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In that case, the prosecution had suppressed an extrajudicial confession of defendant's accomplice that he had actually committed the murder; the accomplice's confession could have influenced the jury's determination of punishment but not its judgment of guilt. But this beginning toward the development of criminal discovery was not carried forward,[75] and the Court has waivered in its application of *Brady*.

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[71] Pyle v. Kansas, 317 U.S. 213 (1942); White v. Ragen, 324 U.S. 760 (1945). *See also* New York ex rel. Whitman v. Wilson, 318 U.S. 688 (1943); Ex parte Hawk, 321 U.S. 114 (1914). *But see* Hysler v. Florida, 315 U.S. 411 (1942); Lisenba v. California, 314 U.S. 219 (1941).

[72] Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957). In the former case, the principal prosecution witness was defendant's accomplice, and he testified that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but did nothing to correct the false testimony. *See also* Giglio v. United States, 405 U.S. 150 (1972) (same). In the latter case, involving a husband's killing of his wife because of her infidelity, a prosecution witness testified at the *habeas corpus* hearing that he told the prosecutor that he had been intimate with the woman but that the prosecutor had told him to volunteer nothing of it, so that at trial he had testified his relationship with the woman was wholly casual. In both cases, the Court deemed it irrelevant that the false testimony had gone only to the credibility of the witness rather than to the defendant's guilt. What if the prosecution should become aware of the perjury of a prosecution witness following the trial? *Cf.* Durley v. Mayo, 351 U.S. 277 (1956). *But see* Smith v. Phillips, 455 U.S. 209, 218–21 (1982) (prosecutor's failure to disclose that one of the jurors has a job application pending before him, thus rendering him possibly partial, does not go to fairness of the trial and due process is not violated).

[73] 386 U.S. 1 (1967).

[74] 373 U.S. 83, 87 (1963). In Jencks v. United States, 353 U.S. 657 (1957), in the exercise of its supervisory power over the federal courts, the Court held that the defense was entitled to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses during the investigatory stage. *Cf.* Scales v. United States, 367 U.S. 203, 257–58 (1961). A subsequent statute modified but largely codified the decision and was upheld by the Court. Palermo v. United States, 360 U.S. 343 (1959), sustaining 18 U.S.C. § 3500.

[75] See the division of opinion in Giles v. Maryland, 386 U.S. 66 (1967).

In finding *Brady* inapplicable because the evidence withheld was not material and not exculpatory, the Court in *Moore v. Illinois,*[76] restated the governing principles. "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."

In *United States v. Agurs,*[77] the Court summarized and somewhat expanded the prosecutor's obligation to disclose to the defense exculpatory evidence in his possession, even in the absence of a request, or upon a general request, by defendant. The obligation is expressed in a tripartite test of materiality of the exculpatory evidence in the context of the trial record. First, if the prosecutor knew or should have known that testimony given to the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[78] Second, if the defense specifically requested certain evidence and the prosecutor withheld it, the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[79] Third (the new law created in *Agurs*), if the defense did not make a request at all, or simply asked for "all *Brady* material" or for "anything exculpatory," a duty resides in the prosecution to reveal to the defense obviously exculpatory evidence; if the prosecutor does not reveal it, reversal of a conviction may be required, but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt.[80]

A prosecutor does not violate the due process clause when, in negotiating with a defendant to obtain a guilty plea or some other action that will lessen the trial burden, such as trial before a judge

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[76] 408 U.S. 786, 794–95 (1972). Joining Justice Blackmun's opinion were Justices Brennan, White, Rehnquist, and Chief Justice Burger. Dissenting were Justices Douglas, Stewart, Marshall, and Powell. Id. at 800.

[77] 427 U.S. 97 (1976).

[78] Id. at 103–04. This situation is the *Mooney v. Holohan* type of case.

[79] Id. at 104–06. This the *Brady* situation.

[80] Id. at 106–14. This was the *Agurs* fact situation. Similarly, there is no obligation that law enforcement officials preserve breath samples which have been utilized in a breath-analysis test; the *Agurs* materiality standard is met only by evidence which "possess[es] an exculpatory value . . . apparent before [it] was destroyed, and also [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984). *See also* Arizona v. Youngblood, 488 U.S. 51 (1988) (negligent failure to refrigerate and otherwise preserve potentially exculpatory physical evidence from sexual assault kit does not violate a defendant's due process rights absent bad faith on the part of the police).

rather than jury, he threatens and carries out the threat to seek a more severe sentence, either by charging a greater offense or recommending a longer sentence.[81] But the prosecutor does deny due process if he penalizes the assertion of a right or privilege by the defendant by charging more severely or recommending a longer sentence.[82] The distinction appears to represent very fine line-drawing, but it appears to be one the Court is committed to.

Proof, Burden of Proof, and Presumptions.—The due process clauses of the Fifth and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[83] "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"[84] In many past cases, this standard was assumed to be the required one,[85] but because it was so widely accepted only recently has the Court had the opportunity to pronounce it guaranteed by due process.[86] The presumption of inno-

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[81] Bordenkircher v. Hayes, 434 U.S. 357 (1978); United States v. Goodwin, 457 U.S. 368 (1982). In the former case, during plea negotiations, the prosecutor told defendant that if he did not plead guilty to the charges he would bring additional charges, and he did so upon defendant's continued refusal. In the latter case, defendant was charged with a misdemeanor and could have been tried before a magistrate; he refused to plead guilty and sought a jury trial in district court. The Government obtained a four-count felony indictment based upon the same conduct and acquired a conviction.

[82] Blackledge v. Perry, 417 U.S. 21 (1974). Defendant was convicted in an inferior court of a misdemeanor. He had a right to a *de novo* trial in superior court, but when he exercised the right the prosecutor obtained a felony indictment based upon the same conduct. The distinction the Court draws between this case and *Bordenkircher* and *Goodwin* is that of pretrial conduct, in which vindictiveness is not likely, and posttrial conduct, in which vindictiveness is more likely and is not permitted. *Accord*, Thigpen v. Roberts, 468 U.S. 27 (1984).

[83] In re Winship, 397 U.S. 358, 364 (1970).

[84] Id. at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). Justice Harlan's *Winship* concurrence, id. at 368, proceeded on the basis that inasmuch as there is likelihood of error in any system of reconstructing past events, the error of convicting the innocent should be reduced to the greatest extent possible through the use of the reasonable doubt standard.

[85] Miles v. United States, 103 U.S. 304, 312 (1881); Davis v. United States, 160 U.S. 469, 488 (1895); Holt v. United States, 218 U.S. 245, 253 (1910); Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

[86] In addition to *Winship*, *see also* Estelle v. Williams, 425 U.S. 501, 503 (1976); Henderson v. Kibbe, 431 U.S. 145, 153 (1977); Ulster County Court v. Allen, 442 U.S. 140, 156 (1979); Sandstorm v. Montana, 442 U.S. 510, 520–24 (1979). On the interrelated concepts of the burden of the prosecution to prove guilt beyond a reasonable doubt and defendant's entitlement to a presumption of innocence, *see* Taylor

cence is valuable in assuring defendants a fair trial,[87] and it operates to ensure that the jury considers the case solely on the evidence.[88]

The Court has long held it would set aside under the due process clause convictions that are supported by no evidence at all,[89] but *Winship* necessitated a reconsideration of whether it should in reviewing state cases weigh the sufficiency of the evidence. Thus, in *Jackson v. Virginia*,[90] it held that federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. The question the reviewing court is to ask itself is not whether *it* believes the evidence at the trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[91]

Inasmuch as due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, the Court held in *Mullaney v. Wilbur*[92] that it was a denial of this constitutional guarantee to require a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter. The Court indicated that a balancing of interests test was to be employed to determine when the due process clause re-

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v. Kentucky, 436 U.S. 478, 483–86 (1978), and Kentucky v. Whorton, 441 U.S. 786 (1979).

[87] E.g., Deutch v. United States, 367 U.S. 456, 471 (1961). *See also* Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam) (jury instruction that explains "reasonable doubt" as doubt that would give rise to a "grave uncertainty," as equivalent to a "substantial doubt," and as requiring "a moral certainty," suggests a higher degree of certainty than is required for acquittal, and therefore violates the Due Process Clause).

[88] Holt v. United States, 218 U.S. 245 (1910); Agnew v. United States, 165 U.S. 36 (1897). These cases overturned Coffin v. United States, 156 U.S. 432, 460 (1895), in which the Court held that the presumption of innocence was evidence from which the jury could find a reasonable doubt.

[89] Thompson v. City of Louisville, 362 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961); Taylor v. Louisiana, 370 U.S. 154 (1962); Barr v. City of Columbia, 378 U.S. 146 (1964); Johnson v. Florida, 391 U.S. 596 (1968). *See also* Chessman v. Teets, 354 U.S. 156 (1957).

[90] 443 U.S. 307 (1979).

[91] Id. at 316, 318–19. On a somewhat related point, the Court has ruled that a general guilty verdict on a multiple-object conspiracy need not be set aside if the evidence is inadequate to support conviction as to one of the objects of the conspiracy, but is adequate to support conviction as to another. Griffin v. United States, 112 U.S. 466 (1991).

[92] 421 U.S. 684 (1975). *See also* Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979).

quired the prosecution to carry the burden and when some part of the burden might be shifted to the defendant, but the decision called into question the practice in many States under which some burdens of persuasion were borne by the defense, and raised the prospect that the prosecution must bear all burdens of persuasion, a significant and weighty task given the large numbers of affirmative defenses.

But the Court soon summarily rejected the argument that *Mullaney* means that the prosecution must negate the insanity defense,[93] and in full-scale consideration upheld a state statute that provided that an intentional killing is murder but permitted the defendant to assert "extreme emotional disturbance" as an affirmative defense which, if proved by the defense by a preponderance of the evidence, would reduce the murder offense to manslaughter.[94] According to the Court, the constitutional deficiency in *Mullaney* was that the statute made malice an element of the offense but permitted malice to be presumed upon proof of the other elements and required the defendant to prove the absence of malice. In *Patterson* the statute obligated the State to prove each element of the offense (the death, the intent to kill, and the causation) beyond a reasonable doubt, but allowed the defendant to present an affirmative defense that would reduce the degree of the offense, and as to which the defendant bears the burden of persuasion by a preponderance of the evidence. The decisive issue, then, was whether the statute required the state to prove beyond a reasonable doubt each element of the offense. So defined, the distinction and the constitutional mandate are formalistic, and the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses.[95] Also formalistic is the

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[93] Rivera v. Delaware, 429 U.S. 877 (1976), dismissing as not presenting a substantial federal question an appeal from a holding that *Mullaney* did not prevent a State from placing on the defendant the burden of proving insanity by a preponderance of the evidence. *See* Patterson v. New York, 432 U.S. 197, 202–05 (1977) (explaining the import of *Rivera*). Justice Rehnquist and Chief Justice Burger concurring in *Mullaney*, 421 U.S. at 704, 705, had argued that the case did not require any reconsideration of the holding in Leland v. Oregon, 343 U.S. 790 (1952), that the defense may be required to prove insanity beyond a reasonable doubt.

[94] Patterson v. New York, 432 U.S. 197 (1977).

[95] Dissenting in *Patterson*, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold that as to those facts which historically have made a substantial difference in the punishment and stigma flowing from a criminal act the State always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. Id. at 216. *Patterson* was followed in Martin v. Ohio, 480 U.S. 228 (1987) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is "prior calculation and design"). Justice Powell,

distinction between elements of the crime and sentencing factors; a state may treat as a sentencing consideration provable by a preponderance of the evidence the fact that the defendant "visibly possessed a firearm" during commission of the offense.[96]

Quite closely related is the issue of statutory presumptions; these generally provide for the proof of the presumed fact, an element of a crime, by the establishment of another fact, the basic fact.[97] In *Tot v. United States*,[98] the Court held that a statutory presumption was valid under the due process clause if it met a "rational connection" test. "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience." In *Leary v. United States*,[99] however, the due process test was stiffened to require that for such a "rational connection" to exist, it must "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Thus, a provision which permitted a jury to infer from defendant's possession of marijuana his knowledge of its illegal importation was voided. A lengthy canvass of factual materials established to the Court's satisfaction that while the greater part of marijuana consumed here is of foreign origin there was still a good amount produced domestically and there was thus no way to assure that the majority of those possessing marijuana have any reason to know their marijuana is imported.[100] The Court left open the question whether a presumption which survived the "rational connection" test "must also satisfy the criminal 'reasonable doubt'

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again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. Id. at 236, 240.

[96] McMillan v. Pennsylvania, 477 U.S. 79 (1986) (the finding increased the minimum sentence that could be imposed but did not affect the maximum sentence).

[97] *See, e.g.*, Yee Hem v. United States, 268 U.S. 178 (1925) (upholding statute that proscribed possession of smoking opium that had been illegally imported and authorized jury to presume illegal importation from fact of possession); Manley v. Georgia, 279 U.S. 1 (1929) (invalidating statutory presumption that every insolvency of a bank shall be deemed fraudulent).

[98] 319 U.S. 463, 467 (1943) (voiding presumption of transportation of firearm in interstate commerce from possession). *Compare* United States v. Gainey, 380 U.S. 63 (1965) (upholding presumption from presence at site of illegal still that defendant was "carrying on" or aiding in "carrying on" its operation), *with* United States v. Romano, 382 U.S. 136 (1965) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still).

[99] 395 U.S. 6, 36 (1969).

[100] Id. at 37–54. While some of the reasoning in *Yee Hem*, supra n.97, was disapproved, it was factually distinguished as involving users of "hard" narcotics.

standard if proof of the crime charged or an essential element thereof depends upon its use."[101]

In its most recent case, a closely divided Court drew a distinction between mandatory presumptions, which a jury must accept, and permissive presumptions, which may be presented to the jury as part of all the evidence to be considered. With respect to mandatory presumptions, "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." But, with respect to permissive presumptions, "the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted."[102] Thus, because the jury was told it had to believe in defendants' guilt beyond a reasonable doubt and that it could consider the inference, due process was not violated by the application of the statutory presumption that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle.[103]

The division of the Court in these cases and in the *Mullaney v. Wilbur* line of cases clearly shows the unsettled doctrinal nature of the issues.

Sentencing.—In *Townsend v. Burke*[104] the Court overturned a sentence imposed on an uncounseled defendant by a judge who

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[101] Id. at 36 n.64. The matter was also left open in Turner v. United States, 396 U.S. 398 (1970) (judged by either "rational connection" or "reasonable doubt," a presumption that the possessor of heroin knew it was illegally imported was valid, but the same presumption with regard to cocaine was invalid under the "rational connection" test because a great deal of the substance was produced domestically), and in Barnes v. United States, 412 U.S. 837 (1973) (under either test a presumption that possession of recently stolen property, if not satisfactorily explained, is grounds for inferring possessor knew it was stolen satisfies due process).

[102] Ulster County Court v. Allen, 442 U.S. 140, 166–67 (1979).

[103] The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. Id. at 168 (Justices Powell, Brennan, Stewart, and Marshall). *See also* Estelle v. McGuire, 112 S. Ct. 475 (1991) (upholding a jury instruction that, to dissenting Justices O'Connor and Stevens, id. at 484, seemed to direct the jury to draw the inference that evidence that a child had been "battered" in the past meant that the defendant, the child's father, had necessarily done the battering).

[104] 334 U.S. 736, 740–41 (1948). In Hicks v. Oklahoma, 447 U.S. 343 (1980), the jury had been charged in accordance with an habitual offender statute that if it found defendant guilty of the offense charged, which would be a third felony conviction, it should assess punishment at 40 years imprisonment. The jury convicted and gave defendant 40 years. Subsequently, in another case, the habitual offender under

in reciting defendant's record from the bench made several errors and facetious comments. "[W]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." But in the absence of revelations of errors by the sentencing judge, the content of procedural due process at sentencing is vague.

Williams v. New York[105] upheld the imposition of the death penalty although the jury in convicting had recommended mercy, the judge indicating that he was disregarding the recommendation because of information in the presentence report prepared by a probation officer and not shown to the defendant or his counsel. The Court viewed as highly undesirable the restriction of judicial discretion in sentencing by requiring adherence to rules of evidence which would exclude highly relevant and informative material; similarly, disclosure of such information to the defense could well dry up sources which feared retribution or embarrassment. Thus, hearsay and rumors would be considered and there would be no opportunity of rebuttal. Still in the context of capital cases, the Court has now, although by no consistent rationale, limited *Williams*. In *Gardner v. Florida*,[106] the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge sentenced the defendant to death, relying in part on a confidential presentence report which he did not characterize or make available to defense or prosecution. Three Justices found that because death was significantly different from other punishments and because sentencing procedures were subject to higher due process standards than when *Williams* was decided, the report must be made part of the record for review so that the factors motivating imposition of the death penalty may be known, and ordinarily must be made available to the defense. All but one of the other Justices joined the result on various other bases.[107] On the other hand, in *United*

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which Hicks had been sentenced was declared unconstitutional, but Hicks' conviction was affirmed on the basis that his sentence was still within the permissible range open to the jury. The Supreme Court reversed. Hicks was denied due process because he was statutorily entitled to the exercise of the jury's discretion and could have been given a sentence as low as ten years. That the jury might still have given the stiffer sentence was only conjectural. On other due process restrictions on the determination of the applicability of recidivist statutes to convicted defendants, *see* Chewing v. Cunningham, 368 U.S. 443 (1962); Oyler v. Boles, 368 U.S. 448 (1962); and Spencer v. Texas, 385 U.S. 554 (1967). On Eighth Amendment relevance, *see* supra, pp. 1495–96.

[105] 337 U.S. 241 (1949). *See also* Williams v. Oklahoma, 358 U.S. 576 (1959).

[106] 430 U.S. 349 (1977).

[107] Only Justices Stevens, Stewart, and Powell took the position described in the text. Id. at 357–61. Justice Brennan without elaboration thought the result com-

States v. Grayson,[108] a noncapital case, the Court relied heavily on *Williams* in holding that a sentencing judge may properly consider his *belief* that the defendant was untruthful in his trial testimony in deciding to impose a more severe sentence than he would otherwise have imposed. Under the current scheme of individualized indeterminate sentencing, the Court declared, the judge must be free to consider the broadest range of information in assessing the defendant's prospects for rehabilitation; defendant's truthfulness, as assessed by the trial judge from his own observations, is relevant information.[109]

In *Specht v. Patterson*,[110] the Court specifically reaffirmed *Williams*, but declined to apply it, finding that due process had been denied under circumstances significantly different from those of *Williams*. Specht had been convicted of taking indecent liberties, which carried a maximum sentence of ten years, but was sentenced under a sex offenders statute to an indefinite term of one day to life. The sex offenders law, the Court observed, did not make the commission of the particular offense the basis for sentencing. Instead, by triggering a new hearing to determine whether the convicted person was a public threat, an habitual offender, or mentally ill, the law in effect constituted a new charge that must be accompanied by procedural safeguards. *Mempa v. Rhay*[111] held that when sentencing is deferred subject to probation and the terms of probation are allegedly violated so that the convicted defendant is returned for sentencing, he must then be represented by counsel, inasmuch as it is a point in the process where substantial rights of the defendant may be affected. Moreover, in *Kent v. United States*[112] the Court required that before a juvenile court decided to waive jurisdiction and transfer a juvenile to an adult court it must hold a hearing and permit defense counsel to examine the probation officer's report which formed the basis for the court's decision.

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pelled by due process, id. at 364, Justices White and Blackmun thought the result necessitated by the Eighth Amendment, id. at 362, 364, as did Justice Marshall in a different manner. Id. at 365. Chief Justice Burger concurred only in the result, id. at 362, and Justice Rehnquist dissented. Id. at 371. *See also* Lankford v. Idaho, 500 U.S. 110 (1991) (due process denied where judge sentenced defendant to death after judge's and prosecutor's actions misled defendant and counsel into believing that death penalty would not be at issue in sentencing hearing).

[108] 438 U.S. 41 (1978).

[109] *See also* United States v. Tucker, 404 U.S. 443, 446 (1972); Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973). *Cf.* 18 U.S.C. § 3577.

[110] 386 U.S. 605 (1967).

[111] 389 U.S. 128 (1967).

[112] 383 U.S. 541, 554, 561, 563 (1966). *Kent* was ambiguous whether it was based on statutory interpretation or constitutional analysis; In re Gault, 387 U.S. 1 (1967), appears to have constitutionalized the language.

It is a denial of due process for a judge to sentence a convicted defendant on retrial to a longer sentence than he received after the first trial if the object of the sentence is to punish the defendant for having successfully appealed his first conviction or to discourage similar appeals by others.[113] If the judge does impose a longer sentence the second time, he must justify it on the record by showing, for example, the existence of new information meriting a longer sentence.[114]

Because the possibility of vindictiveness in resentencing is *de minimis* when it is the jury that sentences, *Pearce's* requirement that a judge resentencing on a subsequent trial must justify a more severe sentence is inapplicable to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence. The Court concluded that the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial nor the sentence imposed, nor would it feel either the personal or institutional interests of judges leading to efforts to discourage the seeking of new trials.[115] The presumption of vindictiveness is also inapplicable if the first sentence was imposed following a guilty plea. Here the Court reasoned that a trial may well afford the court insights into the nature of the crime and the character of the defendant that were not available following the initial guilty plea.[116]

Due process does not impose any limitation upon the sentence that a legislature may affix to any offense; that function is in the Eighth Amendment.[117]

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[113] North Carolina v. Pearce, 395 U.S. 711 (1969). *Pearce* was held to be nonretroactive in Michigan v. Payne, 412 U.S. 47 (1973). When a State provides a two-tier court system in which one may have an expeditious and somewhat informal trial in an inferior court with an absolute right to trial *de novo* in a court of general criminal jurisdiction if convicted, the second court is not bound by the rule in *Pearce*, inasmuch as the potential for vindictiveness and inclination to deter is not present. Colten v. Kentucky, 407 U.S. 104 (1972). *But see* Blackledge v. Perry, 417 U.S. 21 (1974), discussed supra, p. 1761.

[114] An intervening conviction on other charges for acts committed prior to the first sentencing may justify imposition of an increased sentence following a second trial. Wasman v. United States, 468 U.S. 559 (1984).

[115] Chaffin v. Stynchcombe, 412 U.S. 17 (1973). Justices Stewart, Brennan, and Marshall thought the principle was applicable to jury sentencing and that prophylactic limitations appropriate to the problem should be developed. Id. at 35, 38. Justice Douglas dissented on other grounds. Id. at 35. The *Pearce* presumption that an increased, judge-imposed second sentence represents vindictiveness also is inapplicable if the second trial came about because the trial judge herself concluded that a retrial was necessary due to prosecutorial misconduct before the jury in the first trial. Texas v. McCullough, 475 U.S. 134 (1986).

[116] Alabama v. Smith, 490 U.S. 794 (1989).

[117] Williams v. Oklahoma, 358 U.S. 576, 586–87 (1959). *See also* Collins v. Johnston, 237 U.S. 502 (1915). On recidivist statutes, *see* Graham v. West Virginia, 224

The Problem of the Incompetent or Insane Defendant or Convict.—It is a denial of due process to try or sentence a defendant who is insane or incompetent to stand trial.[118] When it becomes evident during the trial that a defendant is or has become insane, or incompetent to stand trial, the court on its own initiative must conduct a hearing on the issue.[119] What the state must do is to provide the defendant with a chance to prove that he is incompetent to stand trial; there is no further constitutional requirement that the state assume the burden of proving the defendant competent. Due process is not offended, therefore, by a statutory presumption that a criminal defendant is competent to stand trial, or by a requirement that the defendant bear the burden of proving incompetence by a preponderance of the evidence.[120] When a State determines that a person charged with a criminal offense is incompetent to stand trial he cannot be committed indefinitely for that reason. The court's power is to commit him to a period no longer than is necessary to determine whether there is a substantial probability that he will attain his capacity in the foreseeable future. If it is determined that this is not the case, then the State must either release the defendant or institute the customary civil commitment proceeding that would be required to commit any other citizen.[121]

Commitment to a mental hospital of a criminal defendant acquitted by reason of insanity does not offend due process, and the period of confinement may extend beyond the period for which the person could have been sentenced if convicted.[122] The purpose of the confinement is not punishment, but treatment, and the Court explained that the length of a possible criminal sentence "therefore is irrelevant to the purposes of . . . commitment."[123] Thus, the in-

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U.S. 616, 623 (1912); Ughbanks v. Armstrong, 208 U.S. 481, 488 (1908), and, under the Eighth Amendment, Rummel v. Estelle, 445 U.S. 263 (1980).

[118] Pate v. Robinson, 383 U.S. 375, 378 (1966) (citing Bishop v. United States, 350 U.S. 961 (1956)).

[119] Id. For treatment of the circumstances when a trial court should inquire into the mental competency of the defendant, see Drope v. Missouri, 420 U.S. 162 (1975). Also, an indigent who makes a preliminary showing that his sanity at the time of his offense will be a substantial factor in his trial is entitled to a court-appointed psychiatrist to assist in presenting the defense. Ake v. Oklahoma, 470 U.S. 68 (1985).

[120] Medina v. California, 112 S. Ct. 2572 (1992).

[121] Jackson v. Indiana, 406 U.S. 715 (1972).

[122] Jones v. United States, 463 U.S. 354 (1983). The fact that the affirmative defense of insanity need only be established by a preponderance of the evidence, while civil commitment requires the higher standard of clear and convincing evidence, does not render the former invalid; proof beyond a reasonable doubt of commission of a criminal act establishes dangerousness justifying confinement and eliminates the risk of confinement for mere idiosyncratic behavior.

[123] 463 U.S. at 368.

sanity acquittee may be confined for treatment "until such time as he has regained his sanity or is no longer a danger to himself or society."[124] It follows, however, that a state may not indefinitely confine an insanity acquittee who is no longer mentally ill but who has an untreatable personality disorder that may lead to criminal conduct.[125]

The Court held in *Ford v. Wainwright* that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding satisfying the minimum requirements of due process.[126] Those minimum standards are not met when the decision on sanity is left to the unfettered discretion of the governor; rather, due process requires the opportunity to be heard before an impartial officer or board.[127]

Corrective Process: Appeals and Other Remedies.—"An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review."[128] This holding has been recently reaffirmed[129] although the Court has also held that when a State does provide appellate process it may not so condition the privilege as to deny it irrationally to some persons, such as indigents.[130] But it is not the case that a State is

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[124] Id. at 370.

[125] Foucha v. Louisiana, 112 S. Ct. 1780 (1992).

[126] 477 U.S. 399 (1986).

[127] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." Id. at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court's holding.

[128] McKane v. Durston, 153 U.S. 684, 687 (1894). *See also* Andrews v. Swartz, 156 U.S. 272, 275 (1895); Murphy v. Massachusetts, 177 U.S. 155, 158 (1900); Reetz v. Michigan, 188 U.S. 505, 508 (1903).

[129] Griffin v. Illinois, 351 U.S. 12, 18 (1956); id. at 21 (Justice Frankfurter concurring), 27 (dissenting opinion); Ross v. Moffitt, 417 U.S. 600 (1974).

[130] The line of cases begins with Griffin v. Illinois, 351 U.S. 12 (1956), in which it was deemed to violate both the due process and the equal protection clauses for a State to deny to indigent defendants free transcripts of the trial proceedings,

free to have no corrective process at all in which defendants may pursue remedies for federal constitutional violations. In *Frank v. Mangum*,[131] the Court asserted that a conviction obtained in a mob-dominated trial was contrary to due process: "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." Consequently, it has been stated numerous times that the absence of some form of corrective process when the convicted defendant alleges a federal constitutional violation contravenes the Fourteenth Amendment,[132] and it has been held that to burden this process, such as limiting the right to petition for *habeas corpus*, is to deny the convicted defendant his constitutional rights.[133]

The mode by which federal constitutional rights are to be vindicated after conviction is for the government concerned to determine. "Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . In respecting the duty laid upon them . . . States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis*. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at a place of detention. . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated."[134] If a State provides a mode of redress, a defendant must first exhaust that mode, and if unsuccessful may seek relief in federal court; if there is no adquate remedy in state court, the defendant may petition a federal court for relief through a writ of *habeas corpus*.[135]

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which would enable them adequately to prosecute appeals from convictions. *See infra*, pp. 1916–20.

[131] 237 U.S. 309, 335 (1915).

[132] Moore v. Dempsey, 261, U.S. 86, 90, 91 (1923); Mooney v. Holohan, 294 U.S. 103, 113 (1935); New York ex rel. Whitman v. Wilson, 318, U.S. 688, 690 (1943); Young v. Ragan, 337 U.S. 235, 238–39 (1949).

[133] Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945).

[134] Carter v. Illinois, 329 U.S. 173, 175–76 (1946).

[135] Supra, pp. 811–12. Note that in Case v. Nebraska, 381 U.S. 336 (1965), the Court had taken for review a case which raised the issue whether a State could simply omit any corrective process for hearing and determining claims of federal con-

When appellate or other corrective process is made available, inasmuch as it is no less a part of the process of law under which a defendant is held in custody, it becomes subject to scrutiny for any alleged unconstitutional deprivation of life or liberty. At first, the Court seemed content to assume that when a state appellate process formally appeared to be sufficient to correct constitutional errors committed by the trial court, the conclusion by the appellate court that the trial court's sentence of execution should be affirmed was ample assurance that life would not be forfeited without due process of law.[136] But in *Moore v. Dempsey*,[137] while insisting that it was not departing from precedent, the Court directed a federal district court in which petitioners had sought a writ of *habeas corpus* to make an independent investigation of the facts alleged by the petitioners—mob domination of their trial—notwithstanding that the state appellate court had ruled against the legal sufficiency of these same allegations. Indubitably, *Moore* marked the abandonment of the Supreme Court's deference, founded upon considerations of comity, to decisions of state appellate tribunals on issues of constitutionality, and the proclamation of its intention no longer to treat as virtually conclusive pronouncements by the latter that proceedings in a trial court were fair, an abandonment soon made even clearer in *Brown v. Mississippi*[138] and now taken for granted.

Rights of Prisoners.—Until relatively recently the view prevailed that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state."[139] This view is not now the law, and may never have been wholly correct.[140] In 1948 the Court declared that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights";[141] "many," indicated less than "all," and it was clear that the due process and equal protection clauses to some extent do apply to prisoners.[142] More direct acknowledgment of constitutional protection came in 1972: "[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners. We are

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stitutional violations, but it dismissed the case when the State in the interim enacted provisions for such process.

[136] Frank v. Mangum, 237 U.S. 309 (1915).

[137] 261 U.S. 86 (1923).

[138] 297 U.S. 278 (1936).

[139] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

[140] *Cf.* In re Bonner, 151 U.S. 242 (1894).

[141] Price v. Johnston, 334 U.S. 266, 285 (1948).

[142] "There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances. . . ."[143] However, while the Court affirmed that federal courts have the responsibility to scrutinize prison practices alleged to violate the Constitution, at the same time concerns of federalism and of judicial restraint caused the Court to emphasize the necessity of deference to the judgments of prison officials and others with responsibility for administering such systems.[144]

Save for challenges to conditions of confinement of pretrial detainees,[145] the Court has generally treated challenges to prison conditions as a whole under the cruel and unusual punishments clause of the Eighth Amendment,[146] and challenges to particular incidents and practices under the due process clause[147] as well as under more specific provisions, such as the First Amendment speech and religion clauses.[148] Prior to formulating its current approach, the Court recognized several rights of prisoners. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline.[149] They have the right to petition for redress of grievances, which includes access to the courts for purposes of presenting their complaints,[150] and to bring actions in federal courts to recover for damages wrongfully

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[143] Cruz v. Beto, 405 U.S. 319, 321 (1972). *See also* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) (invalidating state prison mail censorship regulations).

[144] Bell v. Wolfish, 441 U.S. 520, 545–548, 551, 555, 562 (1979) (federal prison); Rhodes v. Chapman, 452 U.S. 337, 347, 351–352 (1981).

[145] Bell v. Wolfish, 441 U.S. 520 (1979). Persons not yet convicted of a crime may be detained by government upon the appropriate determination of probable cause and the detention may be effectuated through subjection of the prisoner to the restrictions and conditions of the detention facility. But a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. Therefore, unconvicted detainees may not be subjected to conditions and restrictions that amount to punishment. However, the Court limited its concept of punishment to practices intentionally inflicted by prison authorities and to practices which were arbitrary or purposeless and unrelated to legitimate institutional objectives.

[146] Supra, pp. 1497–99.

[147] E.g., Wolff v. McDonnell, 418 U.S. 539 (1974); Baxter v. Palmigiano, 425 U.S. 308 (1976); Vitek v. Jones, 445 U.S. 480 (1980); Washington v. Harper, 494 U.S. 210 (1990) (prison inmate has liberty interest in avoiding the unwanted administration of antipsychotic drugs).

[148] E.g., Procunier v. Martinez, 416 U.S. 396 (1974); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977). On religious practices and ceremonies, see Cooper v. Pate, 378 U.S. 546 (1964); Cruz v. Beto, 405 U.S. 319 (1972).

[149] Lee v. Washington, 390 U.S. 333 (1968).

[150] Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1978).

done them by prison administrators.[151] And they have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration.

In *Turner v. Safley*,[152] the Court announced a general standard for measuring prisoners' claims of deprivation of constitutional rights. "[W]hen a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[153] Several considerations, the Court indicated, are appropriate in determining reasonableness of a prison regulation. First, there must be a rational relation to a legitimate, content-neutral objective, such as prison security, broadly defined. Availability of other avenues for exercise of the inmate right suggests reasonableness. A further indicium of reasonableness is present if accommodation would have a negative effect on liberty or safety of guards or other inmates. On the other hand, an alternative to regulation "that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests" suggests unreasonableness.[154]

Fourth Amendment protection is incompatible with "the concept of incarceration and the needs and objectives of penal institutions," hence a prisoner has no reasonable expectation of privacy in his prison cell protecting him from "shakedown" searches designed to root out weapons, drugs, and other contraband.[155] Avenues of redress "for calculated harassment unrelated to prison needs" are not totally blocked, the Court indicated; inmates may still seek protection in the Eighth Amendment or in state tort law.[156] Existence of "a meaningful postdeprivation remedy" for unauthorized, intentional deprivation of an inmate's property by prison personnel protects the inmate's due process rights.[157] Due process is not impli-

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[151] Haines v. Kerner, 404 U.S. 519 (1972); Preiser v. Rodriguez, 411 U.S. 475 (1973).

[152] 482 U.S. 78 (1987) (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child).

[153] 482 U.S. at 89.

[154] Id. at 91.

[155] Hudson v. Palmer, 468 U.S. 517, 526 (1984); Block v. Rutherford, 468 U.S. 576 (1984) (holding also that prison security needs support a rule prohibiting pretrial detainees contact visits with spouses, children, relatives, and friends).

[156] Hudson v. Palmer, 468 U.S. 517, 530 (1984).

[157] Hudson v. Palmer, 468 U.S. 517, 533 (1984) (holding that state tort law provided adequate postdeprivation remedies). *But see* Zinermon v. Burch, 494 U.S. 113 (1990) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not "unauthorized").

cated at all by negligent deprivation of life, liberty, or property by prison officials.[158]

In *Wolff v. McDonnell*,[159] the Court promulgated due process standards to govern the imposition of discipline upon prisoners. Due process applies, but since prison disciplinary proceedings are not part of a criminal prosecution the full panoply of rights of a defendant is not available. Rather, the analysis must proceed on a basis of identifying the interest in "liberty" which the clause protects.

Where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of "liberty" entitles him to those minimum procedures appropriate under the circumstances.[160] What the minimum procedures consist of is to be determined by balancing the prisoner's interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions. The Court held in *Wolff* that the prison must afford the subject of a disciplinary proceeding advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the action taken; also, the inmate should be allowed to call witnesses and present documentary evidence in defense when permitting him to do so will not hazard the institution's interests.[161] Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt hazard valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Finally, only a partial right to an impartial tribunal was recognized, the Court ruling that limitations imposed on the discretion of a committee of prison officials sufficed for this purpose.[162] Revocation of good time credits, the Court later ruled, must be supported by "some evidence in the record," but an amount that "might be characterized as meager" is constitutionally sufficient.[163]

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[158] Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986).

[159] 418 U.S. 539 (1974).

[160] Id. at 557. This analysis, of course tracks the interest analysis discussed supra, pp. 1723–32.

[161] However, the Court later ruled, reasons for denying an inmate's request to call witnesses need not be disclosed until the issue is raised in court. Ponte v. Real, 471 U.S. 491 (1985).

[162] Id. at 418 U.S., 561–72. The Court continues to adhere to its refusal to require appointment of counsel. Vitek v. Jones, 445 U.S. 480, 496–97 (1980), and id. at 497–500 (Justice Powell concurring); Baxter v. Palmigiano, 425 U.S. 308 (1976).

[163] Superintendent v. Hill, 472 U.S. 445, 454, 457 (1985).

Determination whether due process requires a hearing before a prisoner is transferred from one institution to another requires a close analysis of the applicable statutes and regulations as well as a consideration of the particular harm suffered by the transferee. On the one hand, the Court found that no hearing need be held prior to the transfer from one prison to another prison in which the conditions were substantially less favorable. Since the State had not conferred any right to remain in the facility to which the prisoner was first assigned, defeasible upon the commission of acts for which transfer is a punishment, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all; consequently, there was nothing to hold a hearing about.[164] The same principles govern interstate prison transfers.[165] On the other hand, transfer of a prisoner to a mental hospital pursuant to a statute authorizing transfer if the inmate suffers from a "mental disease or defect" must be preceded by a hearing for two alternative reasons. First, the statute gave the inmate a liberty interest since it presumed he would not be moved absent a finding he was suffering from a mental disease or defect. Second, unlike transfers from one prison to another, transfer to a mental institution was not within the range of confinement covered by the prisoner's sentence, and, moreover, imposed a stigma constituting a deprivation of a liberty interest.[166]

What *kind* of a hearing is required before a state may force a mentally ill prisoner to take antipsychotic drugs against his will was at issue in *Washington v. Harper*.[167] There the Court held that a judicial hearing was not required. Instead, the inmate's substantive liberty interest (derived from the Due Process Clause as well as from state law) was adequately protected by an administrative hearing before independent medical professionals, at which hearing the inmate has the right to a lay advisor but not an attorney.

Probation and Parole.—Sometimes convicted defendants are not sentenced to jail, but instead are placed on probation subject to incarceration upon violation of the conditions which are imposed; others who are jailed may subsequently qualify for release on parole before completing their sentence, and are subject to reincarceration upon violation of imposed conditions. Because both of these dispositions are statutory privileges granted by the govern-

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[164] Meacham v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976).

[165] Olim v. Wakinekona, 461 U.S. 238 (1983).

[166] Vitek v. Jones, 445 U.S. 480 (1980).

[167] 494 U.S. 210 (1990).

mental authority,[168] it was long assumed that the administrators of the systems did not have to accord procedural due process either in the granting stage or in the revocation stage. Now, both granting and revocation are subject to due process analysis, although the results tend to be disparate. Thus, in *Mempa v. Rhay*,[169] the trial judge had deferred sentencing and placed the convicted defendant on probation; when facts subsequently developed which indicated a violation of the conditions of probation, he was summoned and summarily sentenced to prison. The Court held that he had been entitled to counsel at the deferred sentencing hearing.

In *Morrissey v. Brewer*[170] a unanimous Court held that parole revocations must be accompanied by the usual due process hearing and notice requirements. "[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation . . . [But] the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal."[171] What process is due, then, turned upon the State's interests. Its principal interest was that having once convicted a defendant, imprisoned him, and released him for rehabilitation purposes at some risk, it should "be able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." But the State has no interest in revoking parole without some informal procedural guarantees, inasmuch as this will not interfere with its reasonable interest.[172]

Minimal due process, the Court held, requires that at both stages of the revocation process—the arrest of the parolee and the

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[168] Ughbanks v. Armstrong, 208 U.S. 481 (1908), held that parole is not a constitutional right but instead is a "present" from government to the prisoner. In Escoe v. Zerbst, 295 U.S. 490 (1935), the Court's premise was that as a matter of grace the parolee was being granted a privilege and that he should neither expect nor seek due process. Then-Judge Burger in Hyser v. Reed, 318 F. 2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963), reasoned that due process was inapplicable because the parole board's function was to assist the prisoner's rehabilitation and restoration to society and that there was no adversary relationship between the board and the parolee.

[169] 389 U.S. 128 (1967).

[170] 408 U.S. 471 (1972).

[171] Id. at 480, 482.

[172] Id. at 483–84.

formal revocation—the parolee is entitled to certain rights. Promptly following arrest of the parolee, there should be an informal hearing to determine whether reasonable grounds exist for revocation of parole; this preliminary hearing should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available, and should be conducted by someone not directly involved in the case, though he need not be a judicial officer. The parolee should be given adequate notice that the hearing will take place and what violations are alleged, he should be able to appear and speak in his own behalf and produce other evidence, and he should be allowed to examine those who have given adverse evidence against him unless it is determined that the identity of such informant should not be revealed. Also, the hearing officer should prepare a digest of the hearing and base his decision upon the evidence adduced at the hearing.[173]

Prior to the final decision on revocation, there should be a more formal revocation hearing at which there would be a final evaluation of any contested relevant facts and consideration whether the facts as determined warrant revocation. The hearing must take place within a reasonable time after the parolee is taken into custody and he must be enabled to controvert the allegations or offer evidence in mitigation. The procedural details of such hearings are for the States to develop but the Court specified minimum requirements of due process. "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole."[174] Ordinarily the written statement need not indicate that the sentencing court or review board considered alternatives to incarceration,[175] but a sentencing court must consider such alternatives if the probation violation consists of the failure of an indigent probationer, through no fault of his own, to pay a fine or restitution.[176]

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[173] Id. at 484–87.
[174] Id. at 487–89.
[175] Black v. Romano, 471 U.S. 606 (1985).
[176] Bearden v. Georgia, 461 U.S. 660, 672 (1983).

The Court has applied a flexible due process standard to the provision of counsel. Counsel is not invariably required in parole or probation revocation proceedings. The State should, however, provide the assistance of counsel where an indigent person may have difficulty in presenting his version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be provided where the person requests counsel, based on a timely and colorable claim that he has not committed the alleged violation, or if that issue be uncontested, there are reasons in justification or mitigation that might make revocation inappropriate.[177]

With respect to the granting of parole, the Court's analysis of the due process clause's meaning in *Greenholtz v. Nebraska Penal Inmates*[178] is much more problematical. Rejected was the theory that the mere establishment of the possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to a due process protected expectation of being dealt with in any particular way. On the other hand, the Court did recognize in the particular statute before it the creation of some expectancy of release that was entitled to some measure of constitutional protection, while cautioning that only by a case-by-case analysis could it be said whether other parole statutes similarly created such expectancy.[179] In any event, the Court considered the nature of the decisions that parole authorities must make to hold that the full panoply of due process guarantees is not required; procedures designed to elicit specific facts are inappropriate under the circumstances. Rather, minimizing the risk of error is the prime consideration, and that goal was achieved by the board's largely informal methods; the lower court erred, therefore, in imposing requirements of formal hearings, notice, and specification of particular evidence in the record. The inmate was afforded an opportunity to be heard and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due.

Where, however, government by its statutes and regulations creates no obligation of the pardoning authority and thus creates

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[177] Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[178] 442 U.S. 1 (1979). Justice Powell thought that creation of a parole system did create a legitimate expectancy of fair procedure protected by due process, but, save in one respect, he agreed with the Court that the procedure followed was adequate. Id. at 18. Justices Marshall, Brennan, and Stevens argued in dissent that the Court's analysis of the liberty interest was faulty and that due process required more than the board provided. Id. at 22.

[179] Following *Greenholtz*, the Court held in Board of Pardons v. Allen, 482 U.S. 369 (1987), that a liberty interest was created by a Montana statute providing that a prisoner "shall" be released upon certain findings by a parole board.

no legitimate expectancy of release, the prisoner may not by showing the favorable exercise of the authority in the great number of cases demonstrate such a legitimate expectancy. The mere existence of purely discretionary authority and the frequent exercise of it creates no entitlement.[180]

The Problem of the Juvenile Offender.—All of the States of the Union and the District of Columbia make provision for dealing with juvenile offenders outside of the criminal system for adult offenders.[181] These juvenile justice systems apply both to offenses that would be criminal if committed by an adult and to delinquent behavior not recognizable under laws dealing with adults, such as habitual truancy, deportment endangering the morals or health of the juvenile or others, or disobedience making the juvenile uncontrollable by his parents. The reforms of the early part of this century provided not only for segregating juveniles from adult offenders in the adjudication, detention, and correctional facilities, but they also dispensed with the substantive and procedural rules surrounding criminal trials which were mandated by due process. Justification for this abandonment of constitutional guarantees was offered by describing juvenile courts as civil not criminal and as not dispensing criminal punishment, and offering the theory that the state was acting as *parens patriae* for the juvenile offender and was in no sense his adversary.[182] Disillusionment with the results of juvenile reforms coupled with judicial emphasis on constitutional protection of the accused led in the 1960s to a substantial restriction of these elements of juvenile jurisprudence.

After tracing in much detail this history of juvenile courts, the Court held in *In re Gault*[183] that the application of due process to juvenile proceedings would not endanger the good intentions vested in the system nor diminish the features of the system which were deemed desirable—emphasis upon rehabilitation rather than pun-

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[180] Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Jago v. Van Curen, 454 U.S. 14 (1981). The former case involved not parole but commutation of a life sentence, commutation being mecessary to become eligible for parole. The statute gave the Board total discretion to commute, but in at least 75% of the cases prisoner received a favorable action and virtually all of the prisoners who had their sentences commuted were promptly paroled. In *Van Curen*, the Court made express what had been implicit in *Dumschat*; the "mutually explicit understandings" concept under which some property interests are found protected does not apply to liberty interests. *Van Curen* is also interesting because there the parole board had granted the petition for parole but within days revoked it before the prisoner was released, upon being told that he had lied at the hearing before the board.

[181] For analysis of the state laws as well as application of constitutional principles to juveniles, *see* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (2d ed. 1989).

[182] In re Gault, 387 U.S. 1, 12–29 (1967).

[183] 387 U.S. 1 (1967).

ishment, a measure of informality, avoidance of the stigma of criminal conviction, the low visibility of the process—but that the consequences of the absence of due process standards made their application necessary. "Ultimately, however, we confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours. . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. "In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." [184]

Thus, the Court in *Gault* required that notice of charges be given in time for the juvenile to prepare a defense, required a hearing in which the juvenile could be represented by retained or appointed counsel, required observance of the rights of confrontation and cross-examination, and required that the juvenile be protected against self-incrimination. [185] It did not pass upon the right of appeal or the failure to make transcripts of hearings. Earlier, the Court had held that before a juvenile could be "waived" to an adult court for trial, there had to be a hearing and findings of reasons, a result based on statutory interpretation but apparently constitutionalized in *Gault*. [186] Subsequently, it was held that the "essentials of due process and fair treatment" required that a juvenile could be adjudged delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if com-

[184] Id. at 27–28.

[185] Id. at 31–35. Justice Harlan concurred in part and dissented in part, id. at 65, agreeing on the applicability of due process but disagreeing with the standards of the Court. Justice Stewart dissented wholly, arguing that the application of procedures developed for adversary criminal proceedings to juvenile proceedings would endanger their objectives and contending that the decision was a backward step toward undoing the reforms instituted in the past. Id. at 78.

[186] Kent v. United States, 383 U.S. 541 (1966), noted on this point in In re Gault, 387 U.S. 1, 30–31 (1967).

mitted by an adult,[187] but still later the Court held that jury trials were not constitutionally required in juvenile trials.[188]

On a few occasions the Court has considered whether rights accorded to adults during investigation of crime are to be accorded juveniles. In one such case the Court ruled that a juvenile undergoing custodial interrogation by police had not invoked a *Miranda* right to remain silent by requesting permission to consult with his probation officer, since a probation officer could not be equated with an attorney, but indicated as well that a juvenile's waiver of *Miranda* rights was to be evaluated under the same totality-of-the-circumstances approach applicable to adults. That approach "permits—indeed it mandates—inquiry into all the circumstances surrounding the interrogation . . . includ[ing] evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him. . . ."[189] In another case the Court ruled that, while the Fourth Amendment applies to searches of students by public school authorities, neither the warrant requirement nor the probable cause standard is appropriate.[190] Instead, a simple reasonableness

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[187] In re Winship, 397 U.S. 358 (1970). Chief Justice Burger and Justice Stewart dissented, following essentially the Stewart reasoning in *Gault*. "The Court's opinion today rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitation. . . . What the juvenile court systems need is not more but less of the trappings of legal procedure and judicial formalism; the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court." Id. at 375, 376. Justice Black dissented because he did not think the reasonable doubt standard a constitutional requirement at all. Id. at 377.

[188] McKeiver v. Pennsylvania, 403 U.S. 528 (1971). No opinion was concurred in by a majority of the Justices. Justice Blackmun's opinion of the Court, which was joined by Chief Justice Burger and Justices Stewart and White, reasoned that a juvenile proceeding was not "a criminal prosecution" within the terms of the Sixth Amendment, so that jury trials were not automatically required; instead, the prior cases had proceeded on a "fundamental fairness" approach and in that regard a jury was not a necessary component of fair factfinding and its use would have serious repercussions on the rehabilitative and protection functions of the juvenile court. Justice White also submitted a brief concurrence emphasizing the differences between adult criminal trials and juvenile adjudications. Id. at 551. Justice Brennan concurred in one case and dissented in another because in his view open proceedings would operate to protect juveniles from oppression in much the same way as a jury would. Id. at 553. Justice Harlan concurred because he did not believe jury trials were constitutionally mandated in state courts. Id. at 557. Justices Douglas, Black, and Marshall dissented. Id. at 557.

[189] Fare v. Michael C., 442 U.S. 707, 725 (1979).

[190] New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding the search of a student's purse to determine whether the student possessed cigarettes in violation of schoool rule; evidence of drug activity held admissible in a prosecution under the juvenile laws).

standard governs all searches of students' persons and effects by school authorities.[191]

The Court ruled in *Schall v. Martin*[192] that preventive detention of juveniles does not offend due process when it serves the legitimate state purpose of protecting society and the juvenile from potential consequences of pretrial crime, when the terms of confinement serve those legitimate purposes and are nonpunitive, and when procedures provide sufficient protection against erroneous and unnecessary detentions. A statute authorizing pretrial detention of accused juvenile delinquents on a finding of "serious risk" that the juvenile would commit crimes prior to trial, providing for expedited hearings (the maximum possible detention was 17 days), and guaranteeing a formal, adversarial probable cause hearing within that period, was found to satisfy these requirements.

Each state has a procedure by which juveniles may be tried as adults.[193] With the Court having clarified the consitutional requirements for imposition of capital punishment, it was only a matter of time before the Court would have to determine whether states may subject juveniles to capital punishment. In *Stanford v. Kentucky*,[194] the Court held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17; earlier the Court had invalidated a statutory scheme permitting capital punishment for crimes committed before age 16.[195] In weighing validity under the Eighth Amendment, the Court has looked to state practice to determine whether a consensus against execution exists.[196]

Still to be considered by the Court are such questions as the substantive and procedural guarantees to be applied in proceedings when the matter at issue is non-criminal delinquent behavior.

The Problem of Civil Commitment.—As is the case with juvenile offenders, several other classes of persons are subject to confinement by processes and in courts deemed civil rather than criminal. Within this category of "protective commitment" are involuntary commitments for treatment of insanity and other degrees of mental incompetence, retardation, alcoholism, narcotics addiction,

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[191] This single rule, the Court explained, will permit school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." Id. at n.9.

[192] 467 U.S. 253 (1984).

[193] *See* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM, ch. 4, "Waiver of Jurisdiction" (2d ed. 1989).

[194] 492 U.S. 361 (1989).

[195] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[196] *See* analysis of Eighth Amendment principles, supra pp. 1491–92.

sexual psychopathy, and the like. Inasmuch as the deprivation of liberty is as severe as that experienced by juveniles adjudged delinquent, and in addition is accompanied with harm to reputation, it is surprising that the Court has only recently dealt with the issue.[197]

In *O'Connor v. Donaldson*,[198] bypassing "the difficult issues of constitutional law" raised by the lower courts' resolution of the case,[199] the Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[200] The trial jury had found that Donaldson was not dangerous to himself or to others, and the Court ruled that he had been unconstitutionally confined.[201] Left to resolution another day were such questions as "when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness"[202] and the right, if any, to receive treatment for the confined person's illness. To conform to due process requirements, procedures for voluntary admission should recognize the possibility that persons in need of treatment may not be competent to give informed consent; this is not a situation where availability of a meaningful postdeprivation remedy can cure the due process violation.[203]

Procedurally, it is clear that an individual's liberty interest in being free from unjustifiable confinement and from the adverse social consequences of being labeled mentally ill requires government to assume a greater share of the risk of error in proving the exist-

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[197] Only in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), did the Court earlier approach consideration of the problem. Other cases reflected the Court's concern with the rights of convicted criminal defendants and generally required due process procedures or that the commitment of convicted criminal defendants follow the procedures required for civil commitments. Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966); Lynch v. Overholser, 369 U.S. 705 (1962); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); McNeil v. Director, 407 U.S. 245 (1972). *Cf.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

[198] 422 U.S. 563 (1975).

[199] That is, the right to treatment of the involuntarily committed. Supra, pp. 1690–92.

[200] 422 U.S. at 576.

[201] Id. at 576–77. The Court remanded to allow the trial court to determine whether Donaldson should recover personally from his doctors and others for his confinement, under standards formulated under 42 U.S.C. § 1983. *See* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

[202] O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).

[203] Zinermon v. Burch, 494 U.S. 113 (1990).

ence of such illness as a precondition to confinement. Thus, the evidentiary standard of a preponderance, normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings. On the other hand, the criminal standard of beyond a reasonable doubt is not necessary because the state's aim is not punitive and because some or even much of the consequence of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment. The Court therefore imposed a standard of "clear and convincing" evidence.[204]

Difficult questions of what due process may require in the context of commitment of allegedly mentally ill and mentally retarded children by their parents or by the State when such children are wards of the State were confronted in *Parham v. J.R.*[205] Under the challenged laws there were no formal preadmission hearings, but psychiatric and social workers did interview parents and children and reached some form of independent determination that commitment was called for. The Court acknowledged the potential for abuse but balanced this against such factors as the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually act in behalf of their children's welfare, the independent role of medical professionals in deciding to accept the children for admission, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing such care and interfere with the ability of parents to assist with the care of institutionalized children.[206] Similarly, the same concerns, reflected in the statutory obligation of the State to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the Government.[207] Left to future resolution was the question of the due process requirements for postadmission review of the necessity for continued confinement.[208]

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[204] Addington v. Texas, 441 U.S. 418 (1979). *See also* Vitek v. Jones, 445 U.S. 480 (1980) (transfer of prison inmate to mental hospital).

[205] 442 U.S. 584 (1979). *See also* Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).

[206] 442 U.S. at 598–617. The dissenters agreed on this point. Id. at 626–37.

[207] Id. at 617–20. The dissenters would have required a preconfinement hearing. Id. at 637–38.

[208] Id. at 617. The dissent would have mandated a formal postadmission hearing. Id. at 625–26.

EQUAL PROTECTION OF THE LAWS

Scope and Application

State Action.—"[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[1] The Amendment by its express terms provides that "[n]o State . . ." and "nor shall any State . . ." engage in the proscribed conduct. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws."[2] While the state action doctrine is equally applicable to denials of privileges or immunities, due process, and equal protection, it is actually only with the last great right of the Fourteenth Amendment that the doctrine is invariably associated.[3]

"The vital requirement is State responsibility," Justice Frankfurter once wrote, "that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to deny protected rights.[4] Certainly, state legislation commanding a discriminatory result is state action condemned by the first section of the Fourteenth Amendment, and is void.[5] But the difficulty for the Court has begun when the conduct

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[1] Shelley v. Kraemer, 334 U.S. 1, 13 (1948). Similarly, the due process clause of the Fifth Amendment, with its equal protection component, limits only federal governmental action and not that of private parties, as is true of each of the provisions of the Bill of Rights. The scope and reach of the "state action" doctrine is thus the same whether a State or the National Government is concerned. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[2] Civil Rights Cases, 109 U.S. 3, 11 (1883). With regard to the principal issue in this decision, the limitation of the state action requirement on Congress' enforcement powers, *see* infra, pp. 1929–33.

[3] Recently, however, because of broadening due process conceptions and the resulting litigation, issues of state action have been raised with respect to the due process clause. *See, e.g.,* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

[4] Terry v. Adams, 345 U.S. 461, 473 (1953) (concurring). The Justice was speaking of the state action requirement of the Fifteenth Amendment. The Nineteenth and Twenty-sixth Amendments also hinge on state action; the Thirteenth Amendment, banning slavery and involuntary servitude, does not.

[5] United States v. Raines, 362 U.S. 17, 25 (1960). A prime example is the statutory requirement of racially segregated schools condemned in Brown v. Board of

complained of is not so clearly the action of a State but is, perhaps, the action of a minor state official not authorized or perhaps forbidden by state law so to act, or is, perhaps on the other hand, the action of a private party who nonetheless has some relationship with governmental authority.

The continuum of state action ranges from obvious legislated denial of equal protection to private action that is no longer so significantly related to or brigaded with state action that the Amendment applies. The prohibitions of the Amendment "have reference to actions of the political body denominated by a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."[6]

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order."[7] That the doc-

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Education, 347 U.S. 483 (1954). *And see* Peterson v. City of Greenville, 373 U.S. 244 (1963), holding that trespass convictions of African Americans "sitting-in" at a lunch counter over the objection of the manager cannot stand because of a local ordinance commanding such separation, irrespective of the manager's probable attitude if no such ordinance existed.

[6] Ex parte Virginia, 100 U.S. 339, 346–47 (1880).

[7] Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982). "Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority." Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Justice Harlan concurring).

trine serves certain values and disserves others is not a criticism of it but a recognition that in formulating and applying the several tests by which the presence of "state action" is discerned,[8] the Court has considerable discretion and the weights of the opposing values and interests will lead to substantially different applications of the tests. Thus, following the Civil War, when the Court sought to reassert federalism values, it imposed a rather rigid state action standard. During the civil rights movement of the 1950s and 1960s, when almost all state action contentions were raised in a racial context, the Court generally found the presence of state action. As it grew more sympathetic to federalism concerns in the late 1970s and 1980s, the Court began to reassert a strengthened state action doctrine, primarily but hardly exclusively in nonracial cases.

Operation of the state action doctrine was critical in determining whether school systems were segregated unconstitutionally by race. The original *Brown* cases and subsequent ones arose in the context of statutorily mandated separation of the races and occasioned therefore no controversy in finding state action.[9] The aftermath in the South involved not so much state action as the determination of the remedies necessary to achieve a unitary system.[10] But if racial segregation is not the result of state action in some aspect, then its existence is not subject to constitutional remedy.[11] Distinguishing between the two situations has occasioned much controversy.

Confronting in a case arising from Denver, Colorado, the issue of a school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that racial segregation caused by "intentionally segregative school board actions" is *de jure* and not *de facto*, just as if it had been mandated by statute. "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[12] Where it is proved that a meaningful portion of a school system is segregated as a result of official action, the official agency must bear the burden of proving that other school segregation within the system is adventitious and not the result of official action. It is not the responsibility of complainants to show that each

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[8] "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[9] Brown v. Board of Education, 347 U.S. 483 (1954).

[10] Infra, pp. 1843–47.

[11] *Compare* Washington v. Seattle School Dist., 458 U.S. 457 (1982), *with* Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982).

[12] Keyes v. Denver School District, 413 U.S. 189, 208 (1973) (emphasis by Court). *See also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979).

school in a system is *de jure* segregated to be entitled to a system-wide desegregation plan.[13] Moreover, the Court has also apparently adopted a rule to the effect that if it can be proved that at some time in the past a school board has purposefully maintained a racially separated system, a continuing obligation to dismantle that system can be said to have devolved upon the agency at that earlier point so that its subsequent actions can be held to a standard of having promoted desegregation or of not having promoted it, so that facially neutral or ambiguous school board policies can form the basis for a judicial finding of intentional discrimination.[14]

Different results, however, follow when inter-district segregation is an issue. Disregard of district lines is permissible by a federal court in formulating a desegregation plan only when it finds an inter-district violation. "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantive cause of inter-district segregation."[15] The *de jure*/*de facto* distinction is thus well established in school cases and is firmly grounded upon the "state action" language of the Fourteenth Amendment.

It has long been established that the actions of state officers and agents are attributable to the State. Thus, application of a federal statute imposing a criminal penalty on a state judge who excluded African Americans from jury duty was upheld as within congressional power under the Fourteenth Amendment; the judge's action constituted state action even though state law did not authorize him to select the jury in a racially discriminatory manner.[16]

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[13] Id. at 208–213. The continuing validity of the *Keyes* shifting-of-the-burden principle, after Washington v. Davis, 426 U.S. 229 (1976), and Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), was asserted in Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 455–458 & n.7, 467–68 (1979), and Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 540–42 (1979).

[14] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458–61 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534–40 (1979).

[15] Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

[16] Ex parte Virginia, 100 U.S. 339 (1880). Similarly, the acts of a state governor are state actions, Cooper v. Aaron, 358 U.S. 1, 16–17 (1958); Sterling v. Constantin, 287 U.S. 378, 393 (1932), as are the acts of prosecuting attorneys, Mooney v. Holohan, 294 U.S. 103, 112, 113 (1935), state and local election officials, United States v. Classic, 313 U.S. 299 (1941), and law enforcement officials. Griffin v. Maryland, 378 U.S. 130 (1964); Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945). One need not be an employee of the State to act

The fact that the "state action" category is not limited to situations in which state law affirmatively authorizes discriminatory action was made clearer in *Yick Wo v. Hopkins,*[17] in which the Court found unconstitutional state action in the discriminatory administration of an ordinance fair and non-discriminatory on its face. Not even the fact that the actions of the state agents are illegal under state law makes the action nonattributable to the State for purposes of the Fourteenth Amendment.[18] "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[19] When the denial of equal protection is not commanded by law or by administrative regulation but is nonetheless accomplished through police enforcement of "custom"[20] or through hortatory admonitions by public officials to private parties to act in a discriminatory manner,[21] the action is state action. When a State clothes a private party with official authority, he may not engage in conduct forbidden the State.[22]

Beyond this point we enter the area in which the discriminatory intent is that of a private individual and the question is whether a State has encouraged the effort or has impermissibly aided it.[23] Of notable importance and a subject of controversy since

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"under color of" state law; he may merely participate in an act with state officers. United States v. Price, 383 U.S. 787 (1966).

[17] 118 U.S. 356 (1886).

[18] Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); United States v. Price, 383 U.S. 787 (1966). *See also* United States v. Raines, 362 U.S. 17, 25 (1960). As Justice Brandeis noted in Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 246 (1931), "acts done 'by virtue of public position under a State government . . . and . . . in the name and for the State' . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law." Note that for purposes of being amenable to suit in federal court, however, the immunity of the States does not shield state officers who are alleged to be engaging in illegal or unconstitutional action. Ex parte Young, 209 U.S. 123 (1908), supra, pp. 1537–44. Cf. Screws v. United States, *supra*, 147–48.

[19] United States v. Classic, 313 U.S. 299, 326 (1941).

[20] *Cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[21] Lombard v. Louisiana, 373 U.S. 267 (1963). No statute or ordinance mandated segregation at lunch counters but both the mayor and the chief of police had recently issued statements announcing their intention to maintain the existing policy of separation. Thus, the conviction of African Americans for trespass because they refused to leave a segregated lunch counter was voided.

[22] Griffin v. Maryland, 378 U.S. 130 (1964). Guard at private entertainment ground was also deputy sheriff; he could not execute the racially discriminatory policies of his private employer. *See also* Williams v. United States, 341 U.S. 97 (1951).

[23] Examples already alluded to include Lombard v. Louisiana, 373 U.S. 267 (1963), in which certain officials had advocated continued segregation, Peterson v. City of Greenville, 373 U.S. 244 (1963), in which there were segregation-requiring ordinances and customs of separation, and Robinson v. Florida, 378 U.S. 153 (1964), in which health regulations required separate restroom facilities in any establishment serving both races.

it was decided is *Shelley v. Kraemer.*[24] There, property owners brought suit to enforce a racially restrictive covenant, seeking to enjoin the sale of a home by white sellers to black buyers. The covenants standing alone, Chief Justice Vinson said, violated no rights protected by the Fourteenth Amendment. "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." However, that was not all. "These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."[25] Establishing that the precedents were to the effect that judicial action of state courts was state action, the Court continued to find that judicial enforcement of these covenants was forbidden. "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desire to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. . . ."

"These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell."[26]

Arguments about the scope of *Shelley* began immediately. Did the rationale mean that no private decision to discriminate could be effectuated in any manner by action of the State, as by enforcement of trespass laws or judicial enforcement of discrimination in wills? Or did it rather forbid the action of the State in interfering with the willingness of two private parties to deal with each other? Disposition of several early cases possibly governed by *Shelley* left this issue unanswered.[27] But the Court has experienced no dif-

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[24] 334 U.S. 1 (1948).

[25] Id. at 13–14.

[26] Id. at 19. In Hurd v. Hodge, 334 U.S. 24 (1948), the Court outlawed judicial enforcement of restrictive covenants in the District of Columbia as violative of civil rights legislation and public policy. Barrows v. Jackson, 346 U.S. 249 (1953), held that damage actions for violations of racially restrictive covenants would not be judicially entertained.

[27] Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 60 N.W. 2d 110 (1953), aff'd by an equally divided Court, 348 U.S. 880 (1954), rehearing granted, judgment vacated & certiorari dismissed, 349 U.S. 70 (1955); Black v. Cutter Laboratories, 351 U.S. 292 (1956). The central issue in the "sit-in" cases, whether state enforcement of trespass laws at the behest of private parties acting on the basis of

ficulty in finding that state court enforcement of common-law rules in a way that has an impact upon speech and press rights is state action and triggers the application of constitutional rules.[28] It may be that the substantive rule that is being enforced is the dispositive issue, rather than the mere existence of state action. Thus, in *Evans v. Abney*,[29] a state court, asked to enforce a discriminatory stipulation in a will that property devised to a city for use as a public park should never be used by African Americans, ruled that the city could not operate the park in a segregated fashion; instead of striking the segregation requirement from the will, the court ordered return of the property to the decedent's heirs, inasmuch as the trust had failed. The Supreme Court held the decision permissible, inasmuch as the state court had merely carried out the testator's intent with no racial motivation itself, and distinguished *Shelley* on the basis that African Americans were not discriminated against by the reversion, because everyone was deprived of use of the park.[30]

Similar to *Shelley* in controversy and the indefiniteness of its rationale, the latter element of which appears to have undergone a modifying rationalization, is *Reitman v. Mulkey*,[31] in which, following enactment of an "open housing" law by the California legislature, an initiative and referendum measure was passed that repealed the law and amended the state constitution to prevent any agency of the State or of local government from henceforth forbidding racial discrimination in private housing. Upholding a state court invalidation of this amendment, the Court appeared to ground its decision on two lines of reasoning, either on the state court's premise that passage of the provision encouraged private racial discrimination impermissibly or on the basis that the provision made discriminatory racial practices immune from the ordi-

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their own discriminatory motivations, was evaded by the Court, in finding some other form of state action and reversing all convictions. Individual Justices did elaborate, however. *Compare* Bell v. Maryland, 378 U.S. 226, 255–60 (1964) (opinion of Justice Douglas), *with* id. at 326 (Justices Black, Harlan, and White dissenting).

[28] In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and progeny, defamation actions based on common-law rules were found to implicate First Amendment rights and the Court imposed varying limiting rules on such rules of law. *See* id. at 265 (finding state action). Similarly, in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), a civil lawsuit between private parties, the application of state common-law rules to assess damages for actions in a boycott and picketing was found to constitute state action. Id. at 916 n.51.

[29] 396 U.S. 435 (1970). The matter had previously been before the Court in Evans v. Newton, 382 U.S. 296 (1966).

[30] Id. at 445. Note the use of the same rationale in another context in Palmer v. Thompson, 403 U.S. 217, 226 (1971). On a different result in the "Girard College" will case, see infra, p. 1689 n.14.

[31] 387 U.S. 369 (1967). The decision was 5-to–4, Justices Harlan, Black, Clark, and Stewart dissenting. Id. at 387.

nary legislative process, while not so limiting other processes, and thus impermissibly burdened minorities in the achievement of legitimate aims in a way other classes of persons were not burdened.[32] In a subsequent case, the latter rationale was utilized in a unanimous decision voiding an Akron ordinance, which suspended an "open housing" ordinance and provided that any future ordinance regulating transactions in real property "on the basis of race, color, religion, national origin or ancestry" must be submitted to a vote of the people before it could become effective, while any other ordinance would become effective when passed, except that it could be petitioned to referendum.[33]

That *Mulkey* and *Hunter* stand for the proposition that imposing a barrier to racial amelioration legislation is the decisive and condemning factor is evident from two recent decisions with respect to state referendum decisions on busing for integration.[34] Both cases agree that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[35] It is thus not impermissible to overturn a previous governmental decision, or to defeat the effort initially to arrive at such a decision, simply because the state action may conceivably encourage private discrimination.

In other instances in which the discrimination is being practiced by private parties, the question essentially is whether there has been sufficient state involvement to bring the Fourteenth Amendment into play; that is, the private discrimination is not constitutionally forbidden "unless to some significant extent the State in any of its manifestations has been found to have become in-

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[32] *See, e.g.,* id. at 377 (language suggesting both lines of reasoning).

[33] Hunter v. Erickson, 393 U.S. 385 (1969). In Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), New York enacted a statute prohibiting the assignment of students or the establishment of school districts for the purpose of achieving racial balance in attendance, unless with the express approval of a locally elected school board or with the consent of the parents, a measure designed to restrict the state education commissioner's program to ameliorate *de facto* segregation. The federal court held the law void, holding in reliance on *Mulkey* that the statute encouraged racial discrimination *and* that by treating educational matters involving racial criteria differently than it treated other educational matters it made more difficult a resolution of the *de facto* segregation problem.

[34] Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). A five-to-four majority in *Seattle* found the fault to be a racially-based structuring of the political process making it more difficult to undertake actions designed to improve racial conditions than to undertake any other educational action. An 8-to–1 majority in *Crawford* found that repeal of a measure to bus to undo *de facto* segregation, without imposing any barrier to other remedial devices, was permissible.

[35] *Crawford*, 458 U.S. at 539, *quoted in Seattle*, 458 U.S. at 483. *See also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 414 (1977).

volved in it."[36] There is no clear formula. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[37] State action was found in a number of circumstances. The "White Primary" was outlawed by the Court not because the party's discrimination was commanded by statute but because the party operated under the authority of the State and it in fact controlled the outcome of elections.[38] Although the City of Philadelphia was acting as trustee in administering and carrying out the will of someone who had left money for a college, admission to which was stipulated to be for white boys only, the city was held to be engaged in forbidden state action in discriminating against African Americans in admission.[39] When state courts on petition of interested parties removed the City of Macon as trustees of a segregated park left in trust for such use in a will and appointed new trustees in order to keep the park segregated, the Court reversed, finding that the City was still inextricably involved in the maintenance and operation of the park.[40] In a significant case in which the Court explored a lengthy list of contacts between the State and a private corporation, it held that the lessee of property within an off-street parking building owned and operated by a municipality could not exclude African Americans from its restaurant. It was emphasized that the building was publicly built and owned, that the restaurant was an integral part of the complex, that the restaurant and the parking facilities complemented each other, that the parking authority had regulatory power over the lessee and had made stipulations but nothing related to racial discrimination, and that the financial success of the restaurant benefited the governmental agency; "the degree of state participation and involvement in discriminatory action" was sufficient to condemn it.[41]

The question arose, then, what degree of state participation was "significant"? Would licensing of a business clothe the actions of that business with sufficient state involvement? Would regulation? Or provision of police and fire protection? Would enforcement

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[36] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[37] Id. at 722.

[38] Smith v. Allwright, 321 U.S. 649 (1944).

[39] Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957). On remand, the state courts substituted private persons as trustees to carry out the will. In re Girard College Trusteeship, 391 Pa. 434, 138 A. 2d 844, cert. denied, 357 U.S. 570 (1958). This expedient was, however, ultimately held unconstitutional. Brown v. Pennsylvania, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968).

[40] Evans v. Newton, 382 U.S. 296 (1966). Justices Black, Harlan, and Stewart dissented. Id. at 312, 315. For the subsequent ruling in this case, see Evans v. Abney, 396 U.S. 435 (1970), considered supra, p. 1686.

[41] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

of state trespass laws be invalid if it effectuated discrimination? The "sit-in" cases of the early 1960's presented all these questions and more but did not resolve them.[42] The basics of an answer came in *Moose Lodge No. 107 v. Irvis*,[43] in which the Court held that the fact that a private club was required to have a liquor license to serve alcoholic drinks and did have such a license did not bar it from discriminating against African Americans. It denied that private discrimination became constitutionally impermissible "if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever," since any such rule would eviscerate the state action doctrine. Rather, "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination.'"[44] Moreover, while the State had extensive powers to regulate in detail the liquor dealings of its licensees, "it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."[45] And there was nothing in the licensing relationship here that approached "the symbiotic relationship between lessor and lessee" which the Court had found in *Burton*.[46]

The Court subsequently made clear that governmental involvement with private persons or private corporations is not the critical factor in determining the existence of "state action." Rather, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[47] Or, to quote Judge Friendly, who first enunciated the test this way, the "essential point" is "that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private, must be the subject of the complaint."[48] Therefore, the Court

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[42] *See, e.g.*, the various opinions in Bell v. Maryland, 378 U.S. 226 (1964).

[43] 407 U.S. 163 (1972). One provision of the state law was, however, held unconstitutional. That provision required a licensee to observe all its by-laws and therefore mandated the Moose Lodge to follow the discrimination provision of its by-laws. Id. at 177–79.

[44] Id. at 173.

[45] Id. at 176–77.

[46] Id. at 174–75.

[47] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (under the due process clause).

[48] Powe v. Miles, 407 F.2d. 73, 81 (2d Cir. 1968). *See also* NCAA v. Tarkanian, 488 U.S. 179 (1988) (college athletic association's application of rules leading to a state university's suspension of its basketball coach did not constitute state action on the part of the association).

found no such nexus between the State and a public utility's action in terminating service to a customer. Neither the fact that the business was subject to state regulation, nor that the State had conferred in effect a monopoly status upon the utility, nor that in reviewing the company's tariff schedules the regulatory commission had in effect approved the termination provision included therein (but had not required the practice, had "not put its own weight on the side of the proposed practice by ordering it")[49] operated to make the utility's action the State's action.[50] Significantly tightening the standard further against a finding of "state action," the Court asserted that plaintiffs must establish not only that a private party "acted under color of the challenged statute, but also that its actions are properly attributable to the State. . . ."[51] And the actions are to be attributable to the State apparently only if the State compelled the actions and not if the State merely established the process through statute or regulation under which the private party acted. Thus, when a private party, having someone's goods in his possession and seeking to recover the charges owned on storage of the goods, acts under a permissive state statue to sell the goods and retain out of the proceeds his charges, his actions are not governmental action and need not follow the dictates of the due process clause.[52] In the context of regulated nursing home situations, in which the homes were closely regulated and state officials reduced or withdrew Medicaid benefits paid to patients when they were discharged or transferred to institutions providing a lower level of care, the Court found that the actions of the homes in discharging or transferring were not thereby rendered the actions of the government.[53]

In a few cases, the Court has indicated that discriminatory action by private parties may be precluded by the Fourteenth Amendment if the particular party involved is exercising a "public func-

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[49] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). In dissent, Justice Marshall protested that the quoted language marked "a sharp departure" from precedent, "that state authorization and approval of 'private' conduct has been held to support a finding of state action." Id. at 369. Note that in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the plurality opinion used much the same analysis to deny antitrust immunity to a utility practice merely approved but not required by the regulating commission, but most of the Justices were on different sides of the same question in the two cases.

[50] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351–58 (1974). On the due process limitations on the conduct of public utilities, see Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

[51] Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) (due process).

[52] Id. at 164–66. If, however, a state officer acts with the private party in securing the property in dispute, that is sufficient to create the requisite state action and the private party may be subjected to suit if the seizure does not comport with due process. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

[53] Blum v. Yaretsky, 457 U.S. 991 (1982).

tion." This rationale is one of those which emerges from the various opinions in *Terry v. Adams.*[54] In *Marsh v. Alabama,*[55] a Jehovah's Witness had been convicted of trespass after passing out literature on the streets of a company-owned town and the Court reversed. It is not at all clear from the opinion of the Court what it was that made the privately-owned town one to which the Constitution applied. In essence, it appears to have been that the town "had all the characteristics of any other American town," that it was "like" a State. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[56] Subsequent efforts to expand upon *Marsh* were at first successful and then turned back, and the "public function" theory in the context of privately-owned shopping centers was sharply curtailed.[57]

Attempts to apply such a theory to other kinds of private conduct, such as to private utilities,[58] to private utilization of permissive state laws to secure property claimed to belong to creditors,[59] to the operation of schools for "problem" children referred by public institutions,[60] and to the operations of nursing homes the patients of which are practically all funded by public resources,[61] proved unavailing. The "public function" doctrine is to be limited to a delegation of "a power 'traditionally exclusively reserved to the State.'"[62] Therefore, the question is not "whether a private group is serving a 'public function.'. . . That a private entity performs a function which serves the public does not make its acts state action."[63] Public function did play an important part, however, in the Court's finding state action in exercise of peremptory challenges in jury selection by non-governmental parties.

In finding state action in the racially discriminatory use of peremptory challenges by a private party during *voir dire* in a civil case,[64] the Court applied tests developed in an earlier case involv-

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[54] 345 U.S. 461 (1953).

[55] 326 U.S. 501 (1946).

[56] Id. at 506.

[57] *See* Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), *limited in* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and *overruled in* Hudgens v. NLRB, 424 U.S. 507 (1976). The *Marsh* principle is good only when private property has taken on *all* the attributes of a municipality. Id. at 516–17.

[58] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

[59] Flagg Bros. v. Brooks, 436 U.S. 149, 157–159 (1978).

[60] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[61] Blum v. Yaretsky, 457 U.S. 991, 1011–1012 (1982).

[62] Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)).

[63] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[64] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

ing garnishment and attachment.[65] The Court first asks "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority," and then "whether the private party charged with the deprivation could be described in all fairness as a state actor." In answering the second question, the Court considers three factors: "the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[66] There was no question that exercise of peremptory challenges derives from governmental authority (either state or federal, as the case may be); exercise of peremptory challenges is authorized by law, and the number is limited. Similarly, the Court easily concluded that private parties exercise peremptory challenges with the "overt" and "significant" assistance of the court. So too, jury selection is the performance of a traditional governmental function: the jury "is a quintessential governmental body, having no attributes of a private actor," and it followed, so the Court majority believed, that selection of individuals to serve on that body is also a governmental function whether or not it is delegated to or shared with private individuals.[67] Finally, the Court concluded that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself."[68] Dissenting Justice O'Connor complained that the Court was wiping away centuries of adversary practice in which "unrestrained private choice" has been recognized in exercise of peremptory challenges; "[i]t is antithetical to the nature of our adversarial process," the Justice contended, "to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes."[69]

Even though in a criminal case it is the government and the defendant who are adversaries, rather than two private parties, as is ordinarily the case in civil actions, the Court soon applied these same principles to hold that exercise of peremptory challenges by the defense in a criminal case also constitutes state action.[70] The same generalities apply with at least equal force: there is overt and significant governmental assistance in creating and structuring the

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[65] Lugar v. Edmondson Oil Corp., 457 U.S. 922 (1982).

[66] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620–22 (1991) (citations omitted).

[67] Id. at 624, 625.

[68] Id. at 628.

[69] Id. at 639, 643.

[70] Georgia v. McCollum, 112 S. Ct. 2348 (1992). It was, of course, beyond dispute that a prosecutor's exercise of peremptory challenges constitutes state action. *See* Swain v. Alabama, 380 U.S. 202 (1965); Batson v. Kentucky, 476 U.S. 79 (1986).

process, a criminal jury serves an important governmental function and its selection is also important, and the courtroom setting intensifies harmful effects of discriminatory actions. An earlier case[71] holding that a public defender was not a state actor when engaged in general representation of a criminal defendant was distinguished, the Court emphasizing that "exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense," since it involves selection of persons to wield governmental power.[72]

The rules developed by the Court for business regulation are that (1) the "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment,"[73] and (2) "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the State."[74]

Previously, the Court's decisions with respect to state "involvement" in the private activities of individuals and entities raised the question whether financial assistance and tax benefits provided to private parties would so clothe them with state action that discrimination by them and other conduct would be subjected to constitutional constraints. Many lower courts had held state action to exist in such circumstances.[75] However the question might have

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[71] Polk County v. Dodson, 454 U.S. 512 (1981).

[72] 112 U.S. at 2356. Justice O'Connor, again dissenting, pointed out that the Court's distinction was inconsistent with *Dodson's* declaration that public defenders are not vested with state authority "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Id. at 2362. Justice Scalia, also dissenting again, decried reduction of *Edmonson* "to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state." Id. at 2364. Chief Justice Rehnquist, who had dissented in *Edmonson*, concurred in *McCollum* in the belief that it was controlled by *Edmonson*, and Justice Thomas, who had not participated in *Edmonson*, expressed similar views in a concurrence.

[73] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[74] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Flagg Bros. v. Brooks, 436 U.S. 149, 166 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

[75] On funding, *see* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945); Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174 (4th Cir. 1974). *But cf.* Greco v. Orange Mem. Hosp. Corp., 513 F.2d 873 (5th Cir.), cert. denied, 423 U.S. 1000 (1975). On tax benfits, *see* Green v. Connally, 330 F. Supp. 1150 (D.D.C.) (three-judge court), aff'd. sub nom. Coit v. Green, 404 U.S. 997 (1971); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974). *But cf.* New York City Jaycees v. United States Jaycees, 512 F.2d 856 (2d Cir. 1976);

been answered under the older cases, it is evident that a negative answer flows from the premises of the more recent cases. In *Rendell-Baker v. Kohn*,[76] the private school received "problem" students referred to it by public institutions, it was heavily regulated, and it received between 90 and 99% of its operating budget from public funds. In *Blum v. Yaretsky*,[77] the nursing home had practically all of its operating and capital costs subsidized by public funds and more than 90% of its residents had their medical expenses paid from public funds; in setting reimbursement rates, the State included a formula to assure the home a profit. Nevertheless, in both cases the Court found that the entities remained private, and required plaintiffs to show that as to the complained of actions the State was involved, either through coercion or encouragement. "That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business."[78]

In the social welfare area, the Court has drawn a sharp distinction between governmental action subject to substantive due process requirements, and governmental inaction, not so constrained. There being "no affirmative right to governmental aid," the Court announced in *DeShaney v. Winnebago County Social Services Department*[79] that "as a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Before there can be state involvement creating an affirmative duty to protect an individual, the Court explained, the state must have taken a person into its custody and held him there against his will so as to restrict his freedom to act on his own behalf. Thus, while the Court had recognized due process violations for failure to provide adequate medical care to incarcerated prisoners,[80] and for failure to ensure reasonable safety for involuntarily committed mental patients,[81] no such affirmative duty arose from the failure of social services agents to protect an abused child from further abuse from his parent. Even though possible abuse had been reported to the agency and confirmed and monitored by the agency, and the agency

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Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir.), cert. denied, 423 U.S. 995 (1975).

[76] 457 U.S. 830 (1982).

[77] 457 U.S. 991 (1982).

[78] Id. at 1011.

[79] 489 U.S. 189, 197 (1989).

[80] Estelle v. Gamble, 429 U.S. 97 (1976).

[81] Youngberg v. Romeo, 457 U.S. 307 (1982).

had done nothing to protect the child, the Court emphasized that the actual injury was inflicted by the parent and "did not occur while [the child] was in the State's custody."[82] While the State may have incurred liability in tort through the negligence of its social workers, "[not] every tort committed by a state actor [is] a constitutional violation."[83] "[I]t is well to remember . . . that the harm was inflicted not by the State of Wisconsin, but by [the child's] father."[84]

Judicial inquiry into the existence of "state action" may be directed toward the implementation of either of two remedies, and this may well lead to some difference in the search. In the cases considered here suits were against a private actor to compel him to halt his discriminatory action, to enjoin him to admit blacks to a lunch counter, for example. But one could just as readily bring suit against the government to compel it to cease aiding the private actor in his discriminatory conduct. Recurrence to the latter remedy might well avoid constitutional issues that an order directed to the private party would raise.[85] In any event, it must be determined whether the governmental involvement is sufficient to give rise to a constitutional remedy; in a suit against the private party it must be determined whether he is so involved with the government as to be subject to constitutional restraints, while in a suit against the government agency it must be determined whether the government's action "impermissibly fostered" the private conduct.

Thus, in *Norwood v. Harrison*,[86] the Court struck down the provision of free textbooks by the State to private schools set up as racially segregated institutions to avoid desegregated public schools, even though the textbook program predated the establishment of these schools. "[A]ny tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.'. . . The constitutional obligation of the State requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or

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[82] 489 U.S. at 201.

[83] Id. at 202.

[84] Id. at 203.

[85] For example, rights of association protected by the First Amendment. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Justice Douglas dissenting); Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974); Norwood v. Harrison, 413 U.S. 455, 470 (1973). The right can be implicated as well by affirmative legislative action barring discrimination in private organizations. *See* Runyon v. McCrary, 427 U.S. 160, 175–79 (1976).

[86] 413 U.S. 455 (1973).

other invidious discriminations."[87] And in a subsequent case, the Court approved a lower court order that barred the city from permitting exclusive temporary use of public recreational facilities by segregated private schools because that interfered with an outstanding order mandating public school desegregation. But it remanded for further factfinding with respect to permitting nonexclusive use of public recreational facilities and general government services by segregated private schools so that the district court could determine whether such uses "involve government so directly in the actions of those users as to warrant court intervention on constitutional grounds."[88] Unlike the situation in which private club discrimination is attacked directly, "the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities. . . ." Receipt of just any sort of benefit or service at all does not by the mere provision—electricity, water, and police and fire protection, access generally to municipal recreational facilities—constitute a showing of state involvement in discrimination and the lower court's order was too broad because not predicated upon a proper finding of state action. "If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation." The lower court was directed to sift facts and weigh circumstances on a case-by-case basis in making determinations.[89]

It should be noted, however, that the Court has interposed, without mentioning these cases, a potentially significant barrier to utilization of the principle set out in them. In a 1976 decision, which it has expanded since, it held that plaintiffs, seeking disallowal of governmental tax benefits accorded to institutions that allegedly discriminated against complainants and thus involved the government in their actions, must in order to bring the suit show that revocation of the benefit would cause the institutions to cease the complained-of conduct.[90]

"Persons".—In the case in which it was first called upon to interpret this clause, the Court doubted whether "any action of a

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[87] Gilmore v. City of Montgomery, 417 U.S. 556, 568–69 (1974) (quoting Norwood v. Harrison, 413 U.S. 455, 466, 467 (1973)).

[88] Gilmore v. City of Montgomery, 417 U.S. 556, 570 (1974).

[89] Id. at 573–74. In Blum v. Yaretsky, 457 U.S. 991 (1982), plaintiffs, objecting to decisions of the nursing home in discharging or transferring patients, sued public officials, but they objected to the discharges and transfers, not to the changes in Medicaid benefits made by the officials.

[90] Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). *See id.* at 46, 63–64 (Justice Brennan concurring and dissenting).

State not directed by way of discrimination against the [N]egroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[91] Nonetheless, in deciding the *Granger Cases* shortly thereafter, the Justices seemingly entertained no doubt that the railroad corporations were entitled to invoke the protection of the clause.[92] Nine years later, Chief Justice Waite announced from the bench that the Court would not hear argument on the question whether the equal protection clause applied to corporations. "We are all of the opinion that it does."[93] The word has been given the broadest possible meaning. "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . ."[94] The only qualification is that a municipal corporation cannot invoke the clause against its State.[95]

"Within Its Jurisdiction".—Persons "within its jurisdiction" are entitled to equal protection from a State. Largely because Article IV, § 2, has from the beginning guaranteed the privileges and immunities of citizens in the several States, the Court has rarely construed the phrase in relation to natural persons.[96] It was first held that a foreign corporation not doing business in a State under conditions that subjected it to process issuing from the courts of that State was not "within the jurisdiction" and could not complain of the preferences granted resident creditors in the distribution of assets of an insolvent corporation,[97] but this holding was subsequently qualified, the Court holding that a foreign corporation which sued in a court of a State in which it was not licensed to

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[91] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873). *Cf.* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Justice Rehnquist dissenting).

[92] Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & Nw. Ry., 94 U.S. 164 (1877); Chicago, M. & St. P. R.R. v. Ackley, 94 U.S. 179 (1877); Winona & St. Peter R.R. v. Blake, 94 U.S. 180 (1877).

[93] Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886). The background and developments from this utterance are treated in H. GRAHAM, EVERYMAN'S CONSTITUTION—HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM (1968), chs. 9, 10, and pp. 566–84. Justice Black, in Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 85 (1938), and Justice Douglas, in Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576 (1949), have disagreed that corporations are persons for equal protection purposes.

[94] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). For modern examples, *see* Levy v. Louisiana, 391 U.S. 68, 70 (1968); Graham v. Richardson, 403 U.S. 365, 371 (1971).

[95] City of Newark v. New Jersey, 262 U.S. 192 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933).

[96] *See* Plyler v. Doe, 457 U.S. 202, 210–16 (1982) (explicating meaning of the phrase in the context of holding that aliens illegally present in a State are "within its jurisdiction" and may thus raise equal protection claims).

[97] Blake v. McClung, 172 U.S. 239, 261 (1898); Sully v. American Nat'l Bank, 178 U.S. 289 (1900).

do business to recover possession of property wrongfully taken from it in another State was "within the jurisdiction" and could not be subjected to unequal burdens in the maintenance of the suit.[98] The test of amenability to service of process within the State was ignored in a later case dealing with discriminatory assessment of property belonging to a nonresident individual.[99] When a State has admitted a foreign corporation to do business within its borders, that corporation is entitled to equal protection of the laws but not necessarily to identical treatment with domestic corporations.[100]

Equal Protection: Judging Classifications by Law

A guarantee of equal protection of the laws was contained in every draft leading up to the final version of § 1 of the Fourteenth Amendment.[101] Immediately pressing to its sponsors was the desire to provide a firm constitutional basis for already-enacted civil rights legislation,[102] and, by amending the Constitution, to place repeal beyond the accomplishment of a simple majority in a future Congress.[103] No doubt there were conflicting interpretations of the phrase "equal protection" among sponsors and supporters and the legislative history does little to clarify whether any sort of consensus was accomplished and if so what it was.[104] While the Court early recognized that African Americans were the primary intended beneficiaries of the protections thus adopted,[105] the spare language was majestically unconfined to so limited a class or to so limited a purpose. Thus, as will be seen, the equal protection standard

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[98] Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923).

[99] Hillsborough v. Cromwell, 326 U.S. 620 (1946).

[100] Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949); Hanover Ins. Co. v. Harding, 272 U.S. 494 (1926). *See also* Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886).

[101] The story is recounted in J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956). *See also* JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (B. Kendrick, ed. 1914). The floor debates are collected in 1 STATUTORY HISTORY OF THE UNITED STATES—CIVIL RIGHTS 181 (B. Schwartz, ed. 1970).

[102] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, now in part 42 U.S.C. §§ 1981, 1982. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422–37 (1968).

[103] As in fact much of the legislation which survived challenge in the courts was repealed in 1894 and 1909. 28 Stat. 36; 35 Stat. 1088. *See* R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 45–46 (1947).

[104] TENBROEK, EQUAL UNDER LAW (rev. ed. 1965); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); and see the essays collected in H. GRAHAM, EVERYMAN'S CONSTITUTION—HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM (1968). In calling for reargument in Brown v. Board of Education, 345 U.S. 972 (1952), the Court asked for and received extensive analysis of the legislative history of the Amendment with no conclusive results. Brown v. Board of Education, 347 U.S. 483, 489–90 (1954).

[105] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

came to be applicable to all classifications by legislative and other official bodies, though not with much initial success,[106] until now the equal protection clause in the fields of civil rights and fundamental liberties looms large as a constitutional text affording the federal and state courts extensive powers of review with regard to differential treatment of persons and classes.

The Traditional Standard: Restrained Review.—The traditional standard of review of equal protection challenges of classifications developed largely though not entirely in the context of economic regulation.[107] It is still most validly applied there, although it appears in many other contexts as well. A more active review has been developed for classifications based on a "suspect" indicium or affecting a "fundamental" interest.

"The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions." Justice Frankfurter once wrote. "They do not relate to abstract units, A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[108] The mere fact of classification will not void legislation,[109] then, because in the exercise of its powers a legislature has considerable discretion in recognizing the differences between and among persons and situations.[110] "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."[111] Or, more succinctly, "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."[112]

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[106] In Buck v. Bell, 274 U.S. 200, 208 (1927), Justice Holmes characterized the equal protection clause as "the last resort of constitutional arguments."

[107] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination against Chinese on the West Coast).

[108] Tigner v. Texas, 310 U.S. 141, 147 (1980).

[109] Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899). *See also* from the same period, Orient Ins. Co. v. Daggs, 172 U.S. 557 (1869); Bachtel v. Wilson, 204 U.S. 36 (1907); Watson v. Maryland, 218 U.S. 173 (1910), and later cases. Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Goesaert v. Cleary, 335 U.S. 464 (1948); McGowan v. Maryland, 366 U.S. 420 (1961); Schilb v. Kuebel, 404 U.S. 357 (1971); Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Schweiker v. Wilson, 450 U.S. 221 (1981).

[110] Barrett v. Indiana, 229 U.S. 26 (1913).

[111] Barbier v. Connolly, 113 U.S. 27, 32 (1885).

[112] Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

How then is the line between permissible and invidious classification to be determined? In *Lindsley v. Natural Carbonic Gas Co.*,[113] the Court summarized one version of the rules still prevailing. "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Especially because of the emphasis upon the necessity for total arbitrariness, utter irrationality, and the fact that the Court will strain to conceive of a set of facts that will justify the classification, the test is extremely lenient and, assuming the existence of a constitutionally permissible goal, no classification will ever be upset. But, contemporaneously with this test, the Court also pronounced another lenient standard which did leave to the courts a judgmental role. In this test, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[114] Use of the latter standard did in fact result in some invalidations.[115]

But then, coincident with the demise of substantive due process in the area of economic regulation,[116] the Court reverted to the

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[113] 220 U.S. 61, 78–79 (1911), quoted in full in Morey v. Doud, 354 U.S. 457, 463–64 (1957). Classifications which are purposefully discriminatory fall before the equal protection clause without more. E.g., Barbier v. Connolly, 113 U.S. 27, 30 (1885); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886). *Cf.* New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 n.40 (1979). Explicit in all the formulations is that a legislature must have had a permissible purpose, a requirement which is seldom failed, given the leniency of judicial review. *But see* Zobel v. Williams, 457 U.S. 55, 63–64 (1982), and id. at 65 (Justice Brennan concurring).

[114] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

[115] E.g., F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935); Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936).

[116] In Nebbia v. New York, 291 U.S. 502, 537 (1934), speaking of the limits of the due process clause, the Court observed that "in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare."

former standard, deferring to the legislative judgment on questions of economics and related matters; even when an impermissible purpose could have been attributed to the classifiers it was usually possible to conceive of a reason that would justify the classification.[117] Strengthening the deference was the recognition of discretion in the legislature not to try to deal with an evil or a class of evils all within the scope of one enactment but to approach the problem piecemeal, to learn from experience, and to ameliorate the harmful results of two evils differently, resulting in permissible over- and under-inclusive classifications.[118]

In recent years, the Court has been remarkably inconsistent in setting forth the standard which it is using, and the results have reflected this. It has upheld economic classifications that suggested impermissible intention to discriminate, reciting at length the *Lindsley* standard, complete with the conceiving-of-a-basis and the one-step-at-a-time rationale,[119] and it has applied this relaxed standard to social welfare regulations.[120] In other cases, it has utilized the *Royster Guano* standard and has looked to the actual goal articulated by the legislature in determining whether the classification had a reasonable relationship to that goal,[121] although it has usually ended up upholding the classification. Finally, purportedly applying the rational basis test, the Court has invalidated some

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[117] E.g., Tigner v. Texas, 310 U.S. 141 (1940); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Goesaert v. Cleary, 335 U.S. 464 (1948); Railway Express Agency v. City of New York, 336 U.S. 106 (1949); McGowan v. Maryland, 366 U.S. 420 (1961).

[118] Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); Schilb v. Kuebel, 404 U.S. 357, 364–65 (1971); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981).

[119] City of New Orleans v. Dukes, 427 U.S. 297, 303–04 (1976); City of Pittsburg v. Alco Parking Corp., 417 U.S. 369 (1974).

[120] Dandridge v. Williams, 397 U.S. 471, 485–86 (1970); Jefferson v. Hackney, 406 U.S. 535, 549 (1972). *See also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587–94 (1979).

[121] E.g., McGinnis v. Royster, 410 U.S. 263, 270–77 (1973); Johnson v. Robison, 415 U.S. 361, 374–83 (1974); City of Charlotte v. International Ass'n of Firefighters, 426 U.S. 283, 286–89 (1976). It is significant that these opinions were written by Justices who subsequently dissented from more relaxed standard of review cases and urged adherence to at least a standard requiring articulation of the goals sought to be achieved and an evaluation of the "fit" of the relationship between goal and classification. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 182 (1980) (Justices Brennan and Marshall dissenting); Schweiker v. Wilson, 450 U.S. 221, 239 (1981) (Justices Powell, Brennan, Marshall, and Stevens dissenting). *See also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 594 (1979) (Justice Powell concurring in part and dissenting in part), and id. at 597, 602 (Justices White and Marshall dissenting).

classifications in the areas traditionally most subject to total deference.[122]

Attempts to develop a consistent principle have so far been unsuccessful. In *Railroad Retirement Board v. Fritz*,[123] the Court acknowledged that "[t]he most arrogant legal scholar would not claim that all of these cases cited applied a uniform or consistent test under equal protection principles," but then went on to note the differences between *Lindsley* and *Royster Guano* and chose the former. But, shortly, in *Schweiker v. Wilson*,[124] in an opinion written by a different Justice,[125] the Court sustained another classification, using the *Royster Guano* standard to evaluate whether the classification bore a substantial relationship to the goal actually chosen and articulated by Congress. In between these decisions, the Court approved a state classification after satisfying itself that the legislature had pursued a permissible goal, but setting aside the decision of the state court that the classification would not promote that goal; the Court announced that it was irrelevant whether in fact the goal would be promoted, the question instead being whether the legislature "could rationally have decided" that it would.[126]

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[122] E.g., Lindsey v. Normet, 405 U.S. 56, 74–79 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); James v. Strange, 407 U.S. 128 (1972); Department of Agriculture v. Moreno, 413 U.S. 528 (1973); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (rejecting various justifications offered for exclusion of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses were permitted). The Court in Reed v. Reed, 404 U.S. 71, 76 (1971), utilized the *Royster Guano* formulation and purported to strike down a sex classification on the rational basis standard, but, whether the standard was actually used or not, the case was the beginning of the decisions applying a higher standard to sex classifications.

[123] 449 U.S. 166, 174–79 (1980). The quotation is id. at 176–77 n.10. The extent of deference is notable, inasmuch as the legislative history seemed clearly to establish that the purpose the Court purported to discern as the basis for the classification was not the congressional purpose at all. Id. at 186–97 (Justice Brennan dissenting). The Court observed, however, that it was "constitutionally irrelevant" whether the plausible basis was in fact within Congress' reasoning, inasmuch as the Court has never required a legislature to articulate its reasons for enactng a statute. Id. at 179. For a continuation of the debate over actual purpose and conceivable justification, *see* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 680–85 (1981) (Justice Brennan concurring), and id. at 702–06 (Justice Rehnquist dissenting). *Cf.* Schweiker v. Wilson, 450 U.S. 221, 243–45 (1981) (Justice Powell dissenting).

[124] 450 U.S. 221, 230–39 (1981). Nonetheless, the four dissenters thought that the purpose discerned by the Court was not the actual purpose, that it had in fact no purpose in mind, and that the classification was not rational. Id. at 239.

[125] Justice Blackmun wrote the Court's opinion in *Wilson*, Justice Rehnquist in *Fritz*.

[126] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466.

In short, it is uncertain which formulation of the rational basis standard the Court will adhere to.[127] In the main, the issues in recent years have not involved the validity of classifications, but rather the care with which the Court has reviewed the facts and the legislation with its legislative history to uphold the challenged classifications. The recent decisions voiding classifications have not clearly set out which standard they have been using.[128] Determination in this area, then, must await presentation to the Court of a classification which it would sustain under the *Lindsley* standard and invalidate under *Royster Guano*.

The New Standards: Active Review.—When government legislates or acts either on the basis of a "suspect" classification or with regard to a "fundamental" interest, the traditional standard of equal protection review is abandoned, and the Court exercises a "strict scrutiny." Under this standard government must demonstrate a high degree of need, and usually little or no presumption favoring the classification is to be expected. After much initial controversy within the Court, it has now created a third category, finding several classifications to be worthy of a degree of "intermediate" scrutiny requiring a showing of important governmental purposes and a close fit between the classification and the purposes.

Paradigmatic of "suspect" categories is classification by race. First in the line of cases dealing with this issue is *Korematsu v. United States*,[129] concerning the wartime evacuation of Japanese-Americans from the West Coast, in which the Court said that because only a single ethnic-racial group was involved the measure was "immediately suspect" and subject to "rigid scrutiny." The school segregation cases[130] purported to enunciate no *per se* rule, however, although subsequent summary treatment of a host of segregation measures may have implicitly done so, until in striking down state laws prohibiting interracial marriage or cohabitation the Court declared that racial classifications "bear a far heavier burden of justification" than other classifications and were invalid

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[127] In City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 294 (1982), the Court observed that it was not clear whether it would apply *Royster Guano* to the classification at issue, citing *Fritz* as well as Craig v. Boren, 429 U.S. 190 (1976), an intermediate standard case involving gender. Justice Powell denied that *Royster Guano* or *Reed v. Reed* had ever been rejected. Id. at 301 n.6 (dissenting). *See also* id. at 296–97 (Justice White).

[128] The exception is Reed v. Reed, 404 U.S. 71 (1971), which, though it purported to apply *Royster Guano*, may have applied heightened scrutiny. *See* Zobel v. Williams, 457 U.S. 55, 61–63 (1982), in which it found the classifications not rationally related to the goals, without discussing which standard it was using.

[129] 323 U.S. 214, 216 (1944). In applying "rigid scrutiny," however, the Court was deferential to the judgment of military authorities, and to congressional judgment in exercising its war powers.

[130] Brown v. Board of Education, 347 U.S. 483 (1954).

because no "overriding statutory purpose"[131] was shown and they were not necessary to some "legitimate overriding purpose."[132] "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[133] Remedial racial classifications, that is, the development of "affirmative action" or similar programs that classify on the basis of race for the purpose of ameliorating conditions resulting from past discrimination, are subject to more than traditional review scrutiny, but whether the highest or some intermediate standard is the applicable test is uncertain.[134] A measure which does not draw a distinction explicitly on race but which does draw a line between those who seek to use the law to do away with or modify racial discrimination and those who oppose such efforts does in fact create an explicit racial classification and is constitutionally suspect.[135]

Toward the end of the Warren Court, there emerged a trend to treat classifications on the basis of nationality or alienage as suspect,[136] to accord sex classifications a somewhat heightened traditional review while hinting that a higher standard might be appropriate if such classifications passed lenient review,[137] and to pass on statutory and administrative treatments of illegitimates inconsistently.[138] Language in a number of opinions appeared to suggest that poverty was a suspect condition, so that treating the poor adversely might call for heightened equal protection review.[139]

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[131] McLaughlin v. Florida, 379 U.S. 184, 192, 194 (1964).

[132] Loving v. Virginia, 388 U.S. 1, 11 (1967). In Lee v. Washington, 390 U.S. 333 (1968), it was indicated that preservation of discipline and order in a jail might justify racial segregation there if shown to be necessary.

[133] Personnel Administrator v. Feeney, 442 U.S. 256, 272 (1979), *quoted in* Washington v. Seattle School Dist., 458 U.S. 457, 485 (1982).

[134] Regents of the Univ. of California v. Bakke, 438 U.S. 265, 287–20 (1978) (Justice Powell announcing judgment of Court) (suspect), and id. at 355–79 (Justices Brennan, White, Marshall, and Blackmun concurring in part and dissenting in part) (intermediate scrutiny); Fullilove v. Klutznick, 448 U.S. 448, 491–92 (1980) (Chief Justice Burger announcing judgment of Court) ("a most searching examination" but not choosing a particular analysis), and id. at 495 (Justice Powell concurring), 523 (Justice Stewart dissenting) (suspect), 548 (Justice Stevens dissenting) (searching scrutiny).

[135] Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle School Dist., 458 U.S. 457 (1982).

[136] Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

[137] Reed v. Reed, 404 U.S. 71 (1971); for the hint, see Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

[138] *See* Levy v. Louisiana, 391 U.S. 68 (1968) (strict review); Labine v. Vincent, 401 U.S. 532 (1971) (lenient review); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (modified strict review).

[139] *Cf.* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969); Bullock v. Carter, 405 U.S. 134 (1972). *See* Shapiro v. Thompson, 394 U.S. 618, 658–59 (1969) (Justice Harlan dissenting). *But cf.* Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

However, in a major evaluation of equal protection analysis early in this period, Justice Powell for the Court utilized solely the two-tier approach, determining that because the interests involved did not occasion strict scrutiny the Court would thus decide the case on minimum rationality standards.[140] Decisively rejected was the contention that a *de facto* wealth classification, with an adverse impact on the poor, was either a suspect classification or merited some scrutiny other than the traditional basis,[141] a holding that has several times been strongly reaffirmed by the Court.[142] But the Court's rejection of some form of intermediate scrutiny did not long survive.

Without extended consideration of the issue of standards, the Court more recently adopted an intermediate level of scrutiny, perhaps one encompassing several degrees of intermediate scrutiny. Thus, gender classifications must, in order to withstand constitutional challenge, "serve important governmental objectives and must be substantially related to achievement of those objectives."[143] And classifications that disadvantage illegitimates are

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[140] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[141] Id. at 44–45. The Court asserted that only when there is an absolute deprivation of some right or interest because of inability to pay will there be strict scrutiny. Id. at 20.

[142] E.g., United States v. Kras, 409 U.S. 434 (1973); Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[143] Craig v. Boren, 429 U.S. 190, 197 (1976). Justice Powell noted that he agreed the precedents made clear that gender classifications are subjected to more critical examination than when "fundamental" rights and "suspect classes" are absent, id. at 210 (concurring), and added: "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited 'upper tier'—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases." Id. at 210, n.*. Justice Stevens wrote that in his view the two-tiered analysis does not describe a method of deciding cases "but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." Id. at 211, 212. Chief Justice Burger and Justice Rehnquist would employ the rational basis test for gender classification. Id. at 215, 217 (dissenting). Occasionally, because of the particular subject matter, the Court has appeared to apply a rational basis standard in fact if not in doctrine, E.g., Rostker v. Goldberg, 453 U.S. 57 (1981) (military); Michael M. v. Superior Court, 450 U.S. 464 (1981) (application of statutory rape prohibition to boys but not to girls). Four Justices in Frontiero v. Richardson, 411 U.S. 677, 684–87 (1973), were prepared to find sex a suspect classification, and in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n. 9 (1982), the Court appeared to leave open the possibility that at least some sex classifications may be deemed suspect.

subject to a similar though less exacting scrutiny of purpose and fit.[144] This period also saw a withdrawal of the Court from the principle that alienage is always a suspect classification, so that some discriminations against aliens based on the nature of the political order, rather than economics or social interests, need pass only the lenient review standard.[145]

Expansion of the characteristics which when used as a basis for classification must be justified by a higher showing than ordinary economic classifications has so far been resisted, the Court holding, for example, that age classifications are neither suspect nor entitled to intermediate scrutiny.[146] While resisting creation of new suspect or "quasi-suspect" classifications, however, the Court may nonetheless apply the *Royster Guano* rather than the *Lindsley* standard of rationality.[147]

The other phase of active review of classifications holds that when certain fundamental liberties and interests are involved, government classifications which adversely affect them must be justified by a showing of a compelling interest necessitating the classification and by a showing that the distinctions are required to further the governmental purpose. The effect of applying the test, as in the other branch of active review, is to deny to legislative judgments the deference usually accorded them and to dispense with the general presumption of constitutionality usually given state classifications.[148]

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[144] Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Parham v. Hughes, 441 U.S. 347 (1979); Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977). In Mathews v. Lucas, 427 U.S. 495, 506 (1976), it was said that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes." *Lucas* sustained a statutory scheme virtually identical to the one struck down in Califano v. Goldfarb, 430 U.S. 199 (1977), except that the latter involved sex while the former involved illegitimacy.

[145] Applying strict scrutiny, *see*, e.g., Sugarman v. Dougall, 413 U.S. 634 (1973); Nyquist v. Mauclet, 432 U.S. 1 (1977). Applying lenient scrutiny in cases involving restrictions on alien entry into the political community, *see* Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979); Cabell v. Chavez-Salido, 454 U.S. 432 (1982). *See also* Plyler v. Doe, 457 U.S. 202 (1982).

[146] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding mandatory retirement at age 50 for state police); Vance v. Bradley, 440 U.S. 93 (1979) (mandatory retirement at age 60 for foreign service officers); Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) (mandatory retirement at age 70 for state judges). *See also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985) (holding that a lower court "erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation").

[147] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); *See* discussion supra pp. 1805–09.

[148] Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

It is thought[149] that the "fundamental right" theory had its origins in *Skinner v. Oklahoma ex rel. Williamson*,[150] in which the Court subjected to "strict scrutiny" a state statute providing for compulsory sterilization of habitual criminals, such scrutiny being thought necessary because the law affected "one of the basic civil rights." In the apportionment decisions, Chief Justice Warren observed that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[151] A stiffening of the traditional test could be noted in the opinion of the Court striking down certain restrictions on voting eligibility[152] and the phrase "compelling state interest" was used several times in Justice Brennan's opinion in *Shapiro v. Thompson*.[153] Thereafter, the phrase was used in several voting cases in which restrictions were voided, and the doctrine was asserted in other cases.[154]

While no opinion of the Court attempted to delineate the process by which certain "fundamental" rights were differentiated from others,[155] it was evident from the cases that the right to vote,[156] the right of interstate travel,[157] the right to be free of wealth distinctions in the criminal process,[158] and the right of procreation[159] were at least some of those interests that triggered active review when *de jure* or *de facto* official distinctions were made with respect to them. This branch of active review the Court also sought to rationalize and restrict in *Rodriguez*,[160] which involved both a claim of *de facto* wealth classifications being suspect and a claim that education was a fundamental interest so that affording less of it to people because they were poor activated the compelling state interest standard. The Court readily agreed that education was an important value in our society. "But the importance of a service performed by the State does not determine whether it must be re-

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[149] Id. at 660 (Justice Harlan dissenting).

[150] 316 U.S. 535, 541 (1942).

[151] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[152] Carrington v. Rash, 380 U.S. 89 (1965); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968).

[153] 394 U.S. 618, 627, 634, 638 (1969).

[154] Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Dunn v. Blumstein, 405 U.S. 330 (1972).

[155] This indefiniteness has been a recurring theme in dissents. E.g., Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Justice Harlan); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Justice Rehnquist).

[156] E.g., Dunn v. Blumstein, 405 U.S. 330 (1972).

[157] E.g., Shapiro v. Thompson, 394 U.S. 618 (1969).

[158] E.g., Tate v. Short, 401 U.S. 395 (1971).

[159] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

[160] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

garded as fundamental for purposes of examination under the Equal Protection Clause. . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[161] A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undoubted importance.

But just as *Rodriguez* was unable to prevent the Court's adoption of a "three-tier" or "sliding-tier" standard of review in the first phase of the active-review doctrine, so it did not by stressing the requirement that an interest be expressly or impliedly protected by the Constitution prevent the addition of other interests to the list of "fundamental" interests. The difficulty was that the Court decisions on the right to vote, the right to travel, the right to procreate, as well as others, premise the constitutional violation to be of the equal protection clause, which does not itself guarantee the right but prevents the differential governmental treatment of those attempting to exercise the right.[162] Thus, state limitation on the entry into marriage was soon denominated an incursion on a fundamental right which required a compelling justification.[163] While denials of public funding of abortions were held to implicate no fundamental interest—abortion being a fundamental interest—and no suspect classification—because only poor women needed public funding[164]—other denials of public assistance because of illegitimacy, alienage, or sex have been deemed governed by the same standard of review as affirmative harms imposed on those grounds.[165] And in *Plyler v. Doe*,[166] the complete denial of education to the children of illegal aliens was found subject to intermediate scrutiny and invalidated.

Thus, the nature of active review in equal protection jurisprudence remains in flux, subject to shifting majorities and varying degrees of concern about judicial activism and judicial restraint. But the cases, more fully reviewed hereafter, clearly indicate that a sliding scale of review is a fact of the Court's cases, however much its doctrinal explanation lags behind.

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[161] Id. at 30, 33–34. *But see* id. at 62 (Justice Brennan dissenting), 70, 110–17 (Justices Marshall and Douglas dissenting).

[162] Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and id. at 66–68 (Justice Brennan concurring), 78–80 (Justice O'Connor concurring) (travel).

[163] Zablocki v. Redhail, 434 U.S. 374 (1978).

[164] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[165] E.g., Jiminez v. Weinberger, 417 U.S. 628 (1974) (illegitimacy); Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Califano v. Goldfarb, 430 U.S. 199 (1977) (sex).

[166] 457 U.S. 202 (1982).

Testing Facially Neutral Classifications Which Impact on Minorities

A classification expressly upon the basis of race triggers strict scrutiny and ordinarily results in its invalidation; similarly, a classification that facially makes a distinction on the basis of sex, or alienage, or illegitimacy triggers the level of scrutiny appropriate to it. A classification that is ostensibly neutral but is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis is subject to heightened scrutiny and ordinarily invalidation.[167] But when it is contended that a law, which is in effect neutral, has a disproportionately adverse effect upon a racial minority or upon another group particularly entitled to the protection of the equal protection clause, a much more difficult case is presented.

It is necessary that one claiming harm through the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate. "[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[168] In reliance upon a prior Supreme Court decision that had seemed to eschew motive or intent and to pinpoint effect as the key to a constitutional violation[169] and upon the Court's decisions reading congressional civil rights enactments as providing that when employment practices disqualifying disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and

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[167] *See e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). Government may make a racial classification that, for example, does not separate whites from blacks but that by focussing on an issue of racial import creates a classification that is suspect. Washington v. Seattle School Dist., 458 U.S. 457, 467–74 (1982).

[168] Washington v. Davis, 426 U.S. 229, 242 (1976). A classification having a differential impact, absent a showing of discriminatory purpose, is subject to review under the lenient, rationality standard. Id. at 247–48; Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982). The Court has applied the same standard to a claim of selective prosecution allegedly penalizing exercise of First Amendment rights. Wayte v. United States, 470 U.S. 598 (1985) (no discriminatory purpose shown). *And see* Bazemore v. Friday, 478 U.S. 385 (1986) (existence of single-race, state-sponsored 4-H Clubs is permissible, given wholly voluntary nature of membership).

[169] The principal case was Palmer v. Thompson, 403 U.S. 217 (1971), in which a 5-to–4 majority refused to order a city to reopen its swimming pools closed allegedly to avoid complying with a court order to desegregate them. The majority opinion strongly warned against voiding governmental action upon an assessment of official motive, id. at 224–26, but it also, and the *Davis* Court so read it as actually deciding, drew the conclusion that since the pools were closed for both whites and blacks there was no discrimination. The city's avowed reason for closing the pools—to avoid violence and economic loss—could not be impeached by allegations of a racial motive. *See also* Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

that it is an insufficient response to demonstrate some rational basis for the challenged practices,[170] a number of lower federal courts had developed in constitutional litigation a "disproportionate impact" analysis under which a violation could be established upon a showing that a statute or practice adversely affected a class without regard to discriminatory purpose, absent some justification going substantially beyond what would be necessary to validate most other classifications.[171] These cases were disapproved in *Davis*; but the Court did note that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it be true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[172]

Both elucidation and not a little confusion followed upon application of *Davis* in the following Terms. Looking to a challenged zoning decision of a local board which had a harsher impact upon blacks and low-income persons than on others, the Court explained

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[170] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The *Davis* Court adhered to this reading of Title VII, merely refusing to import the statutory standard into the constitutional standard. Washington v. Davis, 426 U.S. 229, 238–39, 246–48 (1976). Subsequent cases involving gender discrimination raised the question of the vitality of *Griggs*, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), but the disagreement among the Justices appears to be whether *Griggs* applies to each section of the antidiscrimination provision of Title VII. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Furnco Const. Co. v. Waters, 438 U.S. 567 (1978). *But see* General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (unlike Title VII, under 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, proof of discriminatory intent is required).

[171] *See* Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (listing and disapproving cases). Cases not cited by the Court included the Fifth Circuit's wrestling with the *de facto*/*de jure* segregation distinction. In Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142, 148–50 (5th Cir. 1972) (*en banc*), cert. denied, 413 U.S. 920 (1973), the court held that motive and purpose were irrelevant and the "*de facto* and *de jure* nomenclature" to be "meaningless." After the distinction was reiterated in Keyes v. Denver School District, 413 U.S. 189 (1973), the Fifth Circuit adopted the position that a decisionmaker must be presumed to have intended the probable, natural, or foreseeable consequences of his decision and thus that a school board decision, whatever its facial motivation, that results in segregation is intentional in the constitutional sense. United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir.), vacated and remanded for reconsideration in light of Washington v. Davis, 429 U.S. 990 (1976), modified and adhered to, 564 F.2d 162, reh. denied, 579 F.2d 910 (5th Cir. 1977–78), cert denied, 443 U.S. 915 (1979). *See also* United States v. Texas Educ. Agency, 600 F.2d 518 (5th Cir. 1979). This form of analysis was, however, substantially cabined in Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 278–80 (1979), although foreseeability as one kind of proof was acknowledged by Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979).

[172] Washington v. Davis, 426 U.S. 229, 242 (1976).

in some detail how inquiry into motivation would work.[173] First, a plaintiff is not required to prove that an action rested solely on discriminatory purpose; establishing "a discriminatory purpose" among permissible purposes shifts the burden to the defendant to show that the same decision would have resulted absent the impermissible motive.[174] Second, determining whether a discriminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Impact provides a starting point and "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," but this is a rare case.[175] In the absence of such a stark pattern, a court will look to such factors as the "historical background of the decision," especially if there is a series of official discriminatory actions. The specific sequence of events may shed light on purpose, as would departures from normal procedural sequences or from substantive considerations usually relied on in the past to guide official actions. Contemporary statements of decisionmakers may be examined, and "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."[176] In most circumstances, a court is to look to the totality of the circumstances to ascertain intent.

Strengthening of the intent standard was evidenced in a decision sustaining against sex discrimination challenge a state law giving an absolute preference in civil service hiring to veterans. Veterans who obtain at least a passing grade on the relevant examination may exercise the preference at any time and as many times as they wish and are ranked ahead of all nonveterans, no matter what their score. The lower court observed that the statutory and administrative exclusion of women from the armed forces until the recent past meant that virtually all women were excluded from state civil service positions and held that results so clearly foreseen

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[173] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

[174] Id. at 265–66, 270 n.21. *See also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977) (once plaintiff shows defendant acted from impermissible motive in not rehiring him, burden shifts to defendant to show result would have been same in the absence of that motive; constitutional violation not established merely by showing of wrongful motive); Hunter v. Underwood, 471 U.S. 222 (1985) (circumstances of enactment made it clear that state constitutional amendment requiring disenfranchisement for crimes involving moral turpitude had been adopted for purpose of racial discrimination, even though it was realized that some poor whites would also be disenfranchised thereby).

[175] *Arlington Heights*, supra, at 266.

[176] Id. at 267–68.

could not be said to be unintended. Reversing, the Supreme Court found that the veterans preference law was not overtly or covertly gender based; too many men are nonveterans to permit such a conclusion and there are women veterans. That the preference implicitly incorporated past official discrimination against women was held not to detract from the fact that rewarding veterans for their service to their country was a legitimate public purpose. Acknowledging that the consequences of the preference were foreseeable, the Court pronounced this fact insufficient to make the requisite showing of intent. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[177]

Moreover, in *City of Mobile v. Bolden*[178] a plurality of the Court apparently attempted to do away with the totality of circumstances test and to evaluate standing on its own each of the factors offered to show a discriminatory intent. At issue was the constitutionality of the use of multi-member electoral districts to select the city commission. A prior decision had invalidated a multi-member districting system as discriminatory against blacks and Hispanics, without considering whether its ruling was premised on discriminatory purpose or adverse impact but listing and weighing a series of factors the totality of which caused the Court to find invidious discrimination.[179] But in the plurality opinion in *Mobile*, each of the factors, viewed "alone," was deemed insufficient to show purposeful discrimination.[180] Moreover, the plurality suggested that some of the factors thought to be derived from its precedents and forming part of the totality test in opinions of the

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[177] Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). This case clearly established the application of *Davis* and *Arlington Heights* to all nonracial classifications attacked under the equal protection clause. But compare Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), and Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979), in the context of the quotation in the text. These cases found the *Davis* standard satisfied on a showing of past discrimination coupled with foreseeable impact in the school segregation area.

[178] 446 U.S. 55 (1980). Also decided by the plurality was that discriminatory purpose is a requisite showing to establish a violation of the Fifteenth Amendment and of the equal protection clause in the "fundamental interest" context, vote dilution, rather than just in the suspect classification context.

[179] White v. Regester, 412 U.S. 755 (1972), was the prior case. *See also* Whitcomb v. Chavis, 403 U.S. 124 (1971). Justice White, the author of *Register*, dissented in *Mobile*, supra, 446 U.S. 94, on the basis that "the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White v. Register*." Justice Blackmun, id. at 80, and Justices Brennan and Marshall, agreed with him as alternate holdings, id. at 94, 103.

[180] Id. at 65–74.

lower federal courts—such as minority access to the candidate selection process, governmental responsiveness to minority interests, and the history of past discrimination—were of quite limited significance in determining discriminatory intent.[181] But, contemporaneously with Congress' statutory rejection of the *Mobile* plurality standards,[182] the Court, in *Rogers v. Lodge*,[183] appeared to disavow much of *Mobile* and to permit the federal courts to find discriminatory purpose on the basis of "circumstantial evidence"[184] that is more reminiscent of pre- *Washington v. Davis* cases than of the more recent decisions.

Rogers v. Lodge was also a multimember electoral district case brought under the equal protection clause[185] and the Fifteenth Amendment. The fact that the system operated to cancel out or dilute black voting strength, standing alone, was insufficient to condemn it; discriminatory intent in creating or maintaining the system was necessary. But direct proof of such intent is not required. "[A]n invidious purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[186] Turning to the lower court's enunciation of standards, the Court approved the *Zimmer* formulation. The fact that no black had ever been elected in the county, in which blacks were a majority of the population but a minority of registered voters, was "important evidence of purposeful exclusion."[187] Standing alone this fact was not sufficient, but a historical showing of past discrimination, of systemic exclusion of blacks from the political process as well as educational seg-

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[181] Id. at 73–74. The principal formulation of the test was in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976), and its components are thus frequently referred to as the *Zimmer* factors.

[182] By the Voting Rights Act Amendments of 1982, P.L. 97–205, 96 Stat. 131, 42 U.S.C. § 1973 (as amended), see S. Rep. No. 417, 97th Congress, 2d sess. 27–28 (1982), Congress proscribed a variety of electoral practices "which results" in a denial or abridgment of the right to vote, and spelled out in essence the *Zimmer* factors as elements of a "totality of the circumstances" test.

[183] 458 U.S. 613 (1982). The decision, handed down within days of final congressional passage of the Voting Rights Act Amendments, was written by Justice White and joined by Chief Justice Burger and Justices Brennan, Marshall, Blackmun, and O'Connor. Justices Powell and Rehnquist dissented, id. at 628, as did Justice Stevens. Id. at 631.

[184] Id. at 618–22 (describing and disagreeing with the *Mobile* plurality, which had used the phrase at 446 U.S. 74). The *Lodge* Court approved the prior reference that motive analysis required an analysis of "such circumstantial and direct evidence" as was available. Id., 618 (quoting *Arlington Heights*, 429 U.S. at 266).

[185] The Court confirmed the Mobile analysis that the "fundamental interest" side of heightened equal protection analysis requires a showing of intent when the criteria of classification are neutral and did not reach the Fifteenth Amendment issue in this case. Id. at 619 n. 6.

[186] Id. at 618 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

[187] Id. at 623–24.

regation and discrimination, combined with continued unresponsiveness of elected officials to the needs of the black community, indicated the presence of discriminatory motivation. The Court also looked to the "depressed socio-economic status" of the black population as being both a result of past discrimination and a barrier to black access to voting power.[188] As for the district court's application of the test, the Court reviewed it under the deferential "clearly erroneous" standard and affirmed it.

The Court in a jury discrimination case has also seemed to allow what it had said in *Davis* and *Arlington Heights* it would not permit.[189] Noting that disproportion alone is insufficient to establish a violation, the Court nonetheless held that plaintiff's showing that 79 percent of the county's population was Spanish-surnamed while jurors selected in recent years ranged from 39 to 50 percent Spanish-surnamed was sufficient to establish a *prima facie* case of discrimination. Several factors probably account for the difference. First, the Court has long recognized that discrimination in jury selection can be inferred from less of a disproportion than is needed to show other discriminations, in major part because if jury selection is truly random any substantial disproportion reveals the presence of an impermissible factor, whereas most official decisions are not random.[190] Second, the jury selection process was "highly subjective" and thus easily manipulated for discriminatory purposes, unlike the process in *Davis* and *Arlington Heights* which was regularized and open to inspection.[191] Thus, jury cases are likely to continue to be special cases and in the usual fact situation, at least where the process is open, plaintiffs will bear a heavy and substantial burden in showing discriminatory racial and other animus.

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[188] Id. at 624–627. The Court also noted the existence of other factors showing the tendency of the system to minimize the voting strength of blacks, including the large size of the jurisdiction and the maintenance of majority vote and single-seat requirements and the absence of residency requirements.

[189] Castaneda v. Partida, 430 U.S. 482 (1977). The decision was 5-to–4, Justice Blackmun writing the opinion of the Court and Chief Justice Burger and Justices Stewart, Powell, and Rehnquist dissenting. Id. at 504–507.

[190] Id. at 493–94. This had been recognized in Washington v. Davis, 426 U.S. 229, 241 (1976), and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 n.13 (1977).

[191] Castaneda v. Partida, 430 U.S. 482, 494, 497–99 (1977).

TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWER

Taxation

At the outset, the Court did not regard the equal protection clause as having any bearing on taxation.[192] It soon, however, took jurisdiction of cases assailing specific tax laws under this provision,[193] and in 1890 it cautiously conceded that "clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition."[194] But it observed that the equal protection clause "was not intended to compel the States to adopt an iron rule of equal taxation" and propounded some conclusions valid today.[195] In succeeding years the clause has been invoked but sparingly to invalidate state levies. In the field of property taxation, inequality has been condemned only in two classes of cases: (1) discrimination in assessments, and (2) discrimination against foreign corporations. In addition, there are a handful of cases invalidating, because of inequality, state laws imposing income, gross receipts, sales and license taxes.

Classification for Purpose of Taxation.—The power of the State to classify for purposes of taxation is "of wide range and flexibility."[196] A State may adjust its taxing system in such a way as

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[192] Davidson v. City of New Orleans, 96 U.S. 97, 106 (1878).

[193] Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886); Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886).

[194] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890) (emphasis supplied).

[195] Id. The State "may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon various trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution." *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); and City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[196] Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). Classifications for purpose of taxation have been held valid in the following situations:

Banks: a heavier tax on banks which make loans mainly from money of depositors than on other financial institutions which make loans mainly from money supplied otherwise than by deposits. First Nat'l Bank v. Tax Comm'n, 289 U.S. 60 (1933).

Bank deposits: a tax of 50 cents per $100 on deposits in banks outside a State in contrast with a rate of 10 cents per $100 on deposits in the State. Madden v. Kentucky, 309 U.S. 83 (1940).

Coal: a tax of 2 1/2 percent on anthracite but not on bituminous coal. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922). Gasoline: a graduated severance tax on oils sold primarily for their gasoline content, measured by resort to Baume gravity. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (prohibition on pass-through to consumers of oil and gas severance tax).

Chain stores: a privilege tax graduated according to the number of stores maintained, Tax Comm'rs v. Jackson, 283 U.S. 527 (1931); Fox v. Standard Oil Co., 294 U.S. 87 (1935); a license tax based on the number of stores both within and without the State, Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937) (distinguishing Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933)).

Electricity: municipal systems may be exempted, Puget Sound Co. v. Seattle, 291 U.S. 619 (1934); that portion of electricity produced which is used for pumping water for irrigating lands may be exempted, Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

Insurance companies: license tax measured by gross receipts upon domestic life insurance companies from which fraternal societies having lodge organizations and insuring lives of members only are exempt, and similar foreign corporations are subject to a fixed and comparatively slight fee for the privilege of doing local business of the same kind. Northwestern Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918).

Oleomargarine: classified separately from butter. Magnano Co. v. Hamilton, 292 U.S. 40 (1934).

Peddlers: classified separately from other vendors. Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941).

Public utilities: a gross receipts tax at a higher rate for railroads than for other public utilities, Ohio Tax Cases, 232 U.S. 576 (1914); a gasoline storage tax which places a heavier burden upon railroads than upon common carriers by bus, Nashville C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); a tax on railroads measured by gross earnings from local operations, as applied to a railroad which received a larger net income than others from the local activity of renting, and borrowing cars, Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940); a gross receipts tax applicable only to public utilities, including carriers, the proceeds of which are used for relieving the unemployed, New York Rapid Transit Corp. v. New York, 303 U.S. 573 (1938).

Wine: exemption of wine from grapes grown in the State while in the hands of the producer, Cox v. Texas, 202 U.S. 446 (1906).

Laws imposing miscellaneous license fees have been upheld as follows:

Cigarette dealers: taxing retailers and not wholesalers. Cook v. Marshall County, 196 U.S. 261 (1905).

Commission merchants: requirements that dealers in farm products on commission procure a license, Payne v. Kansas, 248 U.S. 112 (1918).

Elevators and warehouses: license limited to certain elevators and warehouses on right-of-way of railroad, Cargill Co. v. Minnesota, 180 U.S. 452 (1901); a license tax applicable only to commercial warehouses where no other commercial warehousing facilities in township subject to tax, Independent Warehouses v. Scheele, 331 U.S. 70 (1947).

Laundries: exemption from license tax of steam laundries and women engaged in the laundry business where not more than two women are employed. Quong Wing v. Kirkendall, 223 U.S. 59 (1912).

Merchants: exemption from license tax measured by amount of purchases, of manufacturers within the State selling their own product. Armour & Co. v. Virginia, 246 U.S. 1 (1918).

Sugar refineries: exemption from license applicable to refiners of sugar and molasses of planters and farmers grinding and refining their own sugar and molasses. American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900).

Theaters: license graded according to price of admission. Metropolis Theatre Co. v. Chicago, 228 U.S. 61 (1913).

Wholesalers of oil: occupation tax on wholesalers in oil not applicable to wholesalers in other products. Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910).

to favor certain industries or forms of industry[197] and may tax different types of taxpayers differently, despite the fact that they compete.[198] It does not follow, however, that because "some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed."[199] Classification may not be arbitrary. It must be based on a real and substantial difference[200] and the difference need not be great or conspicuous,[201] but there must be no discrimination in favor of one as against another of the same class.[202] Also, discriminations of an unusual character are scrutinized with special care.[203] A gross sales tax graduated at increasing rates with the volume of sales,[204] a heavier license tax on each unit in a chain of stores where the owner has stores located in more than one county,[205] and a gross receipts tax levied on corporations operating taxicabs, but not on individuals,[206] have been held to be a repugnant to the equal protection clause. But it is not the function of the Court to consider the propriety or justness of the tax, to seek for the motives and criticize the public policy which prompted the adoption of the statute.[207] If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied.[208]

One not within the class claimed to be discriminated against cannot raise the question of constitutionality of a statute on the ground that it denies equal protection of the law.[209] If a tax applies to a class which may be separately taxed, those within the class may not complain because the class might have been more

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[197] Quong Wing v. Kirkendall, 223 U.S. 59, 62 (1912). *See also* Hammond Packing Co. v. Montana, 233 U.S. 331 (1914); Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959).

[198] Puget Sound Co. v. Seattle, 291 U.S. 619, 625 (1934). *See* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[199] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

[200] Southern Ry. v. Greene Co., 216 U.S. 400, 417 (1910); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 400 (1928).

[201] Keeney v. New York, 222 U.S. 525, 536 (1912); Tax Comm'rs v. Jackson, 283 U.S. 527, 538 (1931).

[202] Giozza v. Tierman, 148 U.S. 657, 662 (1893).

[203] Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). *See also* Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890).

[204] Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). *See also* Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 (1936).

[205] Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).

[206] Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928). This case was formally overruled in Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

[207] Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931).

[208] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

[209] Darnell v. Indiana, 226 U.S. 390, 398 (1912); Farmers Bank v. Minnesota, 232 U.S. 516, 531 (1914).

aptly defined nor because others, not of the class, are taxed improperly.[210]

Foreign Corporations and Nonresidents.—The equal protection clause does not require identical taxes upon all foreign and domestic corporations in every case.[211] In 1886, a Pennsylvania corporation previously licensed to do business in New York challenged an increased annual license tax imposed by that State in retaliation for a like tax levied by Pennsylvania against New York corporations. This tax was held valid on the ground that the State, having power to exclude entirely, could change the conditions of admission for the future and could demand the payment of a new or further tax as a license fee.[212] Later cases whittled down this rule considerably. The Court decided that "after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind,"[213] and that where it has acquired property of a fixed and permanent nature in a State, it cannot be subjected to a more onerous tax for the privilege of doing business than is imposed on domestic corporations.[214] A state statute taxing foreign corporations writing fire, marine, inland navigation and casualty insurance on net receipts, including receipts from casualty business, was held invalid under the equal protection clause where foreign companies writing only casualty insurance were not subject to a similar tax.[215] Later, the doctrine of *Philadelphia Fire Association v. New York* was revived to sustain an increased tax on gross premiums which was exacted as an annual license fee from foreign but not from domestic corporations.[216] Even though the right of a foreign corporation to do business in a State rests on a license, yet the equal protection clause is held to insure it equality of treatment, at least so far as ad valorem taxation is concerned.[217] The Court, in *WHYY v. Glassboro*[218] held that a foreign nonprofit corporation licensed to do business in the taxing State is denied equal treatment in violation of the equal protection clause where an exemption from state property taxes granted to domestic cor-

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[210] Morf v. Bingaman, 298 U.S. 407, 413 (1936).

[211] Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 88 (1913). *See also* Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 157 (1918).

[212] Philadelphia Fire Ass'n v. New York, 119 U.S. 110, 119 (1886).

[213] Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 511 (1926).

[214] Southern Ry. v. Green, 216 U.S. 400, 418 (1910).

[215] Concordia Ins. Co. v. Illinois, 292 U.S. 535 (1934).

[216] Lincoln Nat'l Life Ins. Co. v. Read, 325 U.S. 673 (1945). This decision was described as "an anachronism" in Western & Southern Life Ins. Co. v. State Bd. Of Equalization, 451 U.S. 648, 667 (1981), the Court reaffirming the rule that taxes discriminating against foreign corporations must bear a rational relation to a legitimate state purpose.

[217] Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571, 572 (1949).

[218] 393 U.S. 117 (1968).

porations is denied to a foreign corporation solely because it was organized under the laws of a sister State and where there is no greater administrative burden in evaluating a foreign corporation than a domestic corporation in the taxing State.

State taxation of insurance companies, insulated from Commerce Clause attack by the McCarran-Ferguson Act, must pass similar hurdles under the Equal Protection Clause. In *Metropolitan Life Ins. Co. v. Ward*,[219] the Court concluded that taxation favoring domestic over foreign corporations "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Rejecting the assertion that it was merely imposing "Commerce Clause rhetoric in equal protection clothing," the Court explained that the emphasis is different even though the result in some cases will be the same: the Commerce Clause measures the effects which otherwise valid state enactments have on interstate commerce, while the Equal Protection Clause merely requires a rational relation to a valid state purpose.[220] However, the Court's holding that the discriminatory purpose was invalid under equal protection analysis would also be a basis for invalidation under a different strand of Commerce Clause analysis.[221]

Income Taxes.—A state law which taxes the entire income of domestic corporations which do business in the State, including that derived within the State, while exempting entirely the income received outside the State by domestic corporations which do no local business, is arbitrary and invalid.[222] In taxing the income of a nonresident, there is no denial of equal protection in limiting the deduction of losses to those sustained within the State, although residents are permitted to deduct all losses, wherever incurred.[223] A retroactive statute imposing a graduated tax at rates different from those in the general income tax law, on dividends received in

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[219] 470 U.S. 869, 878 (1985). The vote was 5–4, with Justice Powell's opinion for the Court being joined by Chief Justice Burger and by Justices White, Blackmun, and Stevens. Justice O'Connor's dissent was joined by Justices Brennan, Marshall, and Rehnquist.

[220] 470 U.S. at 880.

[221] The first level of the Court's "two-tiered" analysis of state statutes affecting commerce tests for virtual *per se* invalidity. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

[222] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *See also* Walters v. City of St. Louis, 347 U.S. 231 (1954), sustaining municipal income tax imposed on gross wages of employed persons but only on net profits of business men and self-employed.

[223] Shaffer v. Carter, 252 U.S. 37, 56, 57 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

a prior year which were deductible from gross income under the law in effect when they were received, does not violate the equal protection clause.[224]

Inheritance Taxes.—There is no denial of equal protection in prescribing different treatment for lineal relations, collateral kindred and unrelated persons, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increases.[225] A tax on life estates where the remainder passes to lineal heirs is valid despite the exemption of life estates where the remainder passes to collateral heirs.[226] There is no arbitrary classification in taxing the transmission of property to a brother or sister, while exempting that to a son-in-law or daughter-in-law.[227] Vested and contingent remainders may be treated differently.[228] The exemption of property bequeathed to charitable or educational institutions may be limited to those within the State.[229] In computing the tax collectible from a nonresident decedent's property within the State, a State may apply the pertinent rates to the whole estate wherever located and take that proportion thereof which the property within the State bears to the total; the fact that a greater tax may result than would be assessed on an equal amount of property if owned by a resident, does not invalidate the result.[230]

Motor Vehicle Taxes.—In demanding compensation for the use of highways, a State may exempt certain types of vehicles, according to the purpose for which they are used, from a mileage tax on carriers.[231] A state maintenance tax act, which taxes vehicle property carriers for hire at greater rates than similar vehicles carrying property not for hire is reasonable, since the use of roads by one hauling not for hire generally is limited to transportation of his own property as an incident to his occupation and is substantially less than that of one engaged in business as a common carrier.[232] A property tax on motor vehicles used in operating a stage line that makes constant and unusual use of the highways may be measured by gross receipts and be assessed at a higher rate than taxes on property not so employed.[233] Common motor carriers of freight operating over regular routes between fixed termini may be

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[224] Welch v. Henry, 305 U.S. 134 (1938).
[225] Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 288, 300 (1898).
[226] Billings v. Illinois, 188 U.S. 97 (1903).
[227] Campbell v. California, 200 U.S. 87 (1906).
[228] Salomon v. State Tax Comm'n, 278 U.S. 484 (1929).
[229] Board of Educ. v. Illinois, 203 U.S. 553 (1906).
[230] Maxwell v. Bugbee, 250 U.S. 525 (1919).
[231] Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).
[232] Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 78 (1939).
[233] Alward v. Johnson, 282 U.S. 509 (1931).

taxed at higher rates than other carriers, common and private.[234] A fee for the privilege of transporting motor vehicles on their own wheels over the highways of the State for purpose of sale does not violate the equal protection clause as applied to cars moving in caravans.[235] The exemption from a tax for a permit to bring cars into the State in caravans of cars moved for sale between zones in the State is not an unconstitutional discrimination where it appears that the traffic subject to the tax places a much more serious burden on the highways than that which is exempt.[236] Also sustained as valid have been exemptions of vehicles weighing less than 3000 pounds from graduated registration fees imposed on carriers for hire, notwithstanding that the exempt vehicles, when loaded, may outweigh those taxed;[237] and exemptions from vehicle license taxes levied on private motor carriers of persons whose vehicles haul passengers and farm products between points not having railroad facilities or farm and dairy products for producers thereof.[238]

Property Taxes.—The State's latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption on the grounds of policy,[239] whether the exemption results from the terms of the statute itself or the conduct of a state official implementing state policy.[240] A provision for the forfeiture of land for nonpayment of taxes is not invalid because the conditions to which it applies exist only in a part of the State.[241] Also, differences in the basis of assessment are not invalid where the person or property affected might properly be placed in a separate class for purposes of taxation.[242] Early cases drew the distinction between intentional and systematic discriminatory action by state officials in undervaluing some property while taxing at full value other property in the same class—an action that could be invalidated under the equal protection clause—and mere errors in judgment resulting in unequal valuation or undervaluation—actions that did not support a claim of discrimina-

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[234] Bekins Van Lines v. Riley, 280 U.S. 80 (1929).

[235] Morf v. Bingaman, 298 U.S. 407 (1936).

[236] Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).

[237] Carley & Hamilton v. Snook, 281 U.S. 66 (1930).

[238] Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n, 295 U.S. 285 (1935).

[239] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[240] Missouri v. Dockery, 191 U.S. 165 (1903).

[241] Kentucky Union Co. v. Kentucky, 219 U.S. 140, 161 (1911).

[242] Charleston Fed. S. & L. Ass'n v. Alderson, 324 U.S. 182 (1945); Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

tion.[243] More recently, however, the Court in *Allegheny Pittsburgh Coal Co. v. Webster County Commission*,[244] found a denial of equal protection to property owners whose assessments, based on recent purchase prices, ranged from 8 to 35 times higher than comparable neighboring property for which the assessor failed over a 10-year period to readjust appraisals. Then, only a few years later, the Court upheld a California ballot initiative that imposed a quite similar result: property that is sold is appraised at purchase price, while assessments on property that has stayed in the same hands since 1976 may rise no more that 2% per year.[245] *Allegheny Pittsburgh* was distinguished, the disparity in assessments being said to result from administrative failure to implement state policy rather than from implementation of a coherent state policy.[246] California's acquisition-value system favoring those who hold on to property over those who purchase and sell property was viewed as furthering rational state interests in promoting "local neighborhood preservation, continuity, and stability," and in protecting reasonable reliance interests of existing homeowners.[247]

An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level.[248] Equal protection is denied if a State does not itself remove the discrimination; it cannot impose upon the person against whom the discrimination is directed the burden of seeking an upward revision of the assessment of other members of the class.[249] A corporation whose valuations were accepted by the assessing commission cannot complain that it was taxed disproportionately, as compared with others, if the commission did not act fraudulently.[250]

Special Assessment.—A special assessment is not discriminatory because apportioned on an *ad valorem* basis, nor does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community.[251] Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest

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[243] Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918); Raymond v. Chicago Traction Co., 207 U.S. 20, 35, 37 (1907); Coutler v. Louisville & Nashville R.R., 196 U.S. 599 (1905). *See also* Chicago, B. & Q. Ry. v. Babcock, 204 U.S. 585 (1907).

[244] 488 U.S. 336 (1989).

[245] Nordlinger v. Hahn, 112 S. Ct. 2326 (1992).

[246] Id. at 2334–35.

[247] Id. at 2333.

[248] Sioux City Bridge v. Dakota County, 260 U.S. 441, 446 (1923).

[249] Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946); Allegheny Pittsburgh Coal Co. v. Webster County Comm'n, 488 U.S. 336 (1989).

[250] St. Louis-San Francisco Ry v. Middlekamp, 256 U.S. 226, 230 (1921).

[251] Memphis & Charleston Ry. v. Pace, 282 U.S. 241 (1931).

inequality.[252] A special highway assessment against railroads based on real property, rolling stock, and other personal property is unjustly discriminatory when other assessments for the same improvement are based on real property alone.[253] A law requiring the franchise of a railroad to be considered in valuing its property for apportionment of a special assessment is not invalid where the franchises were not added as a separate personal property value to the assessment of the real property.[254] In taxing railroads within a levee district on a mileage basis, it is not necessarily arbitrary to fix a lower rate per mile for those having less than 25 miles of main line within the district than for those having more.[255]

Police Power Regulation

Classification.—Justice Holmes' characterization of the equal protection clause as the "usual last refuge of constitutional arguments"[256] was no doubt made with the practice in mind of contestants tacking on an equal protection argument to a due process challenge of state economic regulation. Few police regulations have been held unconstitutional on this ground.

"[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[257] The Court has made it clear that only the totally irrational classification in the economic field will be struck down,[258] and it has held that legislative classifica-

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[252] Kansas City So. Ry. v. Road Imp. Dist. No. 6, 256 U.S. 658 (1921); Thomas v. Kansas City So. Ry., 261 U.S. 481 (1923).

[253] Road Imp. Dist. v. Missouri Pacific R.R., 274 U.S. 188 (1927).

[254] Branson v. Bush, 251 U.S. 182 (1919).

[255] Columbus & Greenville Ry. v. Miller, 283 U.S. 96 (1931).

[256] Buck v. Bell, 274 U.S. 200, 208 (1927).

[257] McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

[258] City of New Orleans v. Dukes, 427 U.S. 297 (1976). Upholding an ordinance that banned all pushcart vendors from the French Quarter, except those in continuous operation for more than eight years, the Court summarized its method of decision here. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers,

tions that impact severely upon some businesses and quite favorably upon others may be saved through stringent deference to legislative judgment.[259] So deferential is the classification that it denies the challenging party any right to offer evidence to seek to prove that the legislature is wrong in its conclusion that its classification will serve the purpose it has in mind, so long as the question is at least debatable and the legislature "*could rationally have decided*" that its classification would foster its goal.[260]

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and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a super-legislature to judge the wisdom or undesirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." Id. at 303–04.

[259] The "grandfather" clause upheld in *Dukes* preserved the operations of two concerns that had operated in the Quarter for 20 years. The classification was sustained on the basis of (1) the City Council proceeding step-by-step and eliminating vendors of more recent vintage, (2) the Council deciding that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Quarter, and (3) the Council believing that both "grandfathered" vending interests had themselves become part of the distinctive character and charm of the Quarter. Id. 305–06. *See also* Friedman v. Rogers, 440 U.S. 1, 17–18 (1979); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970).

[260] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466 (emphasis by Court). Purporting to promote the purposes of resource conservation, easing solid waste disposal problems, and conserving energy, the legislature had banned plastic nonreturnable milk cartons but permitted all other nonplastic nonreturnable containers, such as paperboard cartons. The state court had thought the distinction irrational, but the Supreme Court thought the legislature could have believed a basis for the distinction existed. Courts will receive evidence that a distinction is wholly irrational. United States v. Carolene Products Co., 304 U.S. 144, 153–54 (1938).

Classifications under police regulations have been held valid as follows:

Advertising: discrimination between billboard and newpaper advertising of cigarettes, Packer Corp. v. Utah, 285 U.S. 105 (1932); prohibition of advertising signs on motor vehicles, except when used in the usual business of the owner and not used mainly for advertising, Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911); prohibition of advertising on motor vehicles except notices or advertising of products of the owner, Railway Express Agency v. New York, 336 U.S. 106 (1949); prohibition against sale of articles on which there is a representation of the flag for advertising purposes, except newspapers, periodicals and books, Halter v. Nebraska, 205 U.S. 34 (1907).

Amusement: prohibition against keeping billiard halls for hire, except in case of hotels having twenty-five or more rooms for use of regular guests. Murphy v. California, 225 U.S. 623 (1912).

Attorneys: Kansas law and court regulations requiring resident of Kansas, licensed to practice in Kansas and Missouri and maintaining law offices in both States, but who practices regularly in Missouri, to obtain local associate counsel as a condition of appearing in a Kansas court. Martin v. Walton, 368 U.S. 25 (1961). Two dissenters, Justices Douglas and Black, would sustain the requirement, if limited in application to an attorney who practiced only in Missouri.

Cattle: a classification of sheep, as distinguished from cattle, in a regulation restricting the use of public lands for grazing. Bacon v. Walker, 204 U.S. 311 (1907). *See also* Omaechevarria v. Idaho, 246 U.S. 343 (1918).

Cotton gins: in a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons. Corporation Comm'n v. Lowe, 281 U.S. 431 (1930).

Debt adjustment business: operation only as incident to legitimate practice of law. Ferguson v. Skrupa, 372 U.S. 726 (1963).

Eye glasses: law exempting sellers of ready-to-wear glasses from regulations forbidding opticians to fit or replace lenses without prescriptions from ophthalmologist or optometrist and from restrictions on solicitation of sale of eye glasses by use of advertising matter. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Fish processing: stricter regulation of reduction of fish to flour or meal than of canning. Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936).

Food: bread sold in loaves must be of prescribed standard sizes, Schmidinger v. Chicago, 226 U.S. 578 (1913); food preservatives containing boric acid may not be sold, Price v. Illinois, 238 U.S. 446 (1915); lard not sold in bulk must be put up in containers holding one, three or five pounds or some whole multiple thereof, Armour & Co. v. North Dakota, 240 U.S. 510 (1916); milk industry may be placed in a special class for regulation, Lieberman v. Van De Carr, 199 U.S. 552 (1906); vendors producing milk outside city may be classified separately, Adams v. Milwaukee, 228 U.S. 572 (1913); producing and nonproducing vendors may be distinguished in milk regulations, St. John v. New York, 201 U.S. 633 (1906); different minimum and maximum milk prices may be fixed for distributors and storekeepers, Nebbia v. New York, 291 U.S. 502 (1934); price differential may be granted for sellers of milk not having a well advertised trade name, Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251 (1936); oleomargarine colored to resemble butter may be prohibited, Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902); table syrups may be required to be so labeled and disclose identity and proportion of ingredients, Corn Products Rfg. Co. v. Eddy, 249 U.S. 427 (1919).

Geographical discriminations: legislation limited in application to a particular geographical or political subdivision of a State, Ft. Smith Co. v. Paving Dist., 274 U.S. 387, 391 (1927); ordinance prohibiting a particular business in certain sections of a municipality, Hadacheck v. Sebastian, 239 U.S. 394 (1915); statute authorizing a municipal commission to limit the height of buildings in commercial districts to 125 feet and in other districts to 80 to 100 feet, Welch v. Swasey, 214 U.S. 91 (1909); ordinance prescribing limits in city outside of which no woman of lewd character shall dwell, L'Hote v. New Orleans, 177 U.S. 587, 595 (1900). And see North v. Russell, 427 U.S. 328, 338 (1976).

Hotels: requirement that keepers of hotels having over fifty guests employ night watchmen. Miller v. Strahl, 239 U.S. 426 (1915).

Insurance companies: regulation of fire insurance rates with exemption for farmers mutuals, German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); different requirements imposed upon reciprocal insurance associations than upon mutual companies, Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943); prohibition against life insurance companies or agents engaging in undertaking business, Daniel v. Family Ins. Co., 336 U.S. 220 (1949).

Intoxicating liquors: exception of druggist or manufacturers from regulation. Lloyd v. Dollison, 194 U.S. 445 (1904); Eberle v. Michigan, 232 U.S. 700 (1914).

Landlord-tenant: requiring trial no later than six days after service of complaint and limiting triable issues to the tenant's default, provisions applicable in no other legal action, under procedure allowing landlord to sue to evict tenants for nonpayment of rent, inasmuch as prompt and peaceful resolution of the dispute is proper objective and tenants have other means to pursue other relief. Lindsey v. Normet, 405 U.S. 56 (1972).

Lodging houses: requirement that sprinkler systems be installed in buildings of nonfireproof construction is valid as applied to such a building which is safeguarded by a fire alarm system, constant watchman service and other safety arrangements. Queenside Hills Co. v. Saxl, 328 U.S. 80 (1946).

Markets: prohibition against operation of private market within six squares of public market. Natal v. Louisiana, 139 U.S. 621 (1891).

Medicine: a uniform standard of professional attainment and conduct for all physicians, Hurwitz v. North, 271 U.S. 40 (1926); reasonable exemptions from medical registration law. Watson v. Maryland, 218 U.S. 173 (1910); exemption of persons who heal by prayer from regulations applicable to drugless physicians, Crane v. Johnson, 242 U.S 339 (1917); exclusion of osteopathic physicians from public hospitals, Hayman v. Galveston, 273 U.S. 414 (1927); requirement that persons who treat eyes without use of drugs be licensed as optometrists with exception for persons treating eyes by use of drugs, who are regulated under a different statute, McNaughton v. Johnson, 242 U.S. 344 (1917); a prohibition against advertising by dentists, not applicable to other professions, Semler v. Dental Examiners, 294 U.S. 608 (1935).

Motor vehicles: guest passenger regulation applicable to automobiles but not to other classes of vehicles, Silver v. Silver, 280 U.S. 117 (1929); exemption of vehicles from other States from registration requirement, Storaasli v. Minnesota, 283 U.S. 57 (1931); classification of driverless automobiles for hire as public vehicles, which are required to procure a license and to carry liability insurance, Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); exemption from limitations on hours of labor for drivers of motor vehicles of carriers of property for hire, of those not principally engaged in transport of property for hire, and carriers operating wholly in metropolitan areas, Welch Co. v. New Hampshire, 306 U.S. 79 (1939); exemption of busses and temporary movements of farm implements and machinery and trucks making short hauls from common carriers from limitations in net load and length of trucks, Sproles v. Binford, 286 U.S. 374 (1932); prohibition against operation of uncertified carriers, Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933); exemption from regulations affecting carriers for hire, of persons whose chief business is farming and dairying, but who occasionally haul farm and dairy products for compensation, Hicklin v. Coney, 290 U.S. 169 (1933); exemption of private vehicles, street cars and omnibuses from insurance requirements applicable to taxicabs, Packard v. Banton, 264 U.S. 140 (1924).

Peddlers and solicitors: a State may classify and regulate itinerant vendors and peddlers, Emert v. Missouri, 156 U.S. 296 (1895); may forbid the sale by them of drugs and medicines, Baccus v. Louisiana, 232 U.S. 334 (1914); prohibit drumming or soliciting on trains for business for hotels, medical practitioners, and the like, Williams v. Arkansas, 217 U.S. 79 (1910); or solicitation of employment to prosecute or collect claims, McCloskey v. Tobin, 252 U.S. 107 (1920). And a municipality may prohibit canvassers or peddlers from calling at private residences unless requested or invited by the occupant to do so. Breard v. City of Alexandria, 341 U.S. 622 (1951).

Property destruction: destruction of cedar trees to protect apple orchards from cedar rust, Miller v. Schoene, 276 U.S. 272 (1928).

Railroads: prohibition on operation on a certain street, Railroad Co. v. Richmond, 96 U.S. 521 (1878); requirement that fences and cattle guards and allow recovery of multiple damages for failure to comply, Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885); Minneapolis Ry. v. Beckwith, 129 U.S. 26 (1889); Minneapolis & St. Louis Ry. v. Emmons, 149 U.S. 364 (1893); assessing railroads with entire expense of altering a grade crossing, New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894); liability for fire communicated by locomotive engines, St. Louis & S. F. Ry. v. Mathews, 165 U.S. 1 (1897); required weed cutting; Missouri, Kan., & Tex. Ry. v. May, 194 U.S. 267 (1904); presumption against a railroad failing to give prescribed warning signals, Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933); required use of locomotive headlights of a specified form and power, Atlantic Coast Line Ry. v. Georgia, 234 U.S. 280 (1914); presumption that railroads are liable for

The Court has condemned a variety of statutory classifications as failing to survive the rational basis test, although some of the cases are of doubtful vitality today and some have been questioned. Thus, the Court invalidated a statute which forbade stock insurance companies to act through agents who were their salaried employees but permitted mutual companies to operate in this manner.[261] A law which required private motor vehicle carriers to obtain certificates of convenience and necessity and to furnish security for the protection of the public was held invalid because of the exemption of carriers of fish, farm, and dairy products.[262] The same result befell a statute which permitted mill dealers without well advertised trade names the benefit of a price differential but which restricted this benefit to such dealers entering the business before a certain date.[263] In a decision since overruled, the Court

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damage caused by operation of their locomotives, Seaboard Air Line Ry. v. Watson, 287 U.S. 86 (1932); required sprinkling of streets between tracks to lay the dust, Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919). State "full-crew" laws do not violate the equal protection clause by singling out the railroads for regulation and by making no provision for minimum crews on any other segment of the transportation industry, Firemen v. Chicago, R.I. & P. Ry., 393 U.S. 129 (1968).

Sales in bulk: requirement of notice of bulk sales applicable only to retail dealers. Lemieux v. Young, 211 U.S. 489 (1909).

Secret societies: regulations applied only to one class of oath-bound associations, having a membership of 20 or more persons, where the class regulated has a tendency to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

Securities: a prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, e.g., cotton, grain. Otis v. Parker, 187 U.S. 606 (1903).

Sunday closing law: notwithstanding that they prohibit the sale of certain commodities and services while permitting the vending of others not markedly different, and, even as to the latter, frequently restrict their distribution to small retailers as distinguished from large establishments handling salable as well as nonsalable items, such laws have been upheld. Despite the desirability of having a required day of rest, a certain measure of mercantile activity must necessarily continue on that day and in terms of requiring the smallest number of employees to forego their day of rest and minimizing traffic congestion, it is preferable to limit this activity to retailers employing the smallest number of workers; also, it curbs evasion to refuse to permit stores dealing in both salable and nonsalable items to be open at all. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961). *See also* Soon Hing v. Crowley, 113 U.S. 703 (1885); Petit v. Minnesota, 177 U.S. 164 (1900).

Telegraph companies: a statute prohibiting stipulation against liability for negligence in the delivery of interstate messages, which did not forbid express companies and other common carriers to limit their liability by contract. Western Union Telegraph Co. v. Milling Co., 218 U.S. 406 (1910).

[261] Hartford Ins. Co. v. Harrison, 301 U.S. 459 (1937).

[262] Smith v. Cahoon, 283 U.S. 553 (1931).

[263] Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936). *See* United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 7 n.2 (1970) (reserving question of case's validity, but interpreting it as standing for the proposition that no showing of a valid legislative purpose had been made).

struck down a law which exempted by name the American Express Company from the terms pertaining to the licensing, bonding, regulation, and inspection of "currency exchanges" engaged in the sale of money orders.[264]

Other Business and Employment Relations

Labor Relations.—Objections to labor legislation on the ground that the limitation of particular regulations to specified industries was obnoxious to the equal protection clause have been consistently overruled. Statutes limiting hours of labor for employees in mines, smelters,[265] mills, factories,[266] or on public works[267] have been sustained. And a statute forbidding persons engaged in mining and manufacturing to issue orders for payment of labor unless redeemable at face value in cash was similarly held unobjectionable.[268] The exemption of mines employing less than ten persons from a law pertaining to measurement of coal to determine a miner's wages is not unreasonable.[269] All corporations[270] or public service corporations[271] may be required to issue to employees who leave their service letters stating the nature of the service and the cause of leaving even though other employers are not so required.

Industries may be classified in a workmen's compensation act according to the respective hazards of each,[272] and the exemption of farm laborers and domestic servants does not render such an act invalid.[273] A statute providing that no person shall be denied opportunity for employment because he is not a member of a labor union does not offend the equal protection clause.[274] At a time

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[264] Morey v. Doud, 354 U.S. 457 (1957), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297 (1976), where the exemption of one concern had been by precise description rather than by name.

[265] Holden v. Hardy, 169 U.S. 366 (1988).

[266] Bunting v. Oregon, 243 U.S. 426 (1917).

[267] Atkin v. Kansas, 191 U.S. 207 (1903).

[268] Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914). *See also* Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901).

[269] McLean v. Arkansas, 211 U.S. 539 (1909).

[270] Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922).

[271] Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922).

[272] Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

[273] New York Central R.R. v. White, 243 U.S. 188 (1917); Middletown v. Texas Power & Light Co., 249 U.S. 152 (1919); Ward & Gow v. Krinsky, 259 U.S. 503 (1922).

[274] Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). Neither is it a denial of equal protection for a city to refuse to withhold from its employees' paychecks dues owing their union, although it withholds for taxes, retirement-insurance programs, saving programs, and certain charities, because its offered justification that its practice of allowing withholding only when it benefits all city or department employees is a legitimate method to avoid the burden of withholding money for all persons or organizations that request a checkoff. City of Charlotte v. Firefighters, 426 U.S. 283 (1976).

when protective labor legislation generally was falling under "liberty of contract" applications of the due process clause, the Court generally approved protective legislation directed solely to women workers[275] and this solicitude continued into present times in the approval of laws which were more questionable,[276] but passage of the sex discrimination provision of the 1964 Civil Rights Act has generally called into question all such protective legislation addressed solely to women.[277]

Monopolies and Unfair Trade Practices.—On the principle that the law may hit the evil where it is most felt, state antitrust laws applicable to corporations but not to individuals,[278] or to vendors of commodities but not to vendors of labor,[279] have been upheld. Contrary to its earlier view, the Court now holds that an antitrust act which exempts agricultural products in the hands of the producer is valid.[280] Diversity with respect to penalties also has been sustained. Corporations violating the law may be proceeded against by bill in equity, while individuals are indicted and tried.[281] A provision, superimposed upon the general antitrust law, for revocation of the licenses of fire insurance companies that enter into illegal combinations, does not violate the equal protection clause.[282] A grant of monopoly privileges, if otherwise an appropriate exercise of the police power, is immune to attack under that clause.[283] Likewise, enforcement of an unfair sales act, whereby merchants are privileged to give trading stamps, worth two and one-half percent of the price, with goods sold at or near statutory cost, while a competing merchant, not issuing stamps, is precluded from making an equivalent price reduction, effects no discrimination. There is a reasonable basis for concluding that destructive, deceptive competition results from selective loss-leader selling whereas such abuses do not attend issuance of trading stamps "across the board," as a discount for payment in cash.[284]

Administrative Discretion.—A municipal ordinance which vests in supervisory authorities a naked and arbitrary power to grant or withhold consent to the operation of laundries in wooden

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[275] E.g., Muller v. Oregon, 208 U.S. 412 (1908).

[276] Goesaert v. Cleary, 335 U.S. 464 (1948).

[277] Title VII, 78 Stat. 253, 42 U.S.C. § 2000e. On sex discrimination generally, *see* infra, pp. 1875–86.

[278] Mallinckrodt Works v. St. Louis, 238 U.S. 41 (1915).

[279] International Harvester Co. v. Missouri, 234 U.S. 199 (1914).

[280] Tigner v. Texas, 310 U.S. 141 (1940) (overruling Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902)).

[281] Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910).

[282] Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905).

[283] Pacific States Co. v. White, 296 U.S. 176 (1935); *see also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873): Nebbia v. New York, 291 U.S. 502, 529 (1934).

[284] Safeway Stores v. Oklahoma Grocers, 360 U.S. 334, 339–41 (1959).

buildings, without consideration of the circumstances of individual cases, constitutes a denial of equal protection of the law when consent is withheld from certain persons solely on the basis of nationality.[285] But a city council may reserve to itself the power to make exceptions from a ban on the operation of a dairy within the city,[286] or from building line restrictions.[287] Written permission of the mayor or president of the city council may be required before any person shall move a building on a street.[288] The mayor may be empowered to determine whether an applicant has a good character and reputation and is a suitable person to receive a license for the sale of cigarettes.[289] In a later case,[290] the Court held that the unfettered discretion of river pilots to select their apprentices, which was almost invariably exercised in favor of their relatives and friends, was not a denial of equal protection to persons not selected despite the fact that such apprenticeship was requisite for appointment as a pilot.

Social Welfare.—The traditional "reasonable basis" standard of equal protection adjudication developed in the main in cases involving state regulation of business and industry. "The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard."[291] Thus, a formula for dispensing aid to dependent children which imposed an upper limit on the amount one family could receive, regardless of the number of children in the family, so that the more children in a family the less money per child was received, was found to be rationally related to the legitimate state interest in encouraging employment and in maintaining an equitable balance between welfare families and the families of the working poor.[292] Similarly, a state welfare assistance formula which, after calculation of individual need, provided less of the determined amount to families with dependent children than to those

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[285] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[286] Fischer v. St. Louis, 194 U.S. 361 (1904).
[287] Gorieb v. Fox, 274 U.S. 603 (1927).
[288] Wilson v. Eureka City, 173 U.S. 32 (1899).
[289] Gundling v. Chicago, 177 U.S. 183 (1900).
[290] Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).
[291] Dandridge v. Williams, 397 U.S. 471, 485 (1970). Decisions respecting the rights of the indigent in the criminal process and dicta in Shapiro v. Thompson, 394 U.S. 618, 627 (1969), had raised the prospect that because of the importance of "food, shelter, and other necessities of life," classifications with an adverse or perhaps severe impact on the poor and needy would be subjected to a higher scrutiny. *Dandridge* was a rejection of this approach, which was more fully elaborated in another context in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 18–29 (1973).
[292] Dandridge v. Williams, 397 U.S. 471, 483–87 (1970).

persons in the aged and infirm categories did not violate equal protection because a State could reasonably believe that the aged and infirm are the least able to bear the hardships of an inadequate standard of living, and that the apportionment of limited funds was therefore rational.[293] While reiterating that this standard of review is "not a toothless one," the Court has nonetheless sustained a variety of distinctions on the basis that Congress could rationally have believed them justified,[294] acting to invalidate a provision only once and then on the premise that Congress was actuated by an improper purpose.[295]

Similarly, the Court has rejected the contention that access to housing, despite its great importance, is of any fundamental interest which would place a bar upon the legislature's giving landlords a much more favorable and summary process of judicially-controlled eviction actions than was available in other kinds of litigation.[296]

However, a statute which prohibited the dispensing of contraceptive devices to single persons for birth control but not for disease prevention purposes and which contained no limitation on dispensation to married persons was held to violate the equal protection clause on several grounds. On the basis of the right infringed by the limitation, the Court saw no rational basis for the State to distinguish between married and unmarried persons. Similarly, the exemption from the prohibition for purposes of disease prevention nullified the argument that the rational basis for the law was the deterrence of fornication, the rationality of which the Court doubted in any case.[297] Also denying equal protection was a law afford-

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[293] Jefferson v. Hackney, 406 U.S. 535 (1972). *See also* Richardson v. Belcher, 404 U.S. 78 (1971) (sustaining Social Security provision reducing disability benefits by amount received from worker's compensation but not that received from private insurance).

[294] E.g., Mathews v. De Castro, 429 U.S. 181 (1976) (provision giving benefits to married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying benefits to divorced woman under 62 with dependents represents rational judgment with respect to likely dependency of married but not divorced women); Califano v. Boles, 443 U.S. 282 (1979) (limitation of benefits to widows and divorced wives of wage earners does not deny equal protection to mother of illegitimate child of wage earner who was never married to wage earner).

[295] Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (also questioning rationality).

[296] Lindsey v. Normet, 405 U.S. 56 (1972). The Court did invalidate one provision of the law requiring tenants against whom an eviction judgment had been entered after a trial to post a bond in double the amout of rent to become due by the determination of the appeal, because it bore no reasonable relationship to any valid state objective and arbitrarily distinguished between defendants in eviction actions and defendants in other actions. Id. at 74–79.

[297] Eisenstadt v. Baird, 405 U.S. 438 (1972).

ing married parents, divorced parents, and unmarried mothers an opportunity to be heard with regard to the issue of their fitness to continue or to take custody of their children, an opportunity the Court decided was mandated by due process, but presuming the unfitness of the unmarried father and giving him no hearing.[298]

Punishment of Crime.—Equality of protection under the law implies that in the administration of criminal justice no person shall be subject to any greater or different punishment than another in similar circumstances.[299] Comparative gravity of criminal offenses is, however, largely a matter of state discretion, and the fact that some offenses are punished with less severity than others does not deny equal protection.[300] Heavier penalties may be imposed upon habitual criminals for like offenses,[301] even after a pardon for an earlier offense,[302] and such persons may be made ineligible for parole.[303] A state law doubling the sentence on prisoners attempting to escape does not deny equal protection by subjecting prisoners who attempt to escape together to different sentences depending on their original sentences.[304]

A statute denying state prisoners good time credit for presentence incarceration but permitting those prisoners who obtain bail or other release immediately to receive good time credit for the entire period which they ultimately spend in custody, good time counting toward the date of eligibility for parole, does not deny the prisoners incarcerated in local jails equal protection inasmuch as the distinction is rationally justified by the fact that good time credit is designed to encourage prisoners to engage in rehabilitation courses and activities which exist only in state prisons and not in local jails.[305]

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[298] Stanley v. Illinois, 405 U.S. 645, 658 (1972).

[299] Pace v. Alabama, 106 U.S. 583 (1883). *See* Salzburg v. Maryland, 346 U.S. 545 (1954), sustaining law rendering illegally seized evidence inadmissible in prosecutions in state courts for misdemeanors but permitting use of such evidence in one county in prosecutions for certain gambling misdemeanors. Distinctions based on county areas were deemed reasonable. In North v. Russell, 427 U.S. 328 (1976), the Court sustained the provision of law-trained judges for some police courts and lay judges for others, depending upon the state constitutional classification of cities according to population, since as long as all people within each classified area are treated equally, the different classifications within the court system are justifiable.

[300] Collins v. Johnston, 237 U.S. 502, 510 (1915); Pennsylvania v. Ashe, 302 U.S. 51 (1937).

[301] McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895); Graham v. West Virginia, 224 U.S. 616 (1912).

[302] Carlesi v. New York, 233 U.S. 51 (1914).

[303] Ughbanks v. Armstrong, 208 U.S. 481 (1908).

[304] Pennsylvania v. Ashe, 302 U.S. 51 (1937).

[305] McGinnis v. Royster, 410 U.S. 263 (1973). *Cf.* Hurtado v. United States, 410 U.S. 578 (1973).

The equal protection clause does, however, render invalid a statute requiring the sterilization of persons convicted of various offenses when the statute draws a line between like offenses, such as between larceny by fraud and embezzlement.[306] A statute which provided that convicted defendants sentenced to imprisonment must reimburse the State for the furnishing of free transcripts of their trial by having amounts deducted from prison pay denied such persons equal protection when it did not require reimbursement of those fined, given suspended sentences, or placed on probation.[307] Similarly, a statute enabling the State to recover the costs of such transcripts and other legal defense fees by a civil action was defective under the equal protection clause because indigent defendants against whom judgment was entered under the statute did not have the benefit of exemptions and benefits afforded other civil judgment debtors.[308] But a bail reform statute which provided for liberalized forms of release and which imposed the costs of operating the system upon one category of released defendants, generally those most indigent, was not invalid because the classification was rational and because the measure was in any event a substantial improvement upon the old bail system.[309] The Court in the last several years has applied the clause strictly to prohibit numerous *de jure* and *de facto* distinctions based on wealth or indigency.[310]

EQUAL PROTECTION AND RACE

Overview

The Fourteenth Amendment "is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citi-

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[306] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

[307] Rinaldi v. Yeager, 384 U.S. 305 (1966). *But see* Fuller v. Oregon, 417 U.S. 40 (1974) (imposition of reimbursement obligation for state-provided defense assistance upon convicted defendants but not upon those acquitted or whose convictions are reversed is objectively rational).

[308] James v. Strange, 407 U.S. 128 (1972).

[309] Schilb v. Kuebel, 404 U.S. 357 (1971).

[310] Infra, pp. 1916–25.

zenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. . . . [The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provision by appropriate legislation."[1] Thus, a state law which on its face worked a discrimination against African Americans was void.[2] In addition, "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[3]

Education

Development and Application of "Separate But Equal".— Cases decided soon after ratification of the Fourteenth Amendment may be read as precluding any state-imposed distinction based on race,[4] but the Court in *Plessy v. Ferguson*[5] adopted a principle first propounded in litigation attacking racial segregation in the schools of Boston, Massachusetts.[6] *Plessy* concerned not schools but a state law requiring the furnishing of "equal but separate" facilities for rail transportation and requiring the separation of "white

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[1] Strauder v. West Virginia, 100 U.S. 303, 306–07 (1880).

[2] Id. (law providing for jury service specified white males). Moreover it will not do to argue that a law that segregates the races or prohibits contacts between them discriminates equally against both races. Buchanan v. Warley, 245 U.S. 60 (1917) (ordinance prohibiting blacks from occupying houses in blocks where whites were predominant and whites from occupying houses in blocks where blacks were predominant). *Compare* Pace v. Alabama, 106 U.S. 583 (1883) (sustaining conviction under statute that imposed a greater penalty for adultery or fornication between a white person and an African American than was imposed for similar conduct by members of the same race, using "equal application" theory), *with* McLaughlin v. Florida, 379 U.S. 184, 188 (1964), and Loving v. Virginia, 388 U.S. 1, 10 (1967) (rejecting theory).

[3] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (discrimination against Chinese).

[4] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67–72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307–08 (1880); Virginia v. Rives, 100 U.S. 313, 318 (1880); Ex parte Virginia, 100 U.S. 339, 344–45 (1880).

[5] 163 U.S. 537 (1896).

[6] Roberts v. City of Boston, 59 Mass. 198, 206 (1849).

and colored" passengers. "The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in exercise of their police power."[7] The Court observed that a common instance of this type of law was the separation by race of children in school, which had been upheld, it was noted, "even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."[8]

Subsequent cases following *Plessy* that actually concerned school segregation did not expressly question the doctrine and the Court's decisions assumed its validity. It held, for example, that a Chinese student was not denied equal protection by being classified with African Americans and sent to school with them rather than with whites,[9] and it upheld the refusal of an injunction to require a school board to close a white high school until it opened a high school for African Americans.[10] And no violation of the equal protection clause was found when a state law prohibited a private college from teaching whites and African Americans together.[11]

In 1938, the Court began to move away from "separate but equal." It then held that a State which operated a law school open to whites only and which did not operate any law school open to African Americans violated an applicant's right to equal protection, even though the State offered to pay his tuition at an out-of-state law school. The requirement of the clause was for equal facilities

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[7] Plessy v. Ferguson, 163 U.S. 537, 543–44 (1896). "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Id. at 552, 559.

[8] Id. at 544–45. The act of Congress in providing for separate schools in the District of Columbia was specifically noted. Justice Harlan's well-known dissent contended that the purpose and effect of the law in question was discriminatory and stamped African Americans with a badge of inferiority. "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Id. at 552, 559.

[9] Gong Lum v. Rice, 275 U.S. 78 (1927).

[10] Cummings v. Board of Education, 175 U.S. 528 (1899).

[11] Berea College v. Kentucky, 211 U.S. 45 (1908).

within the State.[12] When Texas established a law school for African Americans after the plaintiff had applied and been denied admission to the school maintained for whites, the Court held the action to be inadequate, finding that the nature of law schools and the associations possible in the white school necessarily meant that the separate school was unequal.[13] Equally objectionable was the fact that when Oklahoma admitted an African American law student to its only law school it required him to remain physically separate from the other students.[14]

Brown v. Board of Education.—"Separate but equal" was formally abandoned in *Brown v. Board of Education*,[15] involving challenges to segregation *per se* in the schools of four States in which the lower courts had found that the schools provided were equalized or were in the process of being equalized. Though the Court had asked for argument on the intent of the framers, extensive research had proved inconclusive, and the Court asserted that it could not "turn the clock back to 1867. . . or even to 1896," but must rather consider the issue in the context of the vital importance of education in 1954. The Court reasoned that denial of opportunity for an adequate education would often be a denial of the opportunity to succeed in life, that separation of the races in the schools solely on the basis of race must necessarily generate feelings of inferiority in the disfavored race adversely affecting education as well as other matters, and therefore that the equal protection clause was violated by such separation. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[16]

After hearing argument on what remedial order should issue, the Court remanded the cases to the lower courts to adjust the effectuation of its mandate to the particularities of each school district. "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." The lower courts were directed to "require that the defendants make a prompt and reasonable start toward full compliance," although "[o]nce such a start has been made," some additional time would be needed because of problems arising in the course of com-

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[12] Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). *See also* Sipuel v. Board of Regents, 332 U.S. 631 (1948).

[13] Sweatt v. Painter, 339 U.S. 629 (1950).

[14] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[15] 347 U.S. 483 (1954). Segregation in the schools of the District of Columbia was held to violate the due process clause of the Fifth Amendment in Bolling v. Sharpe, 347 U.S. 497 (1954).

[16] Brown v. Board of Education, 347 U.S. 483, 489–90, 492–95 (1954).

pliance and the lower courts were to allow it if on inquiry delay were found to be "in the public interest and [to be] consistent with good faith compliance . . . to effectuate a transition to a racially nondiscriminatory school system." But in any event the lower courts were to require compliance "with all deliberate speed."[17]

Brown's *Aftermath*.—For the next several years, the Court declined to interfere with the administration of its mandate, ruling only in those years on the efforts of Arkansas to block desegregation of schools in Little Rock.[18] In the main, these years were taken up with enactment and administration of "pupil placement laws" by which officials assigned each student individually to a school on the basis of formally nondiscriminatory criteria, and which required the exhaustion of state administrative remedies before each pupil seeking reassignment could bring individual litigation.[19] The lower courts eventually began voiding these laws for discriminatory application, permitting class actions,[20] and the Supreme Court voided the exhaustion of state remedies requirement.[21] In the early 1960's, various state practices—school closings,[22] minority transfer plans,[23] zoning,[24] and the like—were ruled impermissible, and the Court indicated that the time was running out for full implementation of the *Brown* mandate.[25]

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[17] Brown v. Board of Education, 349 U.S. 294, 300–01 (1955).

[18] Cooper v. Aaron, 358 U.S. 1 (1958).

[19] E.g., Covington v. Edwards, 264 F.2d 780 (4th Cir.), cert. denied, 361 U.S. 840 (1959); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95 (4th Cir.), cert. denied, 361 U.S. 818 (1959); Dove v. Parham, 271 F.2d 132 (8th Cir. 1959).

[20] E.g., McCoy v. Greensboro City Bd. of Educ., 283 F.2d 667 (4th Cir. 1960); Green v. School Board of Roanoke, 304 F.2d 118 (4th Cir. 1962); Gibson v. Board of Pub. Instruction of Dade County, 272 F.2d 763 (5th Cir. 1959); Northcross v. Board of Educ. of Memphis, 302 F.2d 818 (6th Cir. 1962), cert. denied, 370 U.S. 944 (1962).

[21] McNeese v. Board of Education, 373 U.S. 668 (1963).

[22] Griffin v. Board of Supervisors of Prince Edward County, 377 U.S. 218 (1964) (holding that "under the circumstances" the closing by a county of its schools while all the other schools in the State were open denied equal protection, the circumstances apparently being the state permission and authority for the closing and the existence of state and county tuition grant/tax credit programs making an official connection with the "private" schools operating in the county and holding that a federal court is empowered to direct the appropriate officials to raise and expend money to operate schools). On school closing legislation in another State, *see* Bush v. Orleans Parish School Bd., 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), aff'd, 365 U.S. 569 (1961); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), aff'd, 368 U.S. 515 (1962).

[23] Goss v. Board of Educ. of City of Knoxville, 373 U.S. 683 (1963). Such plans permitted as of right a student assigned to a school in which students of his race were a minority to transfer to a school where the student majority was of his race.

[24] Northcross v. Board of Educ. of Memphis, 333 F.2d 661 (6th Cir. 1964).

[25] The first comment appeared in dictum in a nonschool case, Watson v. City of Memphis, 373 U.S. 526, 530 (1963), and was implied in Goss v. Board of Educ. of City of Knoxville, 373 U.S. 683, 689 (1963). In Bradley v. School Bd. of City of Richmond, 382 U.S. 103, 105 (1965), the Court announced that "[d]elays in deseg-

About this time, "freedom of choice" plans were promulgated under which each child in the school district could choose each year which school he wished to attend, and, subject to space limitations, he could attend that school. These were first approved by the lower courts as acceptable means to implement desegregation, subject to the reservation that they be fairly administered.[26] Enactment of Title VI of the Civil Rights Act of 1964 and HEW enforcement in a manner as to require effective implementation of affirmative actions to desegregate[27] led to a change of attitude in the lower courts and the Supreme Court. In *Green v. School Board of New Kent County*,[28] the Court posited the principle that the only desegregation plan permissible is one which actually results in the abolition of the dual school, and charged school officials with an affirmative obligation to achieve it. School boards must present to the district courts "a plan that promises realistically to work and promises realistically to work *now*," in such a manner as "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[29] Furthermore, as the Court and lower courts had by then made clear, school desegregation encompassed not only the abolition of dual attendance systems for students, but also the

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regating school systems are no longer tolerable." A grade-a-year plan was implicitly disapproved in Calhoun v. Latimer, 377 U.S. 263 (1964), vacating and remanding 321 F.2d 302 (5th Cir. 1963). *See* Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966).

[26] E.g., Bradley v. School Bd. of City of Richmond, 345 F.2d 310 (4th Cir.), rev'd on other grounds, 382 U.S. 103 (1965); Bowman v. School Bd. of Charles City County, 382 F.2d 326 (4th Cir. 1967).

[27] Pub. L. 88–352, 78 Stat. 252, 42 U.S.C. § 2000d et seq. (prohibiting discrimination in federally assisted programs). HEW guidelines were designed to afford guidance to state-local officials in interpretations of the law and were accepted as authoritative by the courts and utilized. Davis v. Board of School Comm'rs of Mobile County, 364 F.2d 896 (5th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965).

[28] 391 U.S. 430 (1968); Raney v. Board of Educ. of Gould School Dist., 391 U.S. 443 (1968). These cases had been preceded by a circuit-wide promulgation of similar standards in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), modified & aff'd. en banc, 380 F.2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967).

[29] Green, 391 U.S. at 439, 442 (1968). "*Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Id. at 437–38. The case laid to rest the dictum of Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955), that the Constitution "does not require integration" but "merely forbids discrimination." *Green* and Raney v. Board of Educ. of Gould School Dist., 391 U.S. 443 (1968), found "freedom of choice" plans inadequate, and Monroe v. Board of Comm'rs of City of Jackson, 391 U.S. 450 (1968), found a "free transfer" plan inadequate.

merging into one system of faculty,[30] staff, and services, so that no school could be marked as either a "black" or a "white" school.[31]

Implementation of School Desegregation.—In the aftermath of *Green*, the various Courts of Appeals held inadequate an increasing number of school board plans based on "freedom of choice," on zoning which followed traditional residential patterns, or on some combination of the two.[32] The Supreme Court's next opportunity to speak on the subject came when HEW sought to withdraw desegregation plans it had submitted at court request and asked for a postponement of a court-imposed deadline, which was reluctantly granted by the Fifth Circuit. The Court unanimously reversed and announced that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."[33]

In the October 1970 Term the Court in *Swann v. Charlotte-Mecklenburg Board of Education*[34] undertook to elaborate the requirements for achieving a unitary school system and delineating the methods which could or must be used to achieve it, and at the same time struck down state inhibitions on the process.[35] The opinion in *Swann* emphasized that the goal since *Brown* was the dismantling of an officially-imposed dual school system. "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of

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[30] Bradley v. School Bd. of City of Richmond, 382 U.S. 103 (1965) (faculty desegregation is integral part of any pupil desegregation plan); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (upholding district court order requiring assignment of faculty and staff on a ratio based on racial population of district).

[31] United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), mod. & aff'd en banc, 380 F.2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967).

[32] Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir.), cert. denied, 396 U.S. 904 (1969); Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682 (5th Cir.), cert. denied, 396 U.S. 940 (1969); Brewer v. School Bd. of City of Norfolk, 397 F.2d 37 (4th Cir. 1968); Clark v. Board of Educ. of City of Little Rock, 426 F.2d 1035 (8th Cir. 1970).

[33] Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969). The Court summarily reiterated its point several times in the Term. Carter v. West Fana Parish School Board, 396 U.S. 290 (1970); Northcross v. Board of Educ. of Memphis, 397 U.S. 232 (1970); Dowell v. Bd. of Educ. of Oklahoma City, 396 U.S. 269 (1969).

[34] 402 U.S. 1 (1971); *see also* Davis v. Board of School Comm'rs of Mobile County, 402 U.S. 33 (1971).

[35] McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

violation of substantive constitutional rights under the Equal Protection Clause is shown."[36] While "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law," any such situation must be closely scrutinized by the lower courts, and school officials have a heavy burden to prove that the situation is not the result of state-fostered segregation. Any desegregation plan which contemplates such a situation must before a court accepts it be shown not to be affected by present or past discriminatory action on the part of state and local officials.[37] When a federal court has to develop a remedial desegregation plan, it must start with an appreciation of the mathematics of the racial composition of the school district population; its plan may rely to some extent on mathematical ratios but it should exercise care that this use is only a starting point.[38]

Because current attendance patterns may be attributable to past discriminatory actions in site selection and location of school buildings, the Court in *Swann* determined that it is permissible, and may be required, to resort to altering of attendance boundaries and grouping or pairing schools in noncontiguous fashion in order to promote desegregation and undo past official action; in this remedial process, conscious assignment of students and drawing of boundaries on the basis of race is permissible.[39] Transportation of students—busing—is a permissible tool of educational and desegregation policy, inasmuch as a neighborhood attendance policy may be inadequate due to past discrimination. The soundness of any busing plan must be weighed on the basis of many factors, including the age of the students; when the time or distance of travel is so great as to risk the health of children or significantly impinge on the educational process, the weight shifts.[40] Finally, the Court indicated, once a unitary system has been established, no affirmative obligation rests on school boards to adjust attendance year by year to reflect changes in composition of neighborhoods so long as the change is solely attributable to private action.[41]

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[36] 402 U.S. at 18.

[37] Id. at 25–27.

[38] Id. at 22–25.

[39] Id. at 27–29.

[40] Id. at 29–31.

[41] Id. at 31–32. In Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), the Court held that after a school board has complied with a judicially-imposed desegregation plan in student assignments and thus undone the existing segregation, it is beyond the district court's power to order it subsequently to implement a new plan to undo the segregative effects of shifting residential patterns. The Court agreed with the dissenters, Justices Marshall and Brennan, id., 436, 441, that the school board had not complied in other respects, such as in staff hiring and pro-

Northern Schools: Inter- and Intradistrict Desegregation.—The appearance in the Court of school cases from large metropolitan areas in which the separation of the races was not mandated by law but allegedly by official connivance through zoning of school boundaries, pupil and teacher assignment policies, and site selections, required the development of standards for determining when segregation was *de jure* and what remedies should be imposed when such official separation was found.[42]

Accepting the findings of lower courts that the actions of local school officials and the state school board were responsible in part for the racial segregation existing within the school system of the City of Detroit, the Court in *Milliken v. Bradley*[43] set aside a desegregation order which required the formulation of a plan for a metropolitan area including the City and 53 adjacent suburban school districts. The basic holding of the Court was that such a remedy could be implemented only to cure an inter-district constitutional violation, a finding that the actions of state officials and of the suburban school districts were responsible, at least in part, for the interdistrict segregation, through either discriminatory actions within those jurisdictions or constitutional violations within one district that had produced a significant segregative effect in another district.[44] The permissible scope of an inter-district order, however, would have to be considered in light of the Court's language regarding the value placed upon local educational units. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[45] Too, the complexity of formulating and overseeing the implementation of a plan that would effect a *de facto* consolidation of multiple school districts, the Court indicated, would impose a task which few, if any, judges are qualified to perform and one

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motion, but it thought that was irrelevant to the issue of neutral student assignments.

[42] The presence or absence of a statute mandating separation provides no talisman indicating the distinction between *de jure* and *de facto* segregation. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979). As early as Ex parte Virginia, 100 U.S. 339, 347 (1880), it was said that "no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws . . . violates the constitutional inhibition: and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." The significance of a statute is that it simplifies in the extreme a complainant's proof.

[43] 418 U.S. 717 (1974).

[44] Id. at 745.

[45] Id. at 741–42.

which would deprive the people of control of their schools through elected representatives.[46] "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district."[47]

"The controlling principle consistently expounded in our holdings," said the Court in the *Detroit* case, "is that the scope of the remedy is determined by the nature and extent of the constitutional violation."[48] While this axiom caused little problem when the violation consisted of statutorily mandated separation,[49] it has required a considerable expenditure of judicial effort and parsing of opinions to work out in the context of systems in which the official practice was nondiscriminatory but official action operated to the contrary. At first, the difficulty was obscured through the creation of presumptions that eased the burden of proof on plaintiffs, but later the Court had appeared to stiffen the requirements on plaintiffs.

Determination of the existence of a constitutional violation and the formulation of remedies, within one district, first was presented to the Court in a northern setting in *Keyes v. Denver School District*.[50] The lower courts had found the school segregation existing within one part of the City to be attributable to official action, but as to the central city they found the separation not to be the result

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[46] Id. at 742–43. This theme has been sounded in a number of cases in suits seeking remedial actions in particularly intractable areas. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974); O'Shea v. Littleton, 414 U.S. 488, 500–02 (1974). In Hills v. Gautreaux, 425 U.S. 284, 293 (1976), the Court wrote that it had rejected the metropolitan order because of "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities. . . ." In other places, the Court stressed the absence of interdistrict violations, id., 294, and in still others paired the two reasons. Id. at 296.

[47] Milliken v. Bradley, 418 U.S. 717, 746 (1974). The four dissenters argued both that state involvement was so pervasive that an inter-district order was permissible and that such an order was mandated because it was the State's obligation to establish a unitary system, an obligation which could not be met without an inter-district order. Id. at 757, 762, 781.

[48] Id. at 744. *See* Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976) ("[T]he Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power."); Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (Justice Powell concurring) ("a core principle of desegregation cases" is that set out in *Milliken*).

[49] When an entire school system has been separated into white and black schools by law, disestablishment of the system and integration of the entire system is required. "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness." Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971). *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

[50] 413 U.S. 189 (1973).

of official action and refused to impose a remedy for those schools. The Supreme Court found this latter holding to be error, holding that when it is proved that a significant portion of a system is officially segregated, the presumption arises that segregation in the remainder or other portions of the system is also similarly contrived. The burden the shifts to the school board or other officials to rebut the presumption by proving, for example, that geographical structure or natural boundaries have caused the dividing of a district into separate identifiable and unrelated units. Thus, a finding that one significant portion of a school system is officially segregated may well be the predicate for finding that the entire system is a dual one, necessitating the imposition upon the school authorities of the affirmative obligation to create a unitary system throughout.[51]

Keyes then was consistent with earlier cases requiring a showing of official complicity in segregation and limiting the remedy to the violation found; by creating presumptions *Keyes* simply afforded plaintiffs a way to surmount the barriers imposed by strict application of the requirements. Following the enunciation in the *Detroit* inter-district case, however, of the "controlling principle" of school desegregation cases, the Court appeared to move away from the *Keyes* approach.[52] First, the Court held that federal equity power was lacking to impose orders to correct demographic shifts "not attributed to any segregative actions on the part of the defendants."[53] A district court that had ordered implementation of a student assignment plan that resulted in a racially neutral system exceeded its authority, the Court held, by ordering annual readjustments to offset the demographic changes.[54]

Second, in the first *Dayton* case the lower courts had found three constitutional violations that had resulted in some pupil seg-

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[51] Id. at 207–211. Justice Rehnquist argued that imposition of a district-wide segregation order should not proceed from a finding of segregative intent and effect in only one portion, that in effect the Court was imposing an affirmative obligation to integrate without first finding a constitutional violation. Id. at 254 (dissenting). Justice Powell cautioned district courts against imposing disruptive desegregation plans, especially substantial busing in large metropolitan areas, and stressed the responsibility to proceed with reason, flexibility, and balance. Id. at 217, 236 (concurring and dissenting). *See* his opinion in Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (concurring).

[52] Of significance was the disallowance of the disproportionate impact analysis in constitutional interpretation and the adoption of an apparently strengthened intent requirement. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp ., 429 U.S. 252 (1977); Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256 (1979). This principle applies in the school area. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419 (1977).

[53] Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

[54] Id. at 436.

regation, and, based on these three, viewed as "cumulative violations," a district-wide transportation plan had been imposed. Reversing, the Supreme Court reiterated that the remedial powers of the federal courts are called forth by violations and are limited by the scope of those violations. "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'"[55] The goal is to restore the plaintiffs to the position they would have occupied had they not been subject to unconstitutional action. Lower courts "must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy."[56] The Court then sent the case back to the district court for the taking of evidence, the finding of the nature of the violations, and the development of an appropriate remedy.

Surprisingly, however, *Keyes* was reaffirmed and broadly applied in subsequent appeals of the *Dayton* case after remand and in an appeal from Columbus, Ohio.[57] Following the Supreme Court standards, the *Dayton* district court held that the plaintiffs had failed to prove official segregative intent, but was reversed by the appeals court. The *Columbus* district court had found and had been affirmed in finding racially discriminatory conduct and had ordered extensive busing. The Supreme Court held that the evidence adduced in both district courts showed that the school boards had carried out segregating actions affecting a substantial portion of each school system prior to and contemporaneously with the 1954 decision in *Brown v. Board of Education*. The *Keyes* presumption therefore required the school boards to show that systemwide discrimination had not existed, and they failed to do so. Because each system was a dual one in 1954, it was subject to an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated

[55] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (quoting Hills v. Gautreaux, 425 U.S. 284, 294 (1976)).

[56] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977). The Court did not discuss the presumptions that had been permitted by *Keyes*. Justice Brennan, the author of *Keyes*, concurred on the basis that the violations found did not justify the remedy imposed, asserting that the methods of proof utilized in *Keyes* were still valid. Id. at 421.

[57] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

root and branch."[58] Following 1954, segregated schools continued to exist and the school boards had in fact taken actions which had the effect of increasing segregation. In the context of the on-going affirmative duty to desegregate, the foreseeable impact of the actions of the boards could be utilized to infer segregative intent, thus satisfying the *Davis-Arlington Heights* standards.[59] The Court further affirmed the district-wide remedies, holding that its earlier *Dayton* ruling had been premised upon the evidence of only a few isolated discriminatory practices; here, because systemwide impact had been found, systemwide remedies were appropriate.[60]

Reaffirmation of the breadth of federal judicial remedial powers came when, in a second appeal of the *Detroit* case, the Court unanimously upheld the order of a district court mandating compensatory or remedial educational programs for school children who had been subjected to past acts of *de jure* segregation. So long as the remedy is related to the condition found to violate the Constitution, so long as it is remedial, and so long as it takes into account the interests of state and local authorities in managing their own affairs, federal courts have broad and flexible powers to remedy past wrongs.[61]

The broad scope of federal courts' remedial powers was more recently reaffirmed in *Missouri v. Jenkins*.[62] There the Court ruled that a federal district court has the power to order local authorities to impose a tax increase in order to pay to remedy a constitutional violation, and if necessary may enjoin operation of state laws prohibiting such tax increases. However, the Court also held, the district court had abused its discretion by itself imposing an increase in property taxes without first affording local officials "the opportunity to devise their own solutions."[63]

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[58] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979) (quoting Green v. School Bd. of New Kent County, 391 U.S. 430, 437–38 (1968)). Contrast the Court's more recent decision in Bazemore v. Friday, 478 U.S. 385 (1986) (per curiam), holding that adoption of "a wholly neutral admissions policy" for voluntary membership in state-sponsored 4-H Clubs was sufficient even though single race clubs continued to exist under that policy. There is no constitutional requirement that states in all circumstances pursue affirmative remedies to overcome past discrimination, the Court concluded; the voluntary nature of the clubs, unrestricted by state definition of attendance zones or other decisions affecting membership, presented a "wholly different milieu" from public schools. Id. at 408 (concurring opinion of Justice White, endorsed by the Court's per curiam opinion).

[59] Id. at 461–65.

[60] Id. at 465–67.

[61] Milliken v. Bradley, 433 U.S. 267 (1977). The Court also affirmed that part of the order directing the State of Michigan to pay one-half the costs of the mandated programs. Id. at 288–91.

[62] 495 U.S. 33 (1990).

[63] Id. at 52. Similarly, the Court held in Spallone v. United States, 493 U.S. 265 (1990), that a district court had abused its discretion in imposing contempt sanc-

Efforts to Curb Busing and Other Desegregation Remedies.—Especially during the 1970s, courts and Congress grappled with the appropriateness of various remedies for *de jure* racial separation in the public schools, both North and South. Busing of school children created the greatest amount of controversy. *Swann*, of course, sanctioned an order requiring fairly extensive busing, as did the more recent *Dayton* and *Columbus* cases, but the earlier case cautioned as well that courts must observe limits occasioned by the nature of the educational process and the well-being of children,[64] and subsequent cases declared the principle that the remedy must be no more extensive than the violation found.[65] Congress has enacted several provisions of law, either permanent statutes or annual appropriations limits, that purport to restrict the power of federal courts and administrative agencies to order or to require busing, but these, either because of drafting infelicities or because of modifications required to obtain passage, have been largely ineffectual.[66] Stronger proposals, for statutes or for constitutional amendments, were introduced in Congress, but none passed both Houses.[67]

Of considerable importance to the possible validity of any substantial congressional restriction on judicial provision of remedies for *de jure* segregation violations are two decisions contrastingly dealing with referenda-approved restrictions on busing and other

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tions directly on members of a city council for refusing to vote to implement a consent decree designed to remedy housing discrimination. Instead, the court should have proceeded first against the city alone, and should have proceeded against individual council members only if the sanctions against the city failed to produce compliance.

[64] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 30–31 (1971).

[65] Milliken v. Bradley, 418 U.S. 717, 744 (1974).

[66] E.g., § 407(a) of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. § 2000c–6, construed to cover only *de facto* segregation in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971); § 803 of the Education Amendments of 1972, 86 Stat. 372, 20 U.S.C. § 1653 (expired), interpreted in Drummond v. Acree, 409 U.S. 1228 (1972) (Justice Powell in Chambers), and the Equal Educational Opportunities and Transportation of Students Act of 1974, 88 Stat. 514 (1974), 20 U.S.C. §§ 1701–1757, see especially § 1714, interpreted in Morgan v. Kerrigan, 530 F.2d 401, 411–15 (1st Cir.), cert. denied, 426 U.S. 995 (1976), and United States v. Texas Education Agency, 532 F.2d 380, 394 n.18 (5th Cir.), vacated on other grounds sub nom. Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976); and a series of annual appropriations riders, first passed as riders to the 1976 and 1977 Labor-HEW bills, § 108, 90 Stat. 1434 (1976), and § 101, 91 Stat. 1460, 42 U.S.C. § 2000d, upheld against facial attack in Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980).

[67] *See, e.g., The 14th Amendment and School Busing, Hearings before the Senate Judiciary Subcommittee on the Constitution*, 97th Congress, 1st Sess. (1981); and *School Desegregation, Hearings before the House Judiciary Subcommittee on Civil and Constitutional Rights*, 97th Congress, 1st Sess. (1981).

remedies in Washington State and California.[68] Voters in Washington, following a decision by the school board in Seattle to undertake a mandatory busing program, approved an initiative that prohibited school boards from assigning students to any but the nearest or next nearest school that offered the students' course of study; there were so many exceptions, however, that the prohibition in effect applied only to busing for racial purposes. In California the state courts had interpreted the state constitution to require school systems to eliminate both *de jure* and *de facto* segregation. The voters approved an initiative that prohibited state courts from ordering busing unless the segregation was in violation of the Fourteenth Amendment, and a federal judge would be empowered to order it under United States Supreme Court precedents.

By a narrow division, the Court held unconstitutional the Washington measure, and with near unanimity of result if not of reasoning it sustained the California measure. The constitutional flaw in the Washington measure, the Court held, was that it had chosen a racial classification—busing for desegregation—and imposed more severe burdens upon those seeking to obtain such a policy than it imposed with respect to any other policy. Local school boards could make education policy on anything but busing. By singling out busing and making it more difficult than anything else, the voters had expressly and knowingly enacted a law that had an intentional impact on a minority.[69] The Court discerned no such impediment in the California measure, a simple repeal of a remedy that had been within the government's discretion to provide. Moreover, the State continued under an obligation to alleviate *de facto* segregation by every other feasible means. The initiative had merely foreclosed one particular remedy—court-ordered mandatory busing—as inappropriate.[70]

Termination of Court Supervision.—With most school desegregation decrees having been entered decades ago, the issue has arisen as to what showing of compliance is necessary for a school district to free itself of continuing court supervision. The Court grappled with the issue, first in a case involving Oklahoma City

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[68] Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). The decisions were in essence an application of Hunter v. Erickson, 393 U.S. 385 (1969).

[69] Washington v. Seattle School Dist., 458 U.S. 457, 470–82 (1982). Justice Blackmun wrote the opinion of the Court and was joined by Justices Brennan, White, Marshall, and Stevens. Dissenting were Justices Powell, Rehnquist, O'Connor, and Chief Justice Burger. Id. at 488. The dissent essentially argued that because the State was ultimately entirely responsible for all educational decisions, its choice to take back part of the power it had delegated did not raise the issues the majority thought it did.

[70] Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 535–40 (1982).

public schools, then in a case involving the University of Mississippi college system. A desegregation decree may be lifted, the Court said in *Oklahoma City Board of Education v. Dowell,*[71] upon a showing that the purposes of the litigation have been "fully achieved,"—i.e., that the school district is being operated "in compliance with the commands of the Equal Protection Clause," that it has been so operated "for a reasonable period of time," and that it is "unlikely" that the school board would return to its former violations. On remand, the trial court was directed to determine "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past [*de jure*] discrimination had been eliminated to the extent practicable."[72] In *United States v. Fordice,*[73] the Court determined that the State of Mississippi had not, by adopting and implementing race-neutral policies, eliminated all vestiges of its prior *de jure,* racially segregated, "dual" system of higher education. The State must also, to the extent practicable and consistent with sound educational practices, eradicate policies and practices that are traceable to the dual system and that continue to have segregative effects. The Court identified several surviving aspects of Mississippi's prior dual system which are constitutionally suspect, and which must be justified or eliminated. The State's admissions policy, requiring higher test scores for admission to the five historically white institutions than for admission to the three historically black institutions, is suspect because it originated as a means of preserving segregation. Also suspect are the widespread duplication of programs, a possible remnant of the dual "separate-but-equal" system; institutional mission classifications making three historically white schools the flagship "comprehensive" universities; and the retention and operation of all eight schools rather than the possible merger of some.

Juries

It has been established since *Strauder v. West Virginia*[74] that exclusion of an identifiable racial or ethnic group from a grand

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[71] 498 U.S. 237 (1991).

[72] Id. at 249–50.

[73] 112 S. Ct. 2727 (1992).

[74] 100 U.S. 303 (1880). *Cf.* Virginia v. Rives, 100 U.S. 313 (1880). Discrimination on the basis of race, color, or previous condition of servitude in jury selection has also been statutorily illegal since enactment of § 4 of the Civil Rights Act of 1875, 18 Stat. 335, 18 U.S.C. § 243. *See* Ex parte Virginia, 100 U.S. 339 (1880). In Hernandez v. Texas, 347 U.S. 475 (1954), the Court found jury discrimination against Mexican-Americans to be a denial of equal protection, a ruling it reiterated in Castaneda v. Partida, 430 U.S. 482 (1977), finding proof of discrimination by statistical dispari-

jury[75] which indicts a defendant or a petit jury[76] which tries him, or from both,[77] denies a defendant of the excluded race equal protection and necessitates reversal of his conviction or dismissal of his indictment.[78] Even if the defendant's race differs from that of the excluded jurors, the Court has recently held, the defendant has third party standing to assert the rights of jurors excluded on the basis of race.[79] "Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[80] Thus, persons may bring actions seeking affirmative relief to outlaw discrimination in jury selection, instead of depending on defendants to raise the issue.[81]

A *prima facie* case of deliberate and systematic exclusion is made when it is shown that no African Americans have served on juries for a period of years[82] or when it is shown that the number of African Americans who served was grossly disproportionate to the percentage of African Americans in the population and eligible

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ties, even though Mexican-surnamed individuals constituted a governing majority of the county and a majority of the selecting officials were Mexican-American.

[75] Bush v. Kentucky, 107 U.S. 110 (1883); Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 773 (1964); Alexander v. Louisiana, 405 U.S. 625 (1972).

[76] Hollins v. Oklahoma, 295 U.S. 394 (1935); Avery v. Georgia, 345 U.S. 559 (1953).

[77] Neal v. Delaware, 103 U.S. 370 (1881); Martin v. Texas, 200 U.S. 316 (1906); Norris v. Alabama, 294 U.S. 587 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Patton v. Mississippi, 332 U.S. 463 (1947); Coleman v. Alabama, 377 U.S. 129 (1964); Whitus v. Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967); Sims v. Georgia, 385 U.S. 538 (1967).

[78] Even if there is no discrimination in the selection of the petit jury which convicted him, a defendant who shows discrimination in the selection of the grand jury which indicted him is entitled to a reversal of his conviction. Cassell v. Texas, 339 U.S. 282 (1950); Alexander v. Louisiana, 405 U.S. 625 (1972); Vasquez v. Hillery, 474 U.S. 254 (1986) (habeas corpus remedy).

[79] Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991). *See also* Peters v. Kiff, 407 U.S. 493 (1972) (defendant entitled to have his conviction or indictment set aside if he proves such exclusion). The Court in 1972 was substantially divided with respect to the reason for rejecting the "same class" rule—that the defendant be of the excluded class—but in Taylor v. Louisiana, 419 U.S. 522 (1975), involving a male defendant and exclusion of women, the Court ascribed the result to the fair-cross-section requirement of the Sixth Amendment, which would have application across-the—board.

[80] Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 329 (1970).

[81] Id.; Turner v. Fouche, 396 U.S. 346 (1970).

[82] Norris v. Alabama, 294 U.S. 587 (1935); Patton v. Mississippi, 332 U.S. 463 (1947); Hill v. Texas, 316 U.S. 400 (1942).

for jury service.[83] Once this *prima facie* showing has been made, the burden is upon the jurisdiction to prove that discrimination was not practiced; it is not adequate that jury selection officials testify under oath that they did not discriminate.[84] Although the Court in connection with a showing of great disparities in the racial makeup of jurors called has voided certain practices which made discrimination easy to accomplish,[85] it has not outlawed discretionary selection pursuant to general standards of educational attainment and character which can be administered fairly.[86] Similarly, it declined to rule that African Americans must be included on all-white jury commissions which administer the jury selection laws in some States.[87]

In *Swain v. Alabama*,[88] African Americans regularly appeared on jury venires but no African American had actually served on a jury. It appeared that the absence was attributable to the action of the prosecutor in peremptorily challenging all potential African American jurors, but the Court refused to set aside the conviction. The use of peremptory challenges to exclude the African Americans in the particular case was permissible, the Court held, regardless of the prosecutor's motive, although it was indicated the consistent use of such challenges to remove African Americans would be unconstitutional. Because the record did not disclose that the prosecution was responsible solely for the fact that no African American had ever served on a jury and that some exclusions were not the result of defense peremptory challenges, defendant's claims were rejected.

The *Swain* holding as to the evidentiary standard was overruled in *Batson v. Kentucky*, the Court ruling that "a defendant may establish a prima facie case of purposeful [racial] discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's [own] trial." To rebut this showing, the prosecutor "must articulate

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[83] Pierre v. Louisiana, 306 U.S. 354 (1939); Cassell v. Texas, 339 U.S. 282 (1950); Eubanks v. Louisiana, 356 U.S. 584 (1958); Whitus v. Georgia, 385 U.S. 545 (1967); Alexander v. Louisiana, 405 U.S. 625 (1972). For an elaborate discussion of statistical proof, *see* Castaneda v. Partida, 430 U.S. 482 (1977).

[84] Norris v. Alabama, 294 U.S. 587 (1935); Eubanks v. Georgia, 385 U.S. 545 (1967); Sims v. Georgia, 389 U.S. 404 (1967); Turner v. Fouche, 396 U.S. 346, 360–361 (1970).

[85] Avery v. Georgia, 345 U.S. 559 (1953) (names of whites and African Americans listed on differently colored paper for drawing for jury duty); Whitus v. Georgia, 385 U.S. 545 (1967) (jurors selected from county tax books, in which names of African Americans were marked with a "c").

[86] Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 331–37 (1970), and cases cited.

[87] Id. at 340–41.

[88] 380 U.S. 202 (1965).

a neutral explanation related to the particular case," but the explanation "need not rise to the level justifying exercise of a challenge for cause."[89] The Court has also extended *Batson* to apply to racially discriminatory use of peremptory challenges by private litigants in civil litigation,[90] and by a defendant in a criminal case,[91] the principal issue in these cases being the presence of state action, not the invalidity of purposeful racial discrimination.

Discrimination in the selection of grand jury foremen presents a closer question, answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus the Court had "assumed without deciding" that discrimination in selection of foremen for state grand juries would violate equal protection in a system in which the judge selected a foreman to serve as a thirteenth voting juror, and that foreman exercised significant powers.[92] That situation was distinguished, however, in a due process challenge to the federal system, where the foreman's responsibilities are "essentially clerical" and where the selection is from among the members of an already-chosen jury.[93]

Capital Punishment

In *McCleskey v. Kemp*[94] the Court rejected an equal protection claim of a black defendant who received a death sentence following conviction for murder of a white victim, even though a statistical study showed that blacks charged with murdering whites were

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[89] 476 U.S. 79, 96, 98 (1986). The principles were applied in Trevino v. Texas, 112 S. Ct. 1547 (1991), holding that a criminal defendant's allegation of a state's pattern of historical and habitual use of peremptory challenges to exclude members of racial minorities was sufficient to raise an equal protection claim under *Swain* as well as *Batson*. In Hernandez v. New York, 500 U.S. 352 (1991), a prosecutor was held to have sustained his burden of providing a race-neutral explanation for using peremptory challenges to strike bilingual Latino jurors; the prosecutor had explained that, based on the answers and demeanor of the prospective jurors, he had doubted whether they would accept the interpreter's official translation of trial testimony by Spanish-speaking witnesses. The *Batson* ruling applies to cases pending on direct review or not yet final when *Batson* was decided, Griffith v. Kentucky, 479 U.S. 314 (1987), but does not apply to a case on federal habeas corpus review, Allen v. Hardy, 478 U.S. 255 (1986).

[90] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).

[91] Georgia v. McCollum, 112 S. Ct. 2348 (1992).

[92] Rose v. Mitchell, 443 U.S. 545, 551 n.4 (1979).

[93] Hobby v. United States, 468 U.S. 339 (1984). Note also that in this limited context where injury to the defendant was largely conjectural, the Court seemingly revived the same class rule, holding that a white defendant challenging on due process grounds exclusion of blacks as grand jury foremen could not rely on equal protection principles protecting blacks defendants from "the injuries of stigmatization and prejudice" associated with discrimination. Id. at 347.

[94] 481 U.S. 279 (1987). The decision was 5–4, with Justice Powell's opinion of the Court being joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Scalia, and with Justices Brennan, Blackmun, Stevens, and Marshall dissenting.

more than four times as likely to receive a death sentence in the state than were defendants charged with killing blacks. The Court distinguished *Batson v. Kentucky* by characterizing capital sentencing as "fundamentally different" from jury venire selection; consequently, reliance on statistical proof of discrimination is less rather than more appropriate.[95] "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[96] Also, the Court noted, there is not the same opportunity to rebut a statistical inference of discrimination; jurors may not be required to testify as to their motives, and for the most part prosecutors are similarly immune from inquiry.[97]

Housing

Buchanan v. Warley[98] invalidated an ordinance which prohibited blacks from occupying houses in blocks where the greater number of houses were occupied by whites and which prohibited whites from doing so where the greater number of houses were occupied by blacks. Although racially restrictive covenants do not themselves violate the equal protection clause, the judicial enforcement of them, either by injunctive relief or through entertaining damage actions, does violate the Fourteenth Amendment.[99] Referendum passage of a constitutional amendment repealing a "fair housing" law and prohibiting further state or local action in that direction was held unconstitutional in *Reitman v. Mulkey*,[100] though on somewhat ambiguous grounds, while a state constitutional requirement that decisions of local authorities to build low-rent housing projects in an area must first be submitted to referendum, although other similar decisions were not so limited, was

[95] 481 U.S. at 294. Dissenting Justices Brennan, Blackmun and Stevens challenged this position as inconsistent with the Court's usual approach to capital punishment, in which greater scrutiny is required. Id. at 340, 347–48, 366.

[96] Id. at 297. Discretion is especially important to the role of a capital sentencing jury, which must be allowed to consider any mitigating factor relating to the defendant's background or character, or to the nature of the offense; the Court also cited the "traditionally 'wide discretion'" accorded decisions of prosecutors. Id. at 296.

[97] The Court distinguished *Batson* by suggesting that the death penalty challenge would require a prosecutor "to rebut a study that analyzes the past conduct of scores of prosecutors" whereas the peremptory challenge inquiry would focus only on the prosecutor's own acts. 481 U.S. at 296 n.17.

[98] 245 U.S. 60 (1917). *See also* Harmon v. Tyler, 273 U.S. 668 (1927); Richmond v. Deans, 281 U.S. 704 (1930).

[99] Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); Barrows v. Jackson, 346 U.S. 249 (1953). *Cf.* Corrigan v. Buckley, 271 U.S. 323 (1926).

[100] 387 U.S. 369 (1967).

found to accord with the equal protection clause.[101] Private racial discrimination in the sale or rental of housing is subject to two federal laws prohibiting most such discrimination.[102] Provision of publicly assisted housing, of course, must be on a nondiscriminatory basis.[103]

Other Areas of Discrimination

Transportation.—The "separate but equal" doctrine won Supreme Court endorsement in the transportation context,[104] and its passing in the education field did not long predate its demise in transportation as well.[105] During the interval, the Court held invalid a state statute which permitted carriers to provide sleeping and dining cars for white persons only,[106] held that a carrier's provision of unequal, or nonexistent, first class accommodations to African Americans violated the Interstate Commerce Act,[107] and voided both state-required and privately imposed segregation of the races on interstate carriers as burdens on commerce.[108] *Boynton v. Virginia*[109] voided a trespass conviction of an interstate African American bus passenger who had refused to leave a restaurant which the Court viewed as an integral part of the facilities devoted to interstate commerce and therefore subject to the Interstate Commerce Act.

Public Facilities.—In the aftermath of *Brown v. Board of Education*, the Court in a lengthy series of *per curiam* opinions established the invalidity of segregation in publicly provided or supported facilities and of required segregation in any facility or function.[110] A municipality could not operate a racially-segregated park

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[101] James v. Valtierra, 402 U.S. 137 (1971). The Court did not perceive that either on its face or as applied the provision was other than racially neutral. Justices Marshall, Brennan, and Blackmun dissented. Id. at 143.

[102] Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1982, *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), and Title VIII of the Civil Rights Act of 1968, 82 Stat. 73, 42 U.S.C. § 3601 et seq.

[103] *See* Hills v. Gautreaux, 425 U.S. 284 (1976).

[104] Plessy v. Ferguson, 163 U.S. 537 (1896).

[105] Gayle v. Browder, 352 U.S. 903 (1956), aff'g 142 F. Supp. 707 (M.D. Ala.) (statute requiring segregation on buses is unconstitutional). "We have settled beyond question that no State may require racial segregation of interstate transportation facilities. . . . This question is no longer open; it is foreclosed as a litigable issue." Bailey v. Patterson, 369 U.S. 31, 33 (1962).

[106] McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914).

[107] Mitchell v. United States, 313 U.S. 80 (1941).

[108] Morgan v. Virginia, 328 U.S. 373 (1946); Henderson v. United States, 339 U.S. 816 (1950).

[109] 364 U.S. 454 (1960).

[110] E.g., Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (city lease of park facilities); New Orleans City Park Improvement Ass'n v.

pursuant to a will which left the property for that purpose and which specified that only whites could use the park,[111] but it was permissible for the state courts to hold that the trust had failed and to imply a reverter to the decedent's heirs.[112] A municipality under court order to desegregate its publicly-owned swimming pools was held to be entitled to close the pools instead, so long as it entirely ceased operation of them.[113]

Marriage.—Statutes which forbid the contracting of marriage between persons of different races are unconstitutional[114] as are statutes which penalize interracial cohabitation.[115] Similarly, a court may not deny custody of a child based on a parent's remarriage to a person of another race and the presumed "best interests of the child" to be free from the prejudice and stigmatization that might result.[116]

Judicial System.—Segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience[117] or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible.[118] Jail inmates have a right not to be segregated by race unless there is some overriding necessity arising out of the process of keeping order.[119]

Detiege, 358 U.S. 54 (1958) (public parks and golf courses); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (statute requiring segregated athletic contests); Turner v. City of Memphis, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); Schiro v. Bynum, 375 U.S. 395 (1964) (ordinance requiring segregation in municipal auditorium).

[111] Evans v. Newton, 382 U.S. 296 (1966). State courts had removed the city as trustee but the Court thought the city was still inextricably bound up in the operation and maintenance of the park. Justices Black, Harlan, and Stewart dissented because they thought the removal of the city as trustee removed the element of state action. Id. at 312, 315.

[112] Evans v. Abney, 396 U.S. 435 (1970). The Court thought that in effectuating the testator's intent in the fashion best permitted by the Fourteenth Amendment, the state courts engaged in no action violating the equal protection clause. Justices Douglas and Brennan dissented. Id. at 448, 450.

[113] Palmer v. Thompson, 403 U.S. 217 (1971). The Court found that there was no official encouragement of discrimination through the act of closing the pools and that inasmuch as both white and black citizens were deprived of the use of the pools there was no unlawful discrimination. Justices White, Brennan, and Marshall dissented, arguing that state action taken solely in opposition to desegregation was impermissible, both in defiance of the lower court order and because it penalized African Americans for asserting their rights. Id. at 240. Justice Douglas also dissented. Id. 231.

[114] Loving v. Virginia, 388 U.S. 1 (1967).

[115] McLaughlin v. Florida, 379 U.S. 184 (1964).

[116] Palmore v. Sidoti, 466 U.S. 429 (1984).

[117] Johnson v. Virginia, 373 U.S. 61 (1963).

[118] Hamilton v. Alabama, 376 U.S. 650 (1964) (reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

[119] Lee v. Washington, 390 U.S. 333 (1968); Wilson v. Kelley, 294 F. Supp. 1005 (N.D.Ga.), aff'd, 393 U.S. 266 (1968).

Public Designation.—It is unconstitutional to designate candidates on the ballot by race[120] and apparently any sort of designation by race on public records is suspect although not necessarily unlawful.[121]

Public Accommodations.—Whether or not discrimination practiced by operators of retail selling and service establishments gave rise to a denial of constitutional rights occupied the Court's attention considerably in the early 1960's, but it avoided finally deciding one way or the other, generally finding forbidden state action in some aspect of the situation.[122] Passage of the 1964 Civil Rights Act obviated any necessity to resolve the issue.[123]

Elections.—While, of course, the denial of the franchise on the basis of race or color violates the Fifteenth Amendment and a series of implementing statutes enacted by Congress,[124] the administration of election statutes so as to treat white and black voters or candidates differently can constitute a denial of equal protection as well.[125] Additionally, cases of gerrymandering of electoral districts and the creation or maintenance of electoral practices that dilute and weaken black and other minority voting strength is subject to Fourteenth and Fifteenth Amendment and statutory attack.[126]

Permissible Remedial Utilizations of Racial Classifications

Of critical importance in equal protection litigation is the degree to which government is permitted to take race or another suspect classification into account in order to formulate and implement a remedy to overcome the effects of past discrimination against the class. Often the issue is framed in terms of "reverse discrimination," inasmuch as the governmental action deliberately favors members of the class and may simultaneously impact adversely

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[120] Anderson v. Martin, 375 U.S. 399 (1964).

[121] Tancil v. Woolls, 379 U.S. 19 (1964) (summarily affirming lower court rulings sustaining law requiring that every divorce decree indicate race of husband and wife, but voiding laws requiring separate lists of whites and African Americans in voting, tax and property records).

[122] E.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Turner v. City of Memphis, 369 U.S. 350 (1962); Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Robinson v. Florida, 378 U.S. 153 (1964).

[123] Title II, 78 Stat. 243, 42 U.S.C. § 2000a to 2000a–6. *See* Hamm v. City of Rock Hill, 379 U.S. 306 (1964). On the various positions of the Justices on the constitutional issue, see the opinions in Bell v. Maryland, 378 U.S. 226 (1964).

[124] *See* infra, pp. 1946–50.

[125] E.g., Hadnott v. Amos, 394 U.S. 358 (1971); Hunter v. Underwood, 471 U.S. 222 (1985) (disenfranchisement for crimes involving moral turpitude adopted for purpose of racial discrimination).

[126] E.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977); Rogers v. Lodge, 458 U.S. 613 (1982).

upon nonmembers of the class.[127] While the Court in prior cases had accepted both the use of race and other suspect criteria as valid factors in formulating remedies to overcome discrmination[128] and the according of preferences to class members when the class had previously been the object of discrimination,[129] it had never until recently given plenary review to programs that expressly used race as the prime consideration in the awarding of some public benefit.[130]

In *United Jewish Organizations v. Carey*[131] the State, in order to comply with the Voting Rights Act and to obtain the United States Attorney General's approval for a redistricting law, had drawn a plan which consciously used racial criteria to create a certain number of districts with nonwhite populations large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhites. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts, and members of that community sued, alleging that the value of their votes had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the districting, although the fragmented majority of seven concurred in no majority opinion.

Justice White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took

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[127] While the emphasis is upon governmental action, private affirmative actions may implicate statutory bars to uses of race. E.g., McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), held, not in the context of an affirmative action program, that whites were as entitled as any group to protection of federal laws banning racial discrimination in employment. The Court emphasized that it was not passing at all on the permissibility of affirmative action programs. Id. at 280 n.8. In United Steelworkers v. Weber, 443 U.S. 193 (1979), the Court held that title VII did not prevent employers from instituting voluntary, race-conscious affirmative action plans. *Accord*, Johnson v. Transportation Agency, 480 U.S. 616 (1987). Nor does title VII prohibit a court from approving a consent decree providing broader relief than the court would be permitted to award. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). And, court-ordered relief pursuant to title VII may benefit persons not themselves the victims of discrimination. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

[128] E.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22–25 (1971).

[129] Programs to overcome past societal discriminations against women have been approved, Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); Califano v. Webster, 430 U.S. 313 (1977), but gender classifications are not as suspect as racial ones. Preferential treatment for American Indians was approved, Morton v. Mancari, 417 U.S. 535 (1974), but on the basis that the classification was political rather than racial.

[130] The constitutionality of a law school admissions program in which minority applicants were preferred for a number of positions was before the Court in DeFunis v. Odegaard, 416 U.S. 312 (1974), but the merits were not reached.

[131] 430 U.S. 144 (1977). Chief Justice Burger dissented, id., 180, and Justice Marshall did not participate.

place pursuant to the administration of the Voting Rights Act, the Justice argued that compliance with the Act necessarily required States to be race conscious in the drawing of lines so as not to dilute minority voting strength, that this requirement was not dependent upon a showing of past discrimination, and that the States retained discretion to determine just what strength minority voters needed in electoral districts in order to assure their proportional representation. Moreover, the creation of the certain number of districts in which minorities were in the majority was reasonable under the circumstances.[132]

Second, Justice White wrote that, irrespective of what the Voting Rights Act may have required, what the State had done did not violate either the Fourteenth or the Fifteenth Amendment. This was so because the plan, even though it used race in a purposeful manner, represented no racial slur or stigma with respect to whites or any other race; the plan did not operate to minimize or unfairly cancel out white voting strength because as a class whites would be represented in the legislature in accordance with their proportion of the population in the jurisdiction.[133]

With the Court so divided, light on the constitutionality of affirmative action was anticipated in *Regents of the University of California v. Bakke*,[134] but again the Court fragmented. The Davis campus medical school each year admitted 100 students; the school set aside 16 of those seats for disadvantaged minority students, who were qualified but not necessarily as qualified as those winning admission to the other 84 places. Twice denied admission, Bakke sued, arguing that had not the 16 positions been set aside he could have been admitted. The state court ordered him admitted and ordered the school not to consider race in admissions. By two 5-to–4 votes, the Supreme Court affirmed the order admitting Bakke but set aside the order forbidding the consideration of race in admissions.

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[132] Id. at 155–65. Joining this part of the opinion were Justices Brennan, Blackmun, and Stevens.

[133] Id. at 165–68. Joining this part of the opinion were Justices Stevens and Rehnquist. In a separate opinion, Justice Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimulate society's latent race consciousness; (3) they may stigmatize recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many as unjust. The presence of the Voting Rights Act and the Attorney General's supervision made the difference to him in this case. Id. at 168. Justices Stewart and Powell concurred, agreeing with Justice White that there was no showing of a purpose on the legislature's part to discriminate against white voters and that the effect of the plan was insufficient to invalidate it. Id. at 179.

[134] 438 U.S. 265 (1978).

Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964[135] outlawed the college's program and made unnecessary any consideration of the Constitution. They thus would admit Bakke and bar use of race in admissions.[136] The remaining five Justices agreed among themselves that Title VI, on its face and in light of its legislative history, proscribed only what the equal protection clause proscribed.[137] They thus reached the constitutional issue but resolved it differently. Four Justices, in an opinion by Justice Brennan, argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution under appropriate circumstances. Even ostensibly benign racial classifications could be misused and produce stigmatizing effects; therefore, they must be searchingly scrutinized by courts to ferret out these instances. But benign racial preferences, unlike invidious discriminations, need not be subjected to strict scrutiny; instead, an intermediate scrutiny would do. As applied, then, this review would enable the Court to strike down any remedial racial classification that stigmatized any group, that singled out those least well represented in the political process to bear the brunt of the program, or that was not justified by an important and articulated purpose.[138]

Justice Powell argued that all racial classifications are suspect and require strict scrutiny. Since none of the justifications asserted by the college met this high standard of review, he would have invalidated the program. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past societal discrimination.[139] Justice Powell thus joined the first group in agree-

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[135] 78 Stat. 252, 42 U.S.C. § 2000d to 2000d–7. The Act bars discrimination on the ground of race, color, or national origin by any recipient of federal financial assistance.

[136] 438 U.S. at 408–21 (Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger).

[137] Id. at 284–87 (Justice Powell), 328–55 (Justices Brennan, White, Marshall, and Blackmun).

[138] Id. at 355–79 (Justices Brennan, White, Marshall, and Blackmun). The intermediate standard of review adopted by the four Justices is that formulated for gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" Id. at 359.

[139] Id. at 287–320.

ing that Bakke should be admitted, but he joined the second group in permitting the college to consider race to some degree in its admissions.[140]

Finally, in *Fullilove v. Klutznick*,[141] the Court resolved most of the outstanding constitutional question regarding the validity of race-conscious affirmative action programs. Although again there was no majority opinion of the Court, the series of opinions by the six Justices voting to uphold a congressional provision requiring that at least ten percent of public works funds be set aside for minority business enterprises all recognized that alleviation and remediation of past societal discrimination was a legitimate goal and that race was a permissible classification to use in remedying the present effects of past discrimination. Judgment of the Court was issued by Chief Justice Burger, who emphasized Congress' preeminent role under the Commerce clause and under the Fourteenth Amendment to find as a fact the existence of past discrimination and its continuing effects and to implement remedies which were race conscious in order to cure those effects.[142] The principal concurring opinion by Justice Marshall applied the Brennan analysis in *Bakke*, utilizing middle-tier scrutiny to hold that the race conscious set-aside was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination."[143]

Taken together, the opinions recognize that at least in Congress there resides the clear power to make the findings that will form the basis for a judgment of the necessity to use racial classifications in an affirmative way; these findings need not be extensive or express and may be collected in many ways. Whether federal agencies or state legislatures and state agencies have the same breadth and leeway to make findings and formulate remedies was left unsettled but that they have some such power seems evident.[144] Further, while the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to at-

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[140] *See* id., 319–320 (Justice Powell).

[141] 448 U.S. 448 (1980). Justice Stewart, joined by Justice Rehnquist, dissented in one opinion, id. at 522, while Justice Stevens dissented in another. Id. at 532.

[142] Id. at 456–92. Justices White and Powell joined this opinion. Justice Powell also concurred in a separate opinion, id. at 495, which qualified to some extent his agreement with the Chief Justice.

[143] Id. at 517.

[144] Id. at 473–480. The program was an exercise of Congress' spending power, but the constitutional objections raised had not been previously resolved in that context. The plurality therefore turned to Congress' regulatory powers, which in this case undergirded the spending power, and found the power to repose in the commerce clause with respect to private contractors and in § 5 of the Fourteenth Amendment with respect to state agencies. The Marshall plurality appeared to attach no significance in this regard to the fact that Congress was the acting party.

tach no constitutional significance to these limitations, thus leaving the way open for programs of a scope sufficient to remedy all the identified effects of past discrimination.[145] But the most important part of these opinions rests in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. Rejected were the arguments that a stigma attaches to those minority beneficiaries of such programs, that burdens are placed on innocent third parties, and that the program is overinclusive, benefitting some minority members who had suffered no discrimination.[146]

The Court remains divided in ruling on constitutional challenges[147] to affirmative action plans. As a general matter, authority to apply racial classifications is at its greatest when Congress is acting pursuant to section 5 of the Fourteenth Amendment or other of its powers, or when a court is acting to remedy proven discrimination. But impact on disadvantaged non-minorities can also be important. Two recent cases illustrate the latter point. In *Wygant v. Jackson Board of Education*,[148] the Court invalidated a provision of a collective bargaining agreement giving minority teachers a preferential protection from layoffs; in *United States v. Paradise*,[149] the Court upheld as a remedy for past discrimination a court-ordered racial quota in promotions. Justice White, concurring in *Wygant*, emphasized the harsh, direct effect of layoffs on affected non-minority employees.[150] By contrast, a plurality of Justices in *Paradise* viewed the remedy in that case as affecting non-minorities less harshly than did the layoffs in *Wygant*, since the

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[145] Id. at 484–85, 489 (Chief Justice Burger), 513–15 (Justice Powell).

[146] Id. at 484–489 (Chief Justice Burger), 514–515 (Justice Powell), 520–521 (Justice Marshall).

[147] Guidance on constitutional issues is not necessarily afforded by cases arising under Title VII of the Civil Rights Act, the Court having asserted that "the *statutory* prohibition with which the employer must contend was not intended to extend as far as that of the Constitution," and that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace." Johnson v. Transportation Agency, 480 U.S. 616, 628 n.6, 630 (1987) (upholding a local governmental agency's voluntary affirmative action plan predicated upon underrepresentation of women rather than upon past discriminatory practices by that agency) (emphasis original). The constitutionality of the agency's plan was not challenged. *See* id. at 620 n.2.

[148] 476 U.S. 267 (1986).

[149] 480 U.S. 149 (1987).

[150] 476 U.S. at 294. A plurality of Justices in *Wygant* thought that past societal discrimination alone is insufficient to justify racial classifications; they would require some convincing evidence of past discrimination by the governmental unit involved. 476 U.S. at 274–76 (opinion of Justice Powell, joined by Chief Justice Burger and by Justices Rehnquist and O'Connor).

promotion quota would merely delay promotions of those affected, rather than cause the loss of their jobs.[151]

A clear distinction has been drawn between federal and state power to apply racial classifications. In *City of Richmond v. J.A. Croson Co.*,[152] the Court invalidated a minority set-aside requirement that holders of construction contracts with the city subcontract at least 30% of the dollar amount to minority business enterprises. Applying strict scrutiny, the Court found Richmond's program to be deficient because it was not tied to evidence of past discrimination in the city's construction industry. By contrast, the Court in *Metro Broadcasting, Inc. v. FCC*[153] applied a more lenient standard of review in upholding two racial preference policies used by the FCC in the award of radio and television broadcast licenses. The FCC policies, the Court explained, are "benign, race-conscious measures" that are "substantially related" to the achievement of an "important" governmental objective of broadcast diversity.[154]

In *Croson*, the Court ruled that the city had failed to establish a "compelling" interest in the racial quota system because it failed to identify past discrimination in its construction industry. Mere recitation of a "benign" or remedial purpose will not suffice, the Court concluded, nor will reliance on the disparity between the number of contracts awarded to minority firms and the minority population of the city. "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the number of minorities qualified to undertake the particular task."[155] The overinclusive definition of minorities, including U.S. citizens who are "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts," also "impugn[ed] the city's claim of remedial motivation," there having been "no evidence" of any past

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[151] 480 U.S. at 182–83 (opinion of Justice Brennan, joined by Justices Marshall, Blackmun, and Powell). A majority of Justices emphasized that the egregious nature of the past discrimination by the governmental unit justified the ordered relief. 480 U.S. at 153 (opinion of Justice Brennan), id. at 189 (Justice Stevens).

[152] 488 U.S. 469 (1989). *Croson* was decided by a 6–3 vote. The portions of Justice O'Connor's opinion adopted as the opinion of the Court were joined by Chief Justice Rehnquist and by Justices White, Stevens, and Kennedy. The latter two Justices joined only part of Justice O'Connor's opinion; each added a separate concurring opinion. Justice Scalia concurred separately; Justices Marshall, Brennan, and Blackmun dissented.

[153] 497 U.S. 547 (1990). This was a 5–4 decision, Justice Brennan's opinion of the Court being joined by Justices White, Marshall, Blackmun, and Stevens. Justice O'Connor wrote a dissenting opinion joined by the Chief Justice and by Justices Scalia and Kennedy, and Justice Kennedy added a separate dissenting opinion joined by Justice Scalia.

[154] 497 U.S. at 564–65.

[155] 488 U.S. at 501–02.

discrimination against non-Blacks in the Richmond construction industry.[156]

It followed that Richmond's set-aside program also was not "narrowly tailored" to remedy the effects of past discrimination in the city: an individualized waiver procedure made the quota approach unnecessary, and a minority entrepreneur "from anywhere in the country" could obtain an absolute racial preference.[157]

At issue in *Metro Broadcasting* were two minority preference policies of the FCC, one recognizing an "enhancement" for minority ownership and participation in management when the FCC considers competing license applications, and the other authorizing a "distress sale" transfer of a broadcast license to a minority enterprise. These racial preferences—unlike the set-asides at issue in *Fullilove*—originated as administrative policies rather than statutory mandates. Because Congress later endorsed these policies, however, the Court was able to conclude that they bore "the imprimatur of longstanding congressional support and direction."[158]

Metro Broadcasting is noteworthy for several other reasons as well. The Court rejected the dissent's argument—seemingly accepted by a *Croson* majority—that Congress's more extensive authority to adopt racial classifications must trace to section 5 of the Fourteenth Amendment, and instead ruled that Congress also may rely on race-conscious measures in exercise of its commerce and spending powers.[159] This meant that the governmental interest furthered by a race-conscious policy need not be remedial, but could be a less focused interest such as broadcast diversity. Secondly, as noted above, the Court eschewed strict scrutiny analysis: the governmental interest need only be "important" rather than "compelling," and the means adopted need only be "substantially related" rather than "narrowly tailored" to furthering the interest. This means that, for the time being, at least, federal legislation imposing racial preferences need pass a lower hurdle than state and local legislation regardless of whether the federal legislation is an exercise of section 5 power.[160]

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[156] Id. at 506.

[157] Id. at 508.

[158] 497 U.S. at 600. Justice O'Connor's dissenting opinion contended that the case "does not present 'a considered decision of the Congress and the President.'" Id. at 607 (quoting *Fullilove*, 448 U.S. at 473).

[159] 497 U.S. at 563 & n.11. For the dissenting views of Justice O'Connor *see* id. at 606–07. *See also Croson*, 488 U.S. at 504 (opinion of Court).

[160] Because Justice Brennan, who authored the Court's opinion in *Metro Broadcasting*, retired at the end of the 1989–90 Term, the continuing vitality of the opinion bears watching.

THE NEW EQUAL PROTECTION

Classifications Meriting Close Scrutiny

Alienage and Nationality.—"It has long been settled . . . that the term 'person' [in the equal protection clause] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside."[1] Thus, one of the earliest equal protection decisions struck down the administration of a facially-lawful licensing ordinance which was being applied to discriminate against Chinese.[2] But the Court in many cases thereafter recognized a permissible state interest in distinguishing between its citizens and aliens by restricting enjoyment of resources and public employment to its own citizens.[3] But in *Hirabayashi v. United States,*[4] it was announced that "[d]istinctions between citizens solely because of their ancestry" was "odius to a free people whose institutions are founded upon the doctrine of equality." And in *Korematsu v. United States,*[5] classifications based upon race and nationality were said to be suspect and subject to the "most rigid scrutiny." These dicta resulted in a 1948 decision which appeared

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[1] Graham v. Richardson, 403 U.S. 365, 371 (1971). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Truax v. Raich, 239 U.S. 33, 39 (1915); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948). Aliens, even unlawful aliens, are "persons" to whom the Fifth and Fourteenth Amendments apply. Plyler v. Doe, 457 U.S. 202, 210–16 (1982). The Federal Government may not discriminate invidiously against aliens, Mathews v. Diaz, 426 U.S. 67, 77 (1976). However, because of the plenary power delegated by the Constitution to the national government to deal with aliens and naturalization, federal classifications are judged by less demanding standards than are those of the States, and many classifications which would fail if attempted by the States have been sustained because Congress has made them. Id. at 78–84; Fiallo v. Bell, 430 U.S. 787 (1977). Additionally, state discrimination against aliens may fail because it imposes burdens not permitted or contemplated by Congress in its regulations of admission and conditions of admission. Hines v. Davidowitz, 312 U.S. 52 (1941); Toll v. Moreno, 458 U.S. 1 (1982). Such state discrimination may also violate treaty obligations and be void under the supremacy clause, Askura v. City of Seattle, 265 U.S. 332 (1924), and some federal civil rights statutes, such as 42 U.S.C. § 1981, protect resident aliens as well as citizens. Graham v. Richardson, supra, at 376–80.

[2] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[3] McGready v. Virginia, 94 U.S. 391 (1877); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (limiting aliens' rights to develop natural resources); Hauenstein v. Lynham, 100 U.S. 483 (1880); Blythe v. Hinckley, 180 U.S. 333 (1901) (restriction of devolution of property to aliens); Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923) (denial of right to own and acquire land); Heim v. McCall, 239 U.S. 175 (1915); People v. Crane, 214 N.Y. 154, 108 N.E. 427, aff'd, 239 U.S. 195 (1915) (barring public employment to aliens); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927) (prohibiting aliens from operating poolrooms). The Court struck down a statute restricting the employment of aliens by private employers, however. Truax v. Raich, 239 U.S. 33 (1915).

[4] 320 U.S. 81, 100 (1943).

[5] 323 U.S. 214, 216 (1944).

to call into question the rationale of the "particular interest" doctrine under which earlier discriminations had been justified. There the Court held void a statute barring issuance of commerical fishing licenses to persons "ineligible to citizenship," which in effect meant resident alien Japanese.[6] "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." Justice Black said for the Court that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[7]

Announcing "that classifications based on alienage . . . are inherently suspect and subject to close scrutiny," the Court struck down state statutes which either wholly disqualified resident aliens for welfare assistance or imposed a lengthy durational residency requirement on eligibility.[8] Thereafter, in a series of decisions, the Court adhered to its conclusion that alienage was a suspect classification and voided a variety of restrictions. More recently, however, it has created a major "political function" exception to strict scrutiny review, which shows some potential of displacing the previous analysis almost entirely.

In *Sugarman v. Dougall*,[9] the Court voided the total exclusion of aliens from a State's competitive civil service. A State's power "to preserve the basic conception of a political community" enables it to prescribe the qualifications of its officers and voters,[10] the Court held, and this power would extend "also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."[11] But a flat ban upon much of the State's career public service, both of policy-making and non-policy-making jobs, ran afoul of the requirement that in achieving a valid interest through the use of a suspect classifica-

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[6] Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[7] Id. at 420. The decision was preceded by Oyama v. California, 332 U.S. 633 (1948), which was also susceptible to being read as questioning the premise of the earlier cases.

[8] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[9] 413 U.S. 634 (1973).

[10] Id. at 647–49. *See also* Foley v. Connelie, 435 U.S. 291, 296 (1978). Aliens can be excluded from voting, Skatfe v. Rorex, 553 P.2d 830 (Colo. 1976), appeal dismissed for lack of substantial federal question, 430 U.S. 961 (1977), and can be excluded from service on juries. Perkins v. Smith, 370 F. Supp. 134 (D.Md. 1974) (3-judge court), aff'd, 426 U.S. 913 (1976).

[11] Sugarman v. Dougall, 413 U.S. 634, 647 (1973). Such state restrictions are "not wholly immune from scrutiny under the Equal Protection Clause." Id. at 648.

tion the State must employ means that are precisely drawn in light of the valid purpose.[12]

State bars against the admission of aliens to the practice of law were also struck down, the Court holding that the State had not met the "heavy burden" of showing that its denial of admission to aliens was necessary to accomplish a constitutionally permissible and substantial interest. The State's admitted interest in assuring the requisite qualifications of persons licensed to practice law could be adequately served by judging applicants on a case-by-case basis and in no sense could the fact that a lawyer is considered to be an officer of the court serve as a valid justification for a flat prohibition.[13] Nor could Puerto Rico offer a justification for excluding aliens from one of the "common occupations of the community," hence its bar on licensing aliens as civil engineers was voided.[14]

In *Nyquist v. Mauclet*,[15] the Court seemed to expand the doctrine. Challenged was a statute that restricted the receipt of scholarships and similar financial support to citizens or to aliens who were applying for citizenship or who filed a statement affirming their intent to apply as soon as they became eligible. Therefore, since any alien could escape the limitation by a voluntary act, the disqualification was not aimed at aliens as a class, nor was it based on an immutable characteristic possessed by a "discrete and insular minority"—the classification that had been the basis for declaring alienage a suspect category in the first place. But the Court voided the statute. "The important points are that § 661(3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."[16] Two proffered justifications

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[12] Justice Rehnquist dissented. Id. at 649. In the course of the opinion, the Court held inapplicable the doctrine of "special public interest," the idea that a State's concern with the restriction of the resources of the State to the advancement and profit of its citizens is a valid basis for discrimination against out-of-state citizens and aliens generally, but it did not declare the doctrine invalid. Id. at 643–45. The "political function" exception is inapplicable to notaries public, who do not perform functions going to the heart of representative government. Bernal v. Fainter, 467 U.S. 216 (1984).

[13] In re Griffiths, 413 U.S. 717 (1973). Chief Justice Burger and Justice Rehnquist dissented. Id. at 730, and 649 (*Sugarman* dissent also applicable to *Griffiths*).

[14] Examining Board v. Flores de Otero, 426 U.S. 572 (1976). Since the jurisdiction was Puerto Rico, the Court was not sure whether the requirement should be governed by the Fifth or Fourteenth Amendment but deemed the question immaterial since the same result would be achieved. The quoted expression is from Truax v. Raich, 239 U.S. 33, 41 (1915).

[15] 432 U.S. 1 (1977).

[16] Id. at 9. Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented. Id. at 12, 15, 17. Justice Rehnquist's dissent argued that the nature of the disqualification precluded it from being considered suspect.

were held insufficient to meet the high burden imposed by the strict scrutiny doctrine.

However, in the following Term, the Court denied that every exclusion of aliens was subject to strict scrutiny, "because to do so would 'obliterate all the distinctions between citizens and aliens, and thus deprecate the historic values of citizenship.'"[17] Upholding a state restriction against aliens qualifying as state policemen, the Court reasoned that the permissible distinction between citizen and alien is that the former "is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized 'a State's historic power to exclude aliens from participation in its democratic political institutions,' . . . as part of the sovereign's obligation "'to preserve the basic conception of a political community.'"[18] When a State acts thusly by classifying against aliens, its action is not subject to strict scrutiny but rather need only meet the rational basis test. It is therefore permissible to reserve to citizens offices having the "most important policy responsibilities," a reservation drawn from *Sugarman*, but the critical factor in this case is the analysis finding that the police function is "one of the basic functions of government." "The execution of the broad powers vested" in police officers "affects members of the public significantly and often in the most sensitive areas of daily life. . . . Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of 'the common occupations of the community'. . . ."[19]

Continuing to enlarge the exception, the Court in *Ambach v. Norwick*[20] upheld a bar to qualifying as a public school teacher for

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[17] Foley v. Connelie, 435 U.S. 291, 295 (1978). The opinion was by Chief Justice Burger and the quoted phrase was from his dissent in Nyquist v. Mauclet, 432 U.S. 1, 14 (1977). Justices Marshall, Stevens, and Brennan dissented. Id. at 302, 307.

[18] Id.at 295–96. Formally following Sugarman v. Dougall, supra, the opinion considerably enlarged the exception noted in that case; *see also* Nyquist v. Mauclet, 432 U.S. 1, 11 (1977) (emphasizing the "narrowness of the exception"). Concurring in *Foley*, supra, 300, Justice Stewart observed that "it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case." On the other hand, Justice Blackmun, who had written several of the past decisions, including *Mauclet*, concurred also, finding the case consistent. Id.

[19] Id. at 297–98. In Elrod v. Burns, 427 U.S. 347 (1976), barring patronage dismissals of police officers, the Court had nonetheless recognized an exception for policymaking officers which it did not extend to the police.

[20] 441 U.S. 68 (1979). The opinion, by Justice Powell, was joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. The disqualification standard was of

resident aliens who have not manifested an intention to apply for citizenship. The "governmental function" test took on added significance, the Court saying that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."[21] Thus, "governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens."[22] Teachers, the Court thought, because of the role of public education in inculcating civic values and in preparing children for participation in society as citizens and because of the responsibility and discretion they have in fulfilling that role, perform a task that "go[es] to the heart of representative government."[23] The citizenship requirement need only bear a rational relationship to the state interest, and the Court concluded it clearly did so.

Then, in *Cabell v. Chavez-Salido*,[24] the Court sustained a state law imposing a citizenship requirement upon all positions designated as "peace officers," upholding in context that eligibility prerequisite for probation officers. First, the Court held that the extension of the requirement to an enormous range of people who were variously classified as "peace officers" did not reach so far nor was it so broad and haphazard as to belie the claim that the State was attempting to ensure that an important function of government be in the hands of those having a bond of citizenship. "[T]he classifications used need not be precise; there need only be a substantial fit."[25] As to the particular positions, the Court held that "they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens."[26]

Thus, the Court so far has drawn a tripartite differentiation with respect to governmental restrictions on aliens. First, it has disapproved the earlier line of cases and now would foreclose attempts by the States to retain certain economic benefits, primarily employment and opportunities for livelihood, exclusively for citizens. Second, when government exercises principally its spending functions, such as those with respect to public employment gen-

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course, that held invalid as a disqualification for receipt of educational assistance in Nyquist v. Mauclet, 432 U.S. 1 (1977).

[21] Ambach v. Norwick, 441 U.S. 68, 75 (1979).

[22] Id.

[23] Id. at 75–80. The quotation, id. at 76, is from Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

[24] 454 U.S. 432 (1982). Joining the opinion of the Court were Justices White, Powell, Rehnquist, O'Connor, and Chief Justice Burger. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. Id. at 447.

[25] Id. at 442.

[26] Id. at 445.

erally and to eligibility for public benefits, its classifications with an adverse impact on aliens will be strictly scrutinized and usually fail. Third, when government acts in its sovereign capacity, when it acts within its constitutional prerogatives and responsibilities to establish and operate its own government, its decisions with respect to the citizenship qualifications of an appropriately designated class of public office holders will be subject only to traditional rational basis scrutiny.[27] However, the "political function" standard is elastic, and so long as disqualifications are attached to specific occupations[28] rather than to the civil service in general, as in *Sugarman*, the concept seems capable of encompassing the exclusion.

When confronted with a state statute that authorized local school boards to exclude from public schools alien children who were not legally admitted to the United States, the Court determined that an intermediate level of scrutiny was appropriate and found that the proffered justifications did not sustain the classification.[29] Inasmuch as it was clear that the undocumented status of the children was not irrelevant to valid government goals and inasmuch as the Court had previously held that access to education was not a "fundamental interest" which triggered strict scrutiny of governmental distinctions relating to education,[30] the Court's decision to accord intermediate review was based upon an amalgam of at least three factors. First, alienage was a characteristic that provokes special judicial protection when used as a basis for discrimination. Second, the children were innocent parties who were having a particular onus imposed on them because of the misconduct of their parents. Third, the total denial of an education to these chil-

[27] Id. at 438–39

[28] Thus, the statute in *Chavez-Salido* applied to such positions as toll-service employees, cemetery sextons, fish and game wardens, and furniture and bedding inspectors, and yet the overall classification was deemed not so ill-fitting as to require its voiding.

[29] Plyler v. Doe, 457 U.S. 432 (1982). Joining the opinion of the Court were Justices Brennan, Marshall, Blackmun, Powell, and Stevens. Dissenting were Chief Justice Burger and Justices White, Rehnquist, and O'Connor. Id. at 242.

[30] In San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), while holding that education is not a fundamental interest, the Court expressly reserved the question whether a total denial of education to a class of children would infringe upon a fundamental interest. Id.at 18, 25 n.60, 37. The *Plyler* Court's emphasis upon the total denial of education and the generally suspect nature of alienage classifications left ambiguous whether the state discrimination would have been subjected to strict scrutiny if it had survived intermediate scrutiny. Justice Powell thought the Court had rejected strict scrutiny, 457 U.S. at 238 n.2 (concurring), while Justice Blackmun thought it had not reached the question, id. at 235 n.3 (concurring). Indeed, their concurring opinions seem directed more toward the disability visited upon innocent children than the broader complex of factors set out in the opinion of the Court. Id.at 231, 236.

dren would stamp them with an "enduring disability" that would harm both them and the State all their lives.[31] The Court evaluated each of the State's attempted justifications and found none of them satisfying the level of review demanded.[32] It seems evident that *Plyler v. Doe* is a unique case and that whatever it may doctrinally stand for, a sufficiently similar factual situation calling for application of its standards is unlikely to be replicated.

Sex.—Shortly after ratification of the Fourteenth Amendment, the refusal of Illinois to license a woman to practice law was challenged before the Supreme Court, and the Court rejected the challenge in tones which prevailed well into the twentieth century. "The civil law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[33] On the same premise, a statute restricting the franchise to men was sustained.[34]

The greater number of cases have involved legislation aimed to protect women from oppressive working conditions, as by prescrib-

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[31] Id. at 223–24.

[32] Rejected state interests included preserving limited resources for its lawful residents, deterring an influx of illegal aliens, avoiding the special burden caused by these children, and serving children who were more likely to remain in the State and contribute to its welfare. Id. at 227–30.

[33] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873). The cases involving alleged discrimination against women contain large numbers of quaint quotations from unlikely sources. Upholding a law which imposed a fee upon all persons engaged in the laundry business, but excepting businesses employing not more than two women, Justice Holmes said: "If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference." Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912). And upholding a law prohibiting most women from tending bar, Justice Frankfurter said: "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

[34] Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (privileges and immunities).

ing maximum hours[35] or minimum wages[36] or by restricting some of the things women could be required to do.[37] A 1961 decision upheld a state law which required jury service of men but which gave women the option of serving or not. "We cannot say that it is constitutionally impermissible for a State acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."[38] Another type of protective legislation for women that was sustained by the Court is that premised on protection of morals, as by forbidding the sale of liquor to women.[39] In a highly controversial ruling, the Court sustained a state law which forbade the licensing of any female bartender, except for the wives or daughters of male owners. The Court purported to view the law as one for the protection of the health and morals of women generally, with the exception being justified by the consideration that such women would be under the eyes of a protective male.[40]

A wide variety of sex discriminations by governmental and private parties, including the protective labor legislation previously sustained, is now subjected to federal statutory proscription, banning, for instance, sex discrimination in employment and requiring equal pay for equal work.[41] Some states have followed suit.[42]

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[35] Muller v. Oregon, 208 U.S. 412 (1908); Dominion Hotel v. Arizona, 249 U.S. 265 (1919).

[36] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[37] E.g., Radice v. New York, 264 U.S. 292 (1924) (prohibiting night work by women in restaurants). A similar restriction set a maximum weight that women could be required to lift.

[38] Hoyt v. Florida, 368 U.S. 57, 62 (1961).

[39] Cronin v. Adams, 192 U.S. 108 (1904).

[40] Goesaert v. Cleary, 335 U.S. 464 (1948).

[41] Thus, title VII of the Civil Rights Act of 1964, 80 Stat. 662, 42 U.S.C. § 2000e et seq., bans discrimination against either sex in employment. *See, e.g.*, Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971); Dothard v. Rawlinson, 433 U.S. 321 (1977); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Arizona Governing Comm. for Tax Deferred Plans v. Norris, 463 U.S. 1073 (1983) (actuarially based lower monthly retirement benefits for women employees violates Title VII); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) ("hostile environment" sex harassment claim is actionable). Reversing rulings that pregnancy discrimination is not reached by the statutory bar on sex discrimination, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), Congress enacted the Pregnancy Discrimination Act, Pub. L. 95–555 (1978), 92 Stat. 2076, amending 42 U.S.C. § 2000e. The Equal Pay Act, 77 Stat. 56 (1963), amending the Fair Labor Standards Act, 29 U.S.C. § 206(d), generally applies to wages paid for work requiring "equal skill, effort, and responsibility." *See* Corning Glass Works v. Brennan, 417 U.S. 188 (1974). On the controversial issue of "comparable worth" and the interrelationship of title VII and the Equal Pay Act, *see* County of Washington v. Gunther, 452 U.S. 161 (1981).

[42] *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (state prohibition on gender discrimination in aspects of public accommodation, as applied to membership in a civic organization, is justified by compelling state interest).

While the proposed Equal Rights Amendment pended before the States and ultimately failed of ratification,[43] the Supreme Court undertook a major evaluation of sex classification doctrine, first applying a "heightened" traditional standard of review (with bite) to void a discrimination and then, after coming within a vote of making sex a suspect classification, settling upon an intermediate standard. These standards continue, with some uncertainties of application and some tendencies among the Justices both to lessen and to increase the burden of governmental justification, to provide the analysis for evaluation of sex classifications.

In *Reed v. Reed*,[44] the Court held invalid a state probate law which gave males preference over females when both were equally entitled to administer an estate. Because the statute "provides that different treatment be accorded to the applicants on the basis of their sex," Chief Justice Burger wrote, "it thus establishes a classification subject to scrutiny under the Equal Protection Clause." The Court proceeded to hold that under traditional equal protection standards—requiring a classification to be reasonable and not arbitrarily related to a lawful objective—the classification made was an arbitrary way to achieve the objective the State advanced in defense of the law, that is, to reduce the area of controversy between otherwise equally qualified applicants for administration. Thus, the Court used traditional analysis but the holding seems to go somewhat further to say that not all lawful interests of a State may be advanced by a classification based solely on sex.[45]

It is now established that sex classifications, in order to withstand equal protection scrutiny, "must serve important governmental objectives and must be substantially related to achievement of those objectives."[46] Thus, after several years in which sex dis-

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[43] On the Equal Rights Amendment, *see* supra, pp. 904–06, 913.

[44] 404 U.S. 71 (1971).

[45] Id.at 75–77. *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972). A statute similar to that in *Reed* was before the Court in Kirchberg v. Feenstra, 450 U.S. 455 (1981) (invalidating statute giving husband unilateral right to dispose of jointly owned community property without wife's consent).

[46] Craig v. Boren, 429 U.S. 190, 197 (1976); Califano v. Goldfarb, 430 U.S. 199, 210–11 (1977) (plurality opinion); Califano v. Webster, 430 U.S. 313, 316–317 (1977); Orr v. Orr, 440 U.S. 268, 279 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979); Califano v. Westcott, 443 U.S. 76, 85 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982). *But see* Michael M. v. Superior Court, 450 U.S. 464, 468–69 (1981) (plurality opinion); id. at 483 (Justice Blackmun concurring); Rostker v. Goldberg, 453 U.S. 57, 69–72 (1981). The test is the same whether women or men are disadvantaged by the classification, Orr v. Orr, supra, at 279; Caban v. Mohammed, supra, at 394; Mississippi Univ. for Women v. Hogan, supra at 724, although Justice Rehnquist and Chief Justice Burger strongly argued that when males are disadvantaged only the rational basis test

tinctions were more often voided than sustained without a clear statement of the standard of review,[47] a majority of the Court has arrived at the intermediate standard which many had thought it was applying in any event.[48] The Court first examines the statutory or administrative scheme to determine if the purpose or objective is permissible and, if it is, whether it is important. Then, having ascertained the actual motivation of the classification, the Court engages in a balancing test to determine how well the classification serves the end and whether a less discriminatory one would serve that end without substantial loss to the government.[49]

Some sex distinctions were seen to be based solely upon "old notions," no longer valid if ever they were, about the respective roles of the sexes in society, and those distinctions failed to survive even traditional scrutiny. Thus, a state law defining the age of majority as 18 for females and 21 for males, entitling the male child to support by his divorced father for three years longer than the female child, was deemed merely irrational, grounded as it was in the assumption of the male as the breadwinner, needing longer to prepare, and the female as suited for wife and mother.[50] Similarly,

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is appropriate. Craig v. Boren, supra, 217, 218–21; Califano v. Goldfarb, supra, at 224. That adoption of a standard has not eliminated difficulty in deciding such cases should be evident by perusal of the cases following.

[47] In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices were prepared to hold that sex classifications are inherently suspect and must therefore be subjected to strict scrutiny. Id.at 684–87 (Justices Brennan, Douglas, White, and Marshall). Three Justices, reaching the same result, thought the statute failed the traditional test and declined for the moment to consider whether sex was a suspect classification, finding that inappropriate while the Equal Rights Amendment was pending. Id. at 691 (Justices Powell and Blackmun and Chief Justice Burger). Justice Stewart found the statute void under traditional scrutiny and Justice Rehnquist dissented. Id. at 691. In Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982), Justice O'Connor for the Court expressly reserved decision whether a classification that survived intermediate scrutiny would be subject to strict scrutiny.

[48] While their concurrences in Craig v. Boren, 429 U.S. 190, 210, 211 (1976), indicate some reticence about express reliance on intermediate scrutiny, Justices Powell and Stevens have since joined or written opinions stating the test and applying it. E.g., Caban v. Mohammed, 441 U.S. 380, 388 (1979) (Justice Powell writing the opinion of the Court); Parham v. Hughes, 441 U.S. 347, 359 (1979) (Justice Powell concurring); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (Justice Stevens concurring); Caban v. Mohammed, supra, at 401 (Justice Stevens dissenting). Chief Justice Burger and Justice Rehnquist have not clearly stated a test, although their deference to legislative judgment approaches the traditional scrutiny test. *But see* Califano v. Westcott, supra, at 93 (joining Court on substantive decision). *And cf.* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 734–35 (1982) (Justice Blackmun dissenting).

[49] The test is thus the same as is applied to illegitimacy classifications, although with apparently more rigor when sex is involved.

[50] Stanton v. Stanton, 421 U.S. 7 (1975). *See also* Stanton v. Stanton, 429 U.S. 501 (1977). Assumptions about the traditional roles of the sexes afford no basis for support of classifications under the intermediate scrutiny standard. *E.g.*, Orr v. Orr, 440 U.S. 268, 279–80 (1979); Parham v. Hughes, 441 U.S. 347, 355 (1979); Kirchberg v. Feenstra, 450 U.S. 455 (1981). Justice Stevens in particular has been

a state jury system that in effect excluded almost all women was deemed to be based upon an overbroad generalization about the role of women as a class in society, and the administrative convenience served could not justify it.[51]

Assumptions about the relative positions of the sexes, however, are not without some basis in fact, and sex may sometimes be a reliable proxy for the characteristic, such as need, with which it is the legislature's actual intention to deal. But heightened scrutiny requires evidence of the existence of the distinguishing fact and its close correspondence with the condition for which sex stands as proxy. Thus, in the case which first expressly announced the intermediate scrutiny standard, the Court struck down a state statute that prohibited the sale of "non-intoxicating" 3.2 beer to males under 21 and to females under 18.[52] Accepting the argument that traffic safety was an important governmental objective, the Court emphasized that sex is an often inaccurate proxy for other, more germane classifications. Taking the statistics offered by the State as of value, while cautioning that statistical analysis is a "dubious" business that is in tension with the "normative philosophy that underlies the Equal Protection Clause," the Court thought the correlation between males and females arrested for drunk driving showed an unduly tenuous fit to allow the use of sex as a distinction.[53]

Invalidating an Alabama law imposing alimony obligations upon males but not upon females, the Court acknowledged that assisting needy spouses was a legitimate and important governmental objective and would then have turned to ascertaining whether sex was a sufficiently accurate proxy for dependency, so it could be said that the classification was substantially related to achievement of the objective.[54] However, the Court observed that the State already conducted individualized hearings with respect to the need of the wife, so that with little additional burden needy males could be identified and helped. The use of the sex standard

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concerned whether legislative classifications by sex simply reflect traditional ways of thinking or are the result of a reasoned attempt to reach some neutral goal, e.g., Califano v. Goldfarb, 430 U.S. 199, 222–23 (1978) (concurring), and he will sustain some otherwise impermissible distinctions if he finds the legislative reasoning to approximate the latter approach. Caban v. Mohammed, 441 U.S. 380, 401 (1979) (dissenting).

[51] Taylor v. Louisiana, 419 U.S. 522 (1975). The precise basis of the decision was the Sixth Amendment right to a representative cross section of the community, but the Court dealt with and disapproved the reasoning in Hoyt v. Florida, 368 U.S. 57 (1961), in which a similar jury selection process was upheld against due process and equal protection challenge.

[52] Craig v. Boren, 429 U.S. 190 (1976).

[53] Id.at 198, 199–200, 201–04.

[54] Orr v. Orr, 440 U.S. 268 (1979).

as a proxy, therefore, was not justified because it needlessly burdened needy men and advantaged financially secure women whose husbands were in need.[55]

Discrimination between unwed mothers and unwed fathers received different treatments through the Court's perception of the justifications and presumptions underlying each. A New York law permitted the unwed mother but not the unwed father of an illegitimate child to block his adoption by withholding consent. Acting in the instance of one who acknowledged his parenthood and who had maintained a close relationship with his child over the years, the Court could discern no substantial relationship between the classification and some important state interest. Promotion of adoption of illegitimates and their consequent legitimation was important, but the assumption that all unwed fathers either stood in a different relationship to their children than did the unwed mother or that the difficulty of finding the fathers would unreasonably burden the adoption process was overbroad, as the facts of the case revealed. No barrier existed to the State dispensing with consent when the father or his location is unknown, but disqualification of all unwed fathers may not be used as a shorthand for that step.[56] On the other hand, the Court sustained a Georgia statute which permitted the mother of an illegitimate child to sue for the wrongful death of the child but which allowed the father to sue only if he had legitimated the child and there is no mother.[57] There was no opinion of the Court, but both opinions making up the result emphasized that the objective of the State, the avoidance of dif-

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[55] Id. at 280–83. An administrative convenience justification was not available, therefore. Id. at 281 & n.12. While such an argument has been accepted as a sufficient justification in at least some illegitimacy cases, Mathews v. Lucas, 427 U.S. 495, 509 (1976), it has neither wholly been ruled out nor accepted in sex cases. In *Lucas*, supra, 509–10, the Court interpreted Frontiero v. Richardson, 411 U.S. 677 (1973), as having required a showing at least that for every dollar lost to a recipient not meeting the general purpose qualification a dollar is saved in administrative expense. In Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 152 (1980), the Court said that "[i]t may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny . . . , but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers." Justice Stevens apparently would demand a factual showing of substantial savings. Califano v. Goldfarb, 430 U.S. 199, 219 (1977) (concurring).

[56] Caban v. Mohammed, 441 U.S. 380 (1979). Four Justices dissented. Id. at 394 (Justice Stewart), 401 (Justices Stevens and Rehnquist and Chief Justice Burger). For the conceptually different problem of classification between different groups of women on the basis of marriage or absence of marriage to a wage earner, see Califano v. Boles, 443 U.S. 282 (1979).

[57] Parham v. Hughes, 441 U.S. 347 (1979). Justices White, Brennan, Marshall, and Blackmun, who had been in the majority in *Caban*, dissented. Id. at 361.

ficulties in proving paternity, was an important one which was advanced by the classification.[58]

As in the instance of illegitimacy classifications, the issue of sex qualifications for the receipt of governmental financial benefits has divided the Court and occasioned close distinctions. A statutory scheme under which a serviceman could claim his spouse as a "dependent" for allowances while a servicewoman's spouse was not considered a "dependent" unless he was shown in fact to be dependent upon her for more than one half of his support was held an invalid dissimilar treatment of similarly situated men and women, not justified by the administrative convenience rationale.[59] In *Weinberger v. Wiesenfeld*,[60] the Court struck down a Social Security provision that gave survivor's benefits based on the insured's earnings to the widow and minor children but gave such benefits only to the children and not to the widower of a deceased woman worker. Focusing not only upon the discrimination against the widower but primarily upon the discrimination visited upon the woman worker whose earnings did not provide the same support for her family that a male worker's did, the Court saw the basis for the distinction resting upon the generalization that a woman would stay home and take care of the children while a man would not. Since the Court perceived the purpose of the provision to be to enable the surviving parent to choose to remain at home to care for minor children, the sex classification ill fitted the end and was invidiously discriminatory.

But when in *Califano v. Goldfarb*[61] the Court was confronted with a Social Security provision structured much as the benefit sections struck down in *Frontiero* and *Wiesenfeld*, even in the light of an express heightened scrutiny, no majority of the Court could be

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[58] The plurality opinion determined that the statute did not invidiously discriminate against men as a class; it was no overbroad generalization but proceeded from the fact that only men could legitimate children by unilateral action. The sexes were not similarly situated, therefore, and the classification recognized that. As a result, all that was required was that the means be a rational way of dealing with the problem of proving paternity. Id. at 353–58. Justice Powell found the statute valid because the sex-based classification was substantially related to the objective of avoiding problems of proof in proving paternity. He also emphasized that the father had it within his power to remove the bar by legitimating the child. Id. at 359.

[59] Frontiero v. Richardson, 411 U.S. 677 (1973).

[60] 420 U.S. 636 (1975).

[61] 430 U.S. 199 (1977). The dissent argued that whatever the classification utilized, social insurance programs should not automatically be subjected to heightened scrutiny but rather only to traditional rationality review. Id. at 224 (Justice Rehnquist with Chief Justice Burger and Justices Stewart and Blackmun). In Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980), voiding a state workers' compensation provision identical to that voided in *Goldfarb*, only Justice Rehnquist continued to adhere to this view, although the others may have yielded only to precedent.

obtained for the reason for striking down the statute. The section provided that a widow was entitled to receive survivors' benefits based on the earnings of her deceased husband, regardless of dependency, but payments were to go to the widower of a deceased wife only upon proof that he had been receiving at least half of his support from her. The plurality opinion treated the discrimination as consisting of disparate treatment of women wage-earners whose tax payments did not earn the same family protection as male wage earners' taxes. Looking to the purpose of the benefits provision, the plurality perceived it to be protection of the familial unit rather than of the individual widow or widower and to be keyed to dependency rather than need. The sex classification was thus found to be based on an assumption of female dependency which ill-served the purpose of the statute and was an ill-chosen proxy for the underlying qualification. Administrative convenience could not justify use of such a questionable proxy.[62] Justice Stevens, concurring, accepted most of the analysis of the dissent but nonetheless came to the conclusion of invalidity. His argument was essentially that while either administrative convenience or a desire to remedy discrimination against female spouses could justify use of a sex classification, neither purpose was served by the sex classification actually used in this statute.[63]

Again, the Court divided closely when it *sustained* two instances of classifications claimed to constitute sex discrimination. In *Rostker v. Goldberg*,[64] rejecting presidential recommendations, Congress provided for registration only of males for a possible future military draft, excluding women altogether. The Court discussed but did not explicitly choose among proffered equal protection standards, but it apparently applied the intermediate test of *Craig v. Boren*. However, it did so in the context of its often-stated

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[62] Id. at 430 U.S. 204–09, 212–17 (Justices Brennan, White, Marshall, and Powell). Congress responded by eliminating the dependency requirement but by adding a pension offset provision reducing spousal benefits by the amount of various other pensions received. Continuation in this context of the *Goldfarb* gender-based dependency classification for a five-year "grace period" was upheld in Heckler v. Mathews, 465 U.S. 728 (1984), as directly and substantially related to the important governmental interest in protecting against the effects of the pension offset the retirement plans of individuals who had based their plans on unreduced pre-*Goldfarb* payment levels.

[63] Id. at 217. Justice Stevens adhered to this view in Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 154 (1980). Note the unanimity of the Court on the substantive issue, although it was divided on remedy, in voiding in Califano v. Westcott, 443 U.S. 76 (1979), a Social Security provision giving benefits to families with dependent children who have been deprived of parental support because of the unemployment of the father but giving no benefits when the mother is unemployed.

[64] 453 U.S. 57 (1981). Joining the opinion of the Court were Justices Rehnquist, Stewart, Blackmun, Powell, and Stevens, and Chief Justice Burger. Dissenting were Justices White, Marshall, and Brennan. Id. at 83, 86.

preference for extreme deference to military decisions and to congressional resolution of military decisions. Evaluating the congressional determination, the Court found that it has not been "unthinking" or "reflexively" based upon traditional notions of the differences between men and women; rather, Congress had extensively deliberated over its decision. It had found, the Court asserted, that the purpose of registration was the creation of a pool from which to draw combat troops when needed, an important and indeed compelling governmental interest, and the exclusion of women was not only "sufficiently but closely" related to that purpose because they were ill-suited for combat, could be excluded from combat, and registering them would be too burdensome to the military system.[65]

In *Michael M. v. Superior Court*,[66] the Court did expressly adopt the *Craig v. Boren* intermediate standard, but its application of the test appeared to represent a departure in several respects from prior cases in which it had struck down sex classifications. *Michael M.* involved the constitutionality of a statute that punished males, but not females, for having sexual intercourse with a nonspousal person under 18 years of age. The plurality and the concurrence generally agreed, but with some difference of emphasis, that while the law was founded on a clear sex distinction it was justified because it did serve an important governmental interest, the prevention of teenage pregnancies. Inasmuch as women may become pregnant and men may not, women would be better deterred by that biological fact, and men needed the additional legal deterrence of a criminal penalty. Thus, the law recognized that for purposes of this classification men and women were not similarly situated, and the statute did not deny equal protection.[67]

Cases of "benign" discrimination, that is, statutory classifications that benefit women and disadvantage men in order to overcome the effects of past societal discrimination against women,

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[65] Id. at 69–72, 78–83. The dissent argued that registered persons would fill noncombat positions as well as combat ones and that drafting women would add to women volunteers providing support for combat personnel and would free up men in other positions for combat duty. Both dissents assumed without deciding that exclusion of women from combat served important governmental interests. Id. at 83, 93. The majority's reliance on an administrative convenience argument, it should be noted, id., 81, was contrary to recent precedent. Supra, p. 1880 n.55.

[66] 450 U.S. 464 (1981). Joining the opinion of the Court were Justices Rehnquist, Stewart, and Powell, and Chief Justice Burger, constituting only a plurality. Justice Blackmun concurred in a somewhat more limited opinion. Id. at 481. Dissenting were Justices Brennan, White, Marshall, and Stevens. Id. at 488, 496.

[67] Id. at 470–74, 481. The dissents questioned both whether the pregnancy deterrence rationale was the purpose underlying the distinction and whether, if it was, the classification was substantially related to achievement of the goal. Id. at 488, 496.

have presented the Court with some difficulty. Although the first two cases were reviewed under apparently traditional rational basis scrutiny, the more recent cases appear to subject these classifications to the same intermediate standard as any other sex classification. *Kahn v. Shevin*[68] upheld a state property tax exemption allowing widows but not widowers a $500 exemption. In justification, the State had presented extensive statistical data showing the substantial economic and employment disabilities of women in relation to men. The provision, the Court found, was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[69] And in *Schlesinger v. Ballard*,[70] the Court sustained a provision requiring the mandatory discharge from the Navy of a male officer who has twice failed of promotion to certain levels, which in Ballard's case meant discharge after nine years of service, whereas women officers were entitled to 13 years of service before mandatory discharge for want of promotion. The difference was held to be a rational recognition of the fact that male and female officers were dissimilarly situated and that women had far fewer promotional opportunities than men had.

Although in each of these cases the Court accepted the proffered justification of remedial purpose without searching inquiry, later cases caution that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[71] Rather, after specifically citing the heightened scrutiny that all sex classifications are subjected to, the Court looks to the statute and to its legislative history to ascertain that the scheme does not actually penalize women, that it was actually enacted to compensate for past discrimination, and that it does not reflect merely "archaic and overbroad generalizations" about women in its moving force. But where a statute is "deliberately enacted to compensate for particular economic disabilities suffered by women," it

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[68] 416 U.S. 351 (1974).

[69] Id. at 355.

[70] 419 U.S. 498 (1975).

[71] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977); Orr v. Orr, 440 U.S. 268, 280–82 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150–52 (1980). In light of the stiffened standard, Justice Stevens has called for overruling *Kahn*, Califano v. Goldfarb, supra, 223–24, but Justice Blackmun would preserve that case. Orr v. Orr, supra, at 284. *Cf.* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 302–03 (1978) (Justice Powell; less stringent standard of review for benign sex classifications).

serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective.[72]

Many of these lines of cases converged in *Mississippi University for Women v. Hogan*,[73] in which the Court stiffened and applied its standards for evaluating claimed benign distinctions benefiting women and additionally appeared to apply the intermediate standard itself more strictly. The case involved a male nurse who wished to attend a female-only nursing school located in the city in which he lived and worked; if he could not attend this particular school he would have had to commute 147 miles to another nursing school which did accept men, and he would have had difficulty doing so and retaining his job. The State defended on the basis that the female-only policy was justified as providing "educational affirmative action for females." Recitation of a benign purpose, the Court said, was not alone sufficient. "[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[74] But women did not lack opportunities to obtain training in nursing; instead they dominated the field. In the Court's view, the state policy did not compensate for discriminatory barriers facing women, but it perpetuated the stereotype of nursing as a woman's job. "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification."[75] Even if the classification was premised on the proffered basis, the Court concluded, it did not substantially and directly relate to the objective, because the school permitted men to audit the nursing classes and women could still be adversely affected by the presence of men.[76]

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[72] Califano v. Webster, 430 U.S. 313, 316–18, 320 (1977). There was no doubt that the provision sustained in *Webster* had been adopted expressly to relieve past societal discrimination. The four *Goldfarb* dissenters concurred specially, finding no difference between the two provisions. Id. at 321.

[73] 458 U.S. 718 (1982). Joining the opinion of the Court were Justices O'Connor, Brennan, White, Marshall, and Stevens. Dissenting were Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. Id. at 733, 735.

[74] Id. at 728.

[75] Id. at 730. In addition to obligating the State to show that in fact there was existing discrimination or effects from past discrimination, the Court also appeared to take the substantial step of requiring the State "to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination." Id. at 730 n.16. A requirement that the proffered purpose be the actual one and that it must be shown that the legislature actually had that purpose in mind would be a notable stiffening of equal protection standards.

[76] In the major dissent, Justice Powell argued that only a rational basis standard ought to be applied to sex classifications that would "*expand* women's choices," but that the exclusion here satisfied intermediate review because it promoted diversity of educational opportunity and was premised on the belief that single-sex col-

Another area presenting some difficulty is that of the relationship of pregnancy classifications to gender discrimination. In *Cleveland Board of Education v. LaFluer,*[77] a case decided upon due process grounds, two school systems requiring pregnant school teachers to leave work four and five months respectively before the expected childbirths were found to have acted arbitrarily and irrationally in establishing rules not supported by anything more weighty than administrative convenience buttressed with some possible embarrassment of the school boards in the face of pregnancy. On the other hand, the exclusion of pregnancy from a state financed program of payments to persons disabled from employment was upheld against equal protection attack as supportable by legitimate state interests in the maintenance of a self-sustaining program with rates low enough to permit the participation of low-income workers at affordable levels.[78] The absence of supportable reasons in one case and their presence in the other may well have made the significant difference.

Illegitimacy.—After wrestling in a number of cases with the question of the permissibility of governmental classifications disadvantaging illegitimates and the standard for determining which classifications are sustainable, the Court arrived at a standard difficult to state and even more difficult to apply.[79] Although

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leges offer "distinctive benefits" to society. Id. at 735, 740 (emphasis by Justice), 743. The Court noted that because the State maintained no other single-sex public university or college, the case did not present "the question of whether States can provide 'separate but equal' undergraduate institutions for males and females," id. at 720 n.1, although Justice Powell thought the decision did preclude such institutions. Id. at 742–44. *See* Vorchheimer v. School Dist. of Philadelphia, 532 F. 2d 880 (3d Cir. 1976) (finding no equal protection violation in maintenance of two single-sex high schools of equal educational offerings, one for males, one for females), aff'd by an equally divided Court, 430 U.S. 703 (1977) (Justice Rehnquist not participating).

[77] 414 U.S. 632 (1974). Justice Powell concurred on equal protection grounds. Id. at 651. *See also* Turner v. Department of Employment Security, 423 U.S. 44 (1975).

[78] Geduldig v. Aiello, 417 U.S. 484 (1974). The Court denied that the classification was based upon "gender as such." Classification was on the basis of pregnancy, and while only women can become pregnant, that fact alone was not determinative. "The program divides potential recipients into two groups—pregnant woman and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Id. at 496 n.20. For a rejection of a similar attempted distinction, *see* Nyquist v. Mauclet, 432 U.S. 1, 9 (1977); and Trimble v. Gordon, 430 U.S. 762, 774 (1977). *See also* Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). For the transmutation of *Geduldig* into statutory interpretation and Congress' response, *see* supra, p. 1876 n.41.

[79] The first cases set the stage for the lack of consistency. *Compare* Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), invalidating laws which precluded wrongful death actions in cases involving the child or the mother when the child was illegitimate, in which scrutiny was strict, *with* Labine v. Vincent, 401 U.S. 532 (1971), involving intestate succession, in which scrutiny was rational basis, *and* Weber v. Aetna Casualty & Surety Co.,

"illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations," the analogy is "not sufficient to require 'our most exacting scrutiny.'" The scrutiny to which it is entitled is intermediate, "not a toothless [scrutiny]," but somewhere between that accorded race and that accorded ordinary economic classifications. Basically, the standard requires a determination of a legitimate legislative aim and a careful review of how well the classification serves, or "fits," the aim.[80] The common rationale of all the illegitimacy cases is not clear, is in many respects not wholly consistent,[81] but the theme that seems to be imposed on them by the more recent cases is that so long as the challenged statute does not so structure its conferral of rights, benefits, or detriments that some illegitimates who would otherwise qualify in terms of the statute's legitimate purposes are disabled from participation, the imposition of greater burdens upon illegitimates or some classes of illegitimates than upon legitimates is permissible.[82]

Intestate succession rights for illegitimates has divided the Court over the entire period. At first adverting to the broad power of the States over descent of real property, the Court employed re-

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406 U.S. 164 (1972), involving a workmen's compensation statute distinguishing between legitimates and illegitimates, in which scrutiny was intermediate.

[80] Mathews v. Lucas, 427 U.S. 495, 503–06 (1976); Trimble v. Gordon, 430 U.S. 762, 766–67 (1977); Lalli v. Lalli, 439 U.S. 259, 265 (1978). Scrutiny in previous cases had ranged from negligible, Labine v. Vincent, 401 U.S. 532 (1971), to something approaching strictness, Jiminez v. Weinberger, 417 U.S. 628, 631–632 (1974). *Mathews* itself illustrates the uncertainty of statement, suggesting at one point that the *Labine* standard may be appropriate, supra, at 506, and at another that the standard appropriate to sex classifications is to be used, id. at 510, while observing a few pages earlier that illegitimacy is entitled to less exacting scrutiny than either race *or* sex. Id. at 506. *Trimble* settles on intermediate scrutiny but does not assess the relationship between its standard and the sex classification standard. *See* Parham v. Hughes, 441 U.S. 347 (1979), and Caban v. Mohammed, 441 U.S. 380 (1979) (both cases involving classifications reflecting both sex and illegitimacy interests).

[81] The major inconsistency arises from three 5-to–4 decisions. Labine v. Vincent, 401 U.S. 532 (1971), was largely overruled by Trimble v. Gordon, 430 U.S. 762 (1977), which itself was substantially limited by Lalli v. Lalli, 439 U.S. 259 (1978). Justice Powell was the swing vote for different disposition of the latter two cases. Thus, while four Justices argued for stricter scrutiny and usually invalidation of such classifications, *Lalli v. Lalli*, supra, at 277 (Justices Brennan, White, Marshall, and Stevens dissenting), and four favor relaxed scrutiny and usually sustaining the classifications, *Trimble v. Gordon*, supra, 776, 777 (Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissenting), Justice Powell applied his own intermediate scrutiny and selectively voided and sustained. *See Lalli v. Lalli*, supra, (plurality opinion by Justice Powell).

[82] A classification that absolutely distinguishes between legitimates and illegitimates is not alone subject to such review; one that distinguishes among classes of illegitimates is also subject to it, Trimble v. Gordon, 430 U.S. 762, 774 (1977), as indeed are classifications based on other factors. E.g., Nyquist v. Mauclet, 432 U.S. 1, 9 (1977) (alienage).

laxed scrutiny to sustain a law denying illegitimates the right to share equally with legitimates in the estate of their common father, who had acknowledged the illegitimates but who had died intestate.[83] *Labine* was strongly disapproved, however, and virtually overruled in *Trimble v. Gordon*,[84] which found an equal protection violation in a statute allowing illegitimate children to inherit by intestate succession from their mothers but from their fathers only if the father had "acknowledged" the child and the child had been legitimated by the marriage of the parents. The father in *Trimble* had not acknowledged his child, and had not married the mother, but a court had determined that he was in fact the father and had ordered that he pay child support. Carefully assessing the purposes asserted to be the basis of the statutory scheme, the Court found all but one to be impermissible or inapplicable and that one not served closely enough by the restriction. First, it was impermissible to attempt to influence the conduct of adults not to engage in illicit sexual activities by visiting the consequences upon the offspring.[85] Second, the assertion that the statute mirrored the assumed intent of decedents, in that, knowing of the statute's operation, they would have acted to counteract it through a will or otherwise, was rejected as unproved and unlikely.[86] Third, the argument that the law presented no insurmountable barrier to illegitimates inheriting since a decedent could have left a will, married the mother, or taken steps to legitimate the child, was rejected as inapposite.[87] Fourth, the statute did address a substantial problem, a permissible state interest, presented by the difficulties of proving pater-

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[83] Labine v. Vincent, 401 U.S. 532 (1971). Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170 (1972), had confined the analysis of *Labine* to the area of state inheritance laws in expanding review of illegitimacy classifications.

[84] 430 U.S. 762 (1977). Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissented, finding the statute "constitutionally indistinguishable" from the one sustained in *Labine*. Id. at 776. Justice Rehnquist also dissented separately. Id. at 777.

[85] Id. at 768–70. While this purpose had been alluded to in Labine v. Vincent, 401 U.S. 532, 538 (1971), it was rejected as a justification in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 173, 175 (1972). Visiting consequences upon the parent appears to be permissible. Parham v. Hughes, 441 U.S. 347, 352–53 (1979).

[86] Trimble v. Gordon, 430 U.S. 762, 774–76 (1977). The Court cited the failure of the state court to rely on this purpose and its own examination of the statute.

[87] Id. at 773–74. This justification had been prominent in Labine v. Vincent, 401 U.S. 532, 539 (1971), and its absence had been deemed critical in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170–71 (1972). The *Trimble* Court thought this approach "somewhat of an analytical anomaly" and disapproved it. However, the degree to which one could conform to the statute's requirements and the reasonableness of those requirements in relation to a legitimate purpose are prominent in Justice Powell's reasoning in subsequent cases. Lalli v. Lalli, 439 U.S. 259, 266–74 (1978); Parham v. Hughes, 441 U.S. 347, 359 (1979) (concurring). *See also* Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982) (sex); and compare id. at 736 (Justice Powell dissenting).

nity and avoiding spurious claims. However, the court thought the means adopted, total exclusion, did not approach the "fit" necessary between means and ends to survive the scrutiny appropriate to this classification. The state court was criticized for failing "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[88] Because the state law did not follow a reasonable middle ground, it was invalidated.

A reasonable middle ground was discerned, at least by Justice Powell, in *Lalli v. Lalli*,[89] concerning a statute which permitted legitimate children to inherit automatically from both their parents, while illegitmates could inherit automatically only from their mothers, and could inherit from their intestate fathers only if a court of competent jurisdiction had, during the father's lifetime, entered an order declaring paternity. The child tendered evidence of paternity, including a notarized document in which the putative father, in consenting to his marriage, referred to him as "my son" and several affidavits by persons who stated that the elder Lalli had openly and frequently acknowledged that the younger Lalli was his child. In the prevailing view, the single requirement of entry of a court order during the father's lifetime declaring the child as his met the "middle ground" requirement of *Trimble*; it was addressed closely and precisely to the substantial state interest of seeing to the orderly disposition of property at death by establishing proof of paternity of illegitimate children and avoiding spurious claims against intestate estates. To be sure, some illegitimates who were unquestionably established as children of the decreased would be disqualified because of failure of compliance, but individual fairness is not the test. The test rather is whether the requirement is closely enough related to the interests served to meet the standard

[88] Trimble v. Gordon, 430 U.S. 762, 770–73 (1977). The result is in effect a balancing one, the means-ends relationship must be a substantial one in terms of the advantages of the classification as compared to the harms of the classification means. Justice Rehnquist's dissent is especially critical of this approach. Id. at 777, 781–86. Also not interfering with orderly administration of estates is application of *Trimble* in a probate proceeding ongoing at the time *Trimble* was decided; the fact that the death had occurred prior to *Trimble* was irrelevant. Reed v. Campbell, 476 U.S. 852 (1986).

[89] 439 U.S. 259 (1978). The four *Trimble* dissenters joined Justice Powell in the result, although only two joined his opinion. Justices Blackmun and Rehnquist concurred because they thought *Trimble* wrongly decided and ripe for overruling. Id. at 276. The four dissenters, who had joined the *Trimble* majority with Justice Powell, thought the two cases were indistinguishable. Id. at 277.

of rationality imposed. Also, no doubt the State's interest could have been served by permitting other kinds of proof, but that too is not the test of the statute's validity. Hence, the balancing necessitated by the Court's promulgation of standards in such cases caused it to come to different results on closely related fact patterns, making predictability quite difficult but perhaps manageable.[90]

The Court's difficulty in arriving at predictable results has extended outside the area of descent of property. Thus, a Texas child support law affording legitimate children a right to judicial action to obtain support from their fathers while not affording the right to illegitimate children denied the latter equal protection. "A State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers *there is no constitutionally sufficient justification* for denying such an essential right to a child simply because its natural father has not married its mother."[91]

Similarly, a federal Social Security provision was held invalid which made eligible for benefits, because of an insured parent's dis-

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[90] Illustrating the difficulty are two cases in which the fathers of illegitimate children challenged statutes treating them differently than mothers of such children were treated. In Parham v. Hughes, 441 U.S. 347 (1979), the majority viewed the distinction as a gender-based one rather than as an illegitimacy classification and sustained a bar to a wrongful death action by the father of an illegitimate child who had not legitimated him; in Caban v. Mohammed, 441 U.S. 380 (1980), again viewing the distinction as a gender-based one, the majority voided a state law permitting the mother but not the father of an illegitimate child to block his adoption by refusing to consent. Both decisions were 5-to–4.

[91] Gomez v. Perez, 409 U.S. 535, 538 (1978) (emphasis supplied). Following the decision, Texas authorized illegitimate children to obtain support from their fathers. But the legislature required as a first step that paternity must be judicially determined, and imposed a limitations period within which suit must be brought of one year from birth of the child. If suit is not brought within that period the child could never obtain support at any age from his father. No limitation was imposed on the opportunity of a natural child to seek support, up to age 18. In Mills v. Habluetzel, 456 U.S. 91 (1982), the Court invalidated the one-year limitation. While a State has an interest in avoiding stale or fraudulent claims, the limit must not be so brief as to deny such children a reasonable opportunity to show paternity. Similarly, a 2-year statute of limitations on paternity and support actions was held to deny equal protection to illegitimates in Pickett v. Brown, 462 U.S. 1 (1983), and a 6-year limit was struck down in Clark v. Jeter, 486 U.S. 456 (1988). In both cases the Court pointed to the fact that increasingly sophisticated genetic tests are minimizing the "lurking problems with respect to proof of paternity" referred to in *Gomez,* 409 U.S. at 538. Also, the state's interest in imposing the 2-year limit was undercut by exceptions (e.g., for illegitimates receiving public assistance), and by different treatment for minors generally; similarly, the importance of imposing a 6-year limit was belied by that state's more recent enactment of a non-retroactive 18-year limit for paternity and support actions.

ability, all legitimate children as well as those illegitimate children capable of inheriting personal property under state intestacy law and those children who were illegitimate only because of a nonobvious defect in their parents' marriage, regardless of whether they were born after the onset of the disability, but which made all other illegitimate children eligible only if they were born prior to the onset of disability and if they were dependent upon the parent prior to the onset of disability. The Court deemed the purpose of the benefits to be to aid all children and rejected the argument that the burden on illigitimates was necessary to avoid fraud.[92]

However, in a second case, an almost identical program, providing benefits to children of a deceased insured, was sustained because its purpose was found to be to give benefits to children who were dependent upon the deceased parent and the classifications served that purpose. Presumed dependent were all legitimate children as well as those illegitimate children who were able to inherit under state intestacy laws, who were illegitimate only because of the technical invalidity of the parent's marriage, who had been acknowledged in writing by the father, who had been declared to be the father's by a court decision, or who had been held entitled to the father's support by a court. Illegitimate children not covered by these presumptions had to establish that they were living with the insured parent or were being supported by him when the parent died. According to the Court, all the presumptions constituted an administrative convenience which was a permissible device because those illegitimate children who were entitled to benefits because they were in fact dependent would receive benefits upon proof of the fact and it was irrelevant that other children not dependent in fact also received benefits.[93]

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[92] Jiminez v. Weinberger, 417 U.S. 628 (1974). *But cf.* Califano v. Boles, 443 U.S. 282 (1979). *See also* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (limiting welfare assistance to households in which parents are ceremonially married and the children are legitimate or adopted denied illegitimate children equal protection); Richardson v. Davis, 409 U.S. 1069 (1972), aff'g 342 F. Supp. 588 (D. Conn.) (3-judge court), and Richardson v. Griffin, 409 U.S. 1069 (1972), aff'g 346 F. Supp. 1226 (D. Md.) (3-judge court) (Social Security provision entitling illegitimate children to monthly benefit payments only to extent that payments to widow and legitimate children do not exhaust benefits allowed by law denies illegitimates equal protection).

[93] Mathews v. Lucas, 427 U.S. 495 (1976). It can be seen that the only difference between *Jiminez* and *Lucas* is that in the former the Court viewed the benefits as owing to all children and not just to dependents, while in the latter the benefits were viewed as owing only to dependents and not to all children. But it is not clear that in either case the purpose determined to underlie the provision of benefits was compelled by either statutory language or legislative history. For a particularly good illustration of the difference such a determination of purpose can make and the way the majority and dissent in a 5-to–4 decision read the purpose differently, *see* Califano v. Boles, 443 U.S. 282 (1979).

Fundamental Interests: The Political Process

"The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . , absent of course the discrimination which the Constitution condemns."[94] The Constitution provides that the qualifications of electors in congressional elections are to be determined by reference to the qualifications prescribed in the States for the electors of the most numerous branch of the legislature, and the States are authorized to determine the manner in which presidential electors are selected.[95] The second section of the Fourteenth Amendment provides for a proportionate reduction in a State's representation in the House when it denies the franchise to its qualified male citizens[96] and specific discriminations on the basis of race, sex, and age are addressed in other Amendments. "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record . . . are obvious examples indicating factors which a State may take into consideration in determining the qualification of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot."[97]

The perspective of this 1959 opinion by Justice Douglas has now been revolutionized. "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized."[98] "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying

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[94] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–51 (1959).

[95] Article I, § 2, cl. 1 (House of Representatives); Seventeenth Amendment (Senators); Article II, § 1, cl. 2 (presidential electors). *See* Article I, § 4, cl. 1 and discussion supra, pp. 118–21.

[96] Fourteenth Amendment, § 2. Justice Harlan argued that the inclusion of this provision impliedly permitted the States to discriminate with only the prescribed penalty in consequence and that therefore the equal protection clause was wholly inapplicable to state election laws. Reynolds v. Sims, 377 U.S. 533, 589 (1964) (dissenting); Carrington v. Rash, 380 U.S. 89, 97 (1965) (dissenting); Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (concurring and dissenting). Justice Brennan undertook a rebuttal of this position in Oregon v. Mitchell, supra at 229, 250 (concurring and dissenting). *But see* Richardson v. Ramirez, 418 U.S. 24 (1974), where § 2 was relevant in precluding an equal protection challenge.

[97] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

[98] Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.

"And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. . . . [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable."[99] Using this analytical approach, the Court has established a regime of close review of a vast range of state restrictions on the eligibility to vote, on access to the ballot by candidates and parties, and on the weighing of votes cast through the devices of apportionment and districting. Changes in Court membership over the years has led to some relaxation in the application of principles, but even as the Court has drawn back in other areas it has tended to preserve, both doctrinally and in fact, the election cases.[100]

Voter Qualifications.—A State may require residency as a qualification to vote but since durational residency requirements impermissibly restrict the right to vote and penalize the assertion of the constitutional right to travel they are invalid.[101] The Court indicated that the States have a justified interest in preventing fraud and in facilitating determination of the eligibility of potential

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[99] Kramer v. Union Free School Dist., 395 U.S. 621, 626–28 (1969). *See also* Hill v. Stone, 421 U.S. 289, 297 (1975). *But cf.* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).

[100] Thus, in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 34–35 nn.74 & 78 (1973), a major doctrinal effort to curb the "fundamental interest" side of the "new" equal protection, the Court acknowledged that the right to vote did not come within its prescription that rights to be deemed fundamental must be explicitly or implicitly guaranteed in the Constitution. Nontheless, citizens have a "constitutionally protected right to participate in elections" which is protected by the equal protection clause. Dunn v. Blumstein, 405 U.S. 330, 336 (1972). The franchise is the guardian of all other rights. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[101] Dunn v. Blumstein, 405 U.S. 330 (1972). Justice Blackmun concurred specially, id. at 360, Chief Justice Burger dissented, id. at 363, and Justices Powell and Rehnquist did not participate. The voided statute imposed a requirement of one year in the State and three months in the county. The Court did not indicate what duration less than ninety days would be permissible, although it should be noted that in the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. § 1973aa–1, Congress prescribed a thirty-day period for purposes of voting in presidential elections. Note also that it does not matter whether one travels interstate or intrastate. Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), aff'd, 405 U.S. 1035 (1972).

registrants and granted that durational residency requirements furthered these interests, but, it said, the State had not shown that the requirements were "necessary," that is that the interests could not be furthered by means which imposed a lesser burden on the right to vote. Other asserted interests—knowledgeability of voters, common interests, intelligent voting—were said either not to be served by the requirements or to be impermissible interests.

A 50-day durational residency requirement was sustained in the context of the closing of the registration process at 50 days prior to elections and of the mechanics of the State's registration process. The period, the Court found, was necessary to achieve the State's legitimate goals.[102]

A State that exercised general criminal, taxing, and other jurisdiction over persons on certain federal enclaves within the State, the Court held, could not treat these persons as nonresidents for voting purposes.[103] A statute which provided that anyone who entered military service outside the State could not establish voting residence in the State so long as he remained in the military was held to deny to such a person the opportunity such as all non-military persons enjoyed of showing that he had established residence.[104] Restricting the suffrage to those persons who had paid a poll tax was an invidious discrimination because it introduced a "capricious or irrelevant factor" of wealth or ability to pay into an area in which it had no place.[105] Extending this ruling, the Court held that the eligibility to vote in local school elections may not be limited to persons owning property in the district or who have children in school,[106] and denied States the right to restrict the vote

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[102] Marston v. Lewis, 410 U.S. 679 (1973). Registration was by volunteer workers who made statistically significant errors requiring corrections by county recorders before certification. Primary elections were held in the fall, thus occupying the time of the recorders, so that a backlog of registrations had to be processed before the election. A period of 50 days rather than 30, the Court thought, was justifiable. However, the same period was upheld for another State on the authority of *Marston* in the absence of such justification, but it appeared that plaintiffs had not controverted the State's justifying evidence. Burns v. Fortson, 410 U.S. 686 (1973). Justices Brennan, Douglas, and Marshall dissented in both cases. Id. at 682, 688.

[103] Evans v. Cornman, 398 U.S. 419 (1970).

[104] Carrington v. Rash, 380 U.S. 89 (1965).

[105] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). Justices Black, Harlan, and Stewart dissented. Id. at 670, 680. Poll tax qualifications had previously been upheld in Breedlove v. Suttles, 302 U.S. 277 (1937); and Butler v. Thompson, 341 U.S. 937 (1951).

[106] Kramer v. Union Free School Dist., 395 U.S. 621 (1969). The Court assumed without deciding that the franchise in some circumstances could be limited to those "primarily interested" or "primarily affected" by the outcome, but found that the restriction permitted some persons with no interest to vote and disqualified others with an interest. Justices Stewart, Black, and Harlan dissented. Id. at 594.

to property owners in elections on the issuance of revenue bonds[107] or general obligation bonds.[108]

However, the Court held that because the activities of a water storage district fell so disproportionately on landowners as a group, a limitation of the franchise in elections for the district's board of directors to landowners, whether resident or not and whether natural persons or not, excluding non-landowning residents and lessees of land, and weighing the votes granted according to assessed valuation of land, comported with equal protection standards.[109] Adverting to the reservation in prior local governmental unit election cases[110] that some functions of such units might be so specialized as to permit deviation from the usual rules, the Court then proceeded to assess the franchise restrictions according to the traditional standards of equal protection rather than by those of strict scrutiny.[111] Also narrowly approached was the issue of the effect of the District's activities, the Court focusing upon the assessments against landowners as the sole means of paying expenses rather than additionally noting the impact upon lessees and non-landowning residents of such functions as flood control. The approach taken in this case seems different in great degree from that in prior cases and could in the future alter the results in other local government cases. These cases were extended somewhat in *Ball v. James*,[112] in which the Court sustained a system in which voting eligibility was limited to landowners and votes were allocated to these voters on the basis of the number of acres they owned. The entity was a water reclamation district which stores and delivers water to 236,000 acres of land in the State and subsidizes its water operations by selling electricity to hundreds of thousands of consumers in a nearby metropolitan area. The entity's

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[107] Cipriano v. City of Houma, 395 U.S. 701 (1969). Justices Black, Harlan, and Stewart concurred specially. Id. at 707.

[108] City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). Justice Stewart and Chief Justice Burger dissented. Id. at 215. In Hill v. Stone, 421 U.S. 289 (1975), the Court struck down a limitation on the right to vote on a general obligation bond issue to persons who have "rendered" or listed real, mixed, or personal property for taxation in the election district. It was not a "special interest" election since a general obligation bond issue is a matter of general interest.

[109] Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719 (1973). *See also* Associated Enterprises v. Toltec Watershed Improv. Dist., 410 U.S. 743 (1973) (limitation of franchise to property owners in the creation and maintenance of district upheld). Justices Douglas, Brennan, and Marshall dissented in both cases. Id. at 735, 745.

[110] 410 U.S. at 727–28.

[111] Id. at 730, 732. Thus, the Court posited reasons that might have moved the legislature to adopt the exclusions.

[112] 451 U.S. 355 (1981). Joining the opinion of the Court were Justices Stewart, Powell, Rehnquist, Stevens, and Chief Justice Burger. Dissenting were Justices White, Brennan, Marshall, and Blackmun. Id. at 374.

board of directors was elected through a system in which the eligibility to vote was as described above. The Court thought the entity was a specialized and limited form to which its general franchise rulings did not apply.[113]

Finding that prevention of "raiding"—the practice whereby voters in sympathy with one party vote in another's primary election in order to distort that election's results—is a legitimate and valid state goal, as one element in the preservation of the integrity of the electoral process, the Court sustained a state law requiring those voters eligible at that time to register to enroll in the party of their choice at least 30 days before the general election in order to be eligible to vote in the party's next primary election, 8 to 11 months hence. The law did not impose a prohibition upon voting but merely imposed a time deadline for enrollment, the Court held, and it was because of the plaintiffs' voluntary failure to register that they did not meet the deadline.[114] But a law which prohibited a person from voting in the primary election of a political party if he has voted in the primary election of any other party within the preceding 23 months was subjected to strict scrutiny and was voided, inasmuch as it constituted a severe restriction upon a voter's right to associate with the party of his choice by requiring him to forgo participation in at least one primary election in order to change parties.[115] A less restrictive "closed primary" system was also invalidated, the Court finding insufficient justification for a state's preventing a political party from allowing independents to vote in its primary.[116]

It must not be forgotten, however, that it is only when a State extends the franchise to some and denies it to others that a "right to vote" arises and is protected by the equal protection clause. If a State chooses to fill an office by means other than through an election, neither the equal protection clause nor any other constitutional provision prevents it from doing so. Thus, in *Rodriguez v.*

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[113] The water district cases were distinguished in Quinn v. Millsap, 491 U.S. 95, 109 (1989), the Court holding that a "board of freeholders" appointed to recommend a reorganization of local government had a mandate "far more encompassing" than land use issues, since its recommendations "affect[] all citizens . . . regardless of land ownership."

[114] Rosario v. Rockefeller, 410 U.S. 752 (1973). Justices Powell, Douglas, Brennan, and Marshall dissented. Id. at 763.

[115] Kusper v. Pontikes, 414 U.S. 51 (1973). Justices Blackmun and Rehnquist dissented. Id. at 61, 65.

[116] Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). Although independents were allowed to register in a party on the day before a primary, the state's justifications for "protect[ing] the integrity of the Party against the Party itself" were deemed insubstantial. Id. at 224.

Popular Democratic Party,[117] the Court unanimously sustained a Puerto Rico statute which authorized the political party to which an incumbent legislator belonged to designate his successor in office until the next general election upon his death or resignation. Neither the fact that the seat was filled by appointment nor the fact that the appointment was by the party, rather than by the Governor or some other official, raised a constitutional question.

The right of unconvicted jail inmates and convicted misdemeanants (who typically are under no disability) to vote by absentee ballot remains unsettled. In an early case applying rational basis scrutiny, the Court held that the failure of a State to provide for absentee balloting by unconvicted jail inmates, when absentee ballots were available to other classes of voters, did not deny equal protection when it was not shown that the inmates could not vote in any other way.[118] Subsequently, the Court held unconstitutional a statute denying absentee registration and voting rights to persons confined awaiting trial or serving misdemeanor sentences, but it is unclear whether the basis was the fact that persons confined in jails outside the county of their residences could register and vote absentee while those confined in the counties of their residences could not, or whether the statute's jumbled distinctions among categories of qualified voters on no rational standard made it wholly arbitrary.[119]

Access to the Ballot.—The equal protection clause applies to state specification of qualifications for elective and appointive office. While one may "have no right" to be elected or appointed to an office, all persons "do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guaran-

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[117] 457 U.S. 1 (1982). *See also* Fortson v. Morris, 385 U.S. 231 (1966) (legislature could select Governor from two candidates having highest number of votes cast when no candidate received majority); Sailors v. Board of Elections, 387 U.S. 105 (1967) (appointment rather than election of county school board); Valenti v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1968) (three-judge court), aff'd, 393 U.S. 405 (1969) (gubernatorial appointment to fill United States Senate vacancy).

[118] McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969). *But see* Goosby v. Osser, 409 U.S. 512 (1973) (*McDonald* does not preclude challenge to absolute prohibition on voting).

[119] O'Brien v. Skinner, 414 U.S. 524 (1974). *See* American Party of Texas v. White, 415 U.S. 767, 794–95 (1974).

tees."[120] In *Bullock v. Carter*,[121] the Court utilized a somewhat modified form of the strict test in passing upon a filing fee system for primary election candidates which imposed the cost of the election wholly on the candidates and which made no alternative provision for candidates unable to pay the fees; the reason for application of the standard, however, was that the fee system deprived some classes of voters of the opportunity to vote for certain candidates and it worked its classifications along lines of wealth. The system itself was voided because it was not reasonably connected with the State's interest in regulating the ballot and did not serve that interest and because the cost of the election could be met out of the state treasury, thus avoiding the discrimination.[122]

Recognizing the state interest in maintaining a ballot of reasonable length in order to promote rational voter choice, the Court observed nonetheless that filing fees alone do not test the genuineness of a candidacy or the extent of voter support for an aspirant. Therefore, effectuation of the legitimate state interest must be achieved by means that do not unfairly or unnecessarily burden the party's or the candidate's "important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance." "[T]he process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars."[123] In the absence of reasonable alternative means of ballot access, the Court held, a State may not disqualify an indigent candidate unable to pay filing fees.[124]

In *Clements v. Fashing*,[125] the Court sustained two provisions of state law, one that barred certain officeholders from seeking

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[120] Turner v. Fouche, 396 U.S. 346, 362–63 (1970) (voiding a property qualification for appointment to local school board). *See also* Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977) (voiding a qualification for appointment as airport commissioner of ownership of real or personal property that is assessed for taxes in the jurisdiction in which airport is located); Quinn v. Millsap, 491 U.S. 95 (1989) (voiding property ownership requirement for appointment to board authorized to propose reorganization of local government). *Cf.* Snowden v. Hughes, 321 U.S. 1 (1944).

[121] 405 U.S. 134, 142–44 (1972).

[122] Id. at 144–49.

[123] Lubin v. Panish, 415 U.S. 709, 716 (1974).

[124] Concurring, Justices Blackmun and Rehnquist suggested that a reasonable alternative would be to permit indigents to seek write-in votes without paying a filing fee, id. at 722, but the Court indicated this would be inadequate. Id. at 719 n.5.

[125] 457 U.S. 957 (1982). A plurality of four contended that save in two circumstances—ballot access classifications based on wealth and ballot access classifications imposing burdens on new or small political parties or independent candidates—limitations on candidate access to the ballot merit only traditional rational

election to the legislature during the term of office for which they had been elected or appointed, but that did not reach other officeholders whose terms of office expired with the legislators' terms and did not bar legislators from seeking other offices during their terms, and the other that automatically terminated the terms of certain officeholders who announced for election to other offices, but that did not apply to other officeholders who could run for another office while continuing to serve. The Court was splintered in such a way, however, that it is not possible to derive a principle from the decision applicable to other fact situations.

In *Williams v. Rhodes*,[126] a complex statutory structure which had the effect of keeping off the ballot all but the candidates of the two major parties was struck down under the strict test because it deprived the voters of the opportunity of voting for independent and third-party candidates and because it seriously impeded the exercise of the right to associate for political purposes. Similarly, a requirement that an independent candidate for office in order to obtain a ballot position must obtain 25,000 signatures, including 200 signatures from each of at least 50 of the State's 102 counties, was held to discriminate against the political rights of the inhabitants of the most populous counties, when it was shown that 93.4% of the registered voters lived in the 49 most populous counties.[127] But to provide that the candidates of any political organization obtaining 20% or more of the vote in the last gubernatorial or presidential election may obtain a ballot position simply by winning the party's primary election while requiring candidates of other parties or independent candidates to obtain the signatures of less than five percent of those eligible to vote at the last election for the office sought is not to discriminate unlawfully, inasmuch as

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basis scrutiny, because candidacy is not a fundamental right. The plurality found both classifications met the standard. Id. at 962–73 (Justices Rehnquist, Powell, O'Connor, and Chief Justice Burger). Justice Stevens concurred, rejecting the plurality's standard, but finding that inasmuch as the disparate treatment was based solely on the State's classification of the different offices involved, and not on the characteristics of the persons who occupy them or seek them, the action did not violate the equal protection clause. Id. at 973. The dissent primarily focused on the First Amendment but asserted that the classifications failed even a rational basis test. Id. at 976 (Justices Brennan, White, Marshall, and Blackmun).

[126] 393 U.S. 23 (1968). "[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." Id. at 34. Justices Douglas and Harlan would have relied solely on the First Amendment, id. at 35, 41, while Justices Stewart and White and Chief Justice Warren dissented. Id. at 48, 61, 63.

[127] Moore v. Ogilvie, 394 U.S. 814 (1969) (overruling MacDougall v. Green, 335 U.S. 281 (1948)).

the State placed no barriers of any sort in the way of obtaining signatures and since write-in votes were also freely permitted.[128]

Reviewing under the strict test the requirements for qualification of new parties and independent candidates for ballot positions, the Court recognized as valid objectives and compelling interests the protection of the integrity of the nominating and electing process, the promotion of party stability, and the assurance of a modicum of order in regulating the size of the ballot by requiring a showing of some degree of support for independents and new parties before they can get on the ballot.[129] "[T]o comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot."[130] Decision whether or not a state statutory structure affords a feasible opportunity is a matter of degree, "very much a matter of 'consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.'"[131]

Thus, in order to assure that parties seeking ballot space command a significant, measurable quantum of community support, Texas was upheld in treating different parties in ways rationally constructed to achieve this objective. Candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election had to be nominated by primary elections and went on the ballot automatically, because the prior vote adequately demonstrated support. Candidates whose parties polled less than 200,000 but more than 2 percent could be nominated in primary elections or in conventions. Candidates of parties not coming within either of the first two categories had to be nominated in conventions and could obtain ballot space only if the notarized list of participants at the conventions totalled at least one percent of the total votes cast for governor in the last preceding general election or, failing this, if in the 55 succeeding days a requisite number of qualified voters signed petitions to bring the total up to one percent of the gubernatorial vote. [W]hat is demanded may not be so exessive or impractical as to be in reality a mere device to always,

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[128] Jenness v. Fortson, 403 U.S. 431 (1971).

[129] Storer v. Brown, 415 U.S. 724 (1974); American Party of Texas v. White, 415 U.S. 767 (1974); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979). *And see* Indiana Communist Party v. Whitcomb, 414 U.S. 441 (1974) (impermissible to condition ballot access upon a political party's willingness to subscribe to oath that party "does not advocate the overthrow of local, state or national government by force or violence," opinion of Court based on First Amendment, four Justices concurring on equal protection grounds).

[130] Storer v. Brown, 415 U.S. 724, 746 (1974).

[131] Id. at 730 (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)).

or almost always, exclude parties with significant support from the ballot," but the Court thought that one percent, or 22,000 signatures in 1972, "falls within the outer boundaries of support the State may require."[132] Similarly, independent candidates can be required to obtain a certain number of signatures as a condition to obtain ballot space.[133] A State may validly require that each voter participate only once in each year's nominating process and it may therefore disqualify any person who votes in a primary election from signing nominating or supporting petitions for independent parties or candidates.[134] Equally valid is a state requirement that a candidate for elective office, as an independent or in a regular party, must not have been affiliated with a political party, or with one other than the one of which he seeks its nomination, within one year prior to the primary election at which nominations for the general election are made.[135] So too, a state may limit access to the general election ballot to candidates who received at least 1% of the primary votes cast for the particular office.[136] But it is impermissible to print the names of the candidates of the two major parties only on the absentee ballots, leaving off independents and other parties.[137] Also invalidated was a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot.[138]

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[132] American Party of Texas v. White, 415 U.S. 767, 783 (1974). In Storer v. Brown, 415 U.S. 724, 738–40 (1974), the Court remanded so that the district court could determine whether the burden imposed on an independent party was too severe, it being required in 24 days in 1972 to gather 325,000 signatures from a pool of qualified voters who had not voted in that year's partisan primary elections. *See also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (voiding provision that required a larger number of signatures to get on ballot in subdivisions than statewide).

[133] American Party of Texas v. White, 415 U.S. 767, 788–91 (1974). The percentages varied with the office but no more than 500 signatures were needed in any event.

[134] Id. at 785–87.

[135] Storer v. Brown, 415 U.S. 724, 728–37 (1974). Dissenting, Justices Brennan, Douglas and Marshall thought the state interest could be adequately served by a shorter time period than a year before the primary election, which meant in effect 17 months before the general election. Id. at 755.

[136] Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

[137] American Party of Texas v. White, 415 U.S. 767, 794–95 (1974). Upheld, however, was state financing of the primary election expenses that excluded convention expenses of the small parties. Id. at 791–94. But the major parties had to hold conventions simultaneously with the primary elections the cost of which they had to bear. For consideration of similar contentions in the context of federal financing of presidential elections, *see* Buckley v. Valeo, 424 U.S. 1, 93–97 (1976).

[138] Anderson v. Celebrezze, 460 U.S. 780 (1983). State interests in assuring voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters.

Apportionment and Districting.—Prior to 1962, attacks in federal courts on the drawing of boundaries for congressional and legislative election districts or the apportionment of seats to previously existing units ran afoul of the "political question" doctrine.[139] But *Baker v. Carr*[140] reinterpreted the doctrine in considerable degree and opened the federal courts to voter complaints founded on unequally populated voting districts. *Wesberry v. Sanders*[141] found in Article I, § 2, of the Constitution a command that in the election of Members of the House of Representatives districts were to be made up of substantially equal numbers of persons. In six decisions handed down on June 15, 1964, the Court required the alteration of the election districts for practically all the legislative bodies in the United States.[142]

"We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the State."[143] What was required was that each

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[139] Supra, pp. 687–98. Applicability of the doctrine to cases of this nature was left unresolved in Smiley v. Holm, 285 U.S. 355 (1932), and Wood v. Broom, 287 U.S. 1 (1932), was supported by only a plurality in Colegrove v. Green, 328 U.S. 549 (1946), but became the position of the Court in subsequent cases. Cook v. Fortson, 329 U.S. 675 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947); MacDougall v. Green, 335 U.S. 281 (1948); South v. Peters, 339 U.S. 276 (1950); Hartsfield v. Sloan, 357 U.S. 916 (1958).

[140] 369 U.S. 186 (1962).

[141] 376 U.S. 1 (1964). Supra, pp. 106–08. Striking down a county unit system of electing a governor, the Court, in an opinion by Justice Douglas, had already coined a variant phrase of the more popular "one man, one vote." "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." Gray v. Sanders, 372 U.S. 368, 381 (1963).

[142] Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Donis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964). In the last case, the Court held that approval of the apportionment plan in a vote of the people was insufficient to preserve it from constitutional attack. "An individual's constitutionally protected right to cast an equally weighed vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause." Id. at 736. Justice Harlan dissented wholly, denying that the equal protection clause had any application at all to apportionment and districting and contending that the decisions were actually the result of a "reformist" nonjudicial attitude on the part of the Court. 377 U.S. at 589. Justices Stewart and Clark dissented in two and concurred in four cases on the basis of their view that the equal protection clause was satisfied by a plan that was rational and that did not systematically frustrate the majority will. 377 U.S., 741, 744.

[143] Reynolds v. Sims, 377 U.S. 533, 568 (1964).

State "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."[144]

Among the principal issues raised by these decisions were which units were covered by the principle, to what degree of exactness population equality had to be achieved, and to what other elements of the apportionment and districting process the equal protection clause extended.

The first issue has largely been resolved, although some few problem areas persist. It has been held that a school board the members of which were appointed by boards elected in units of disparate populations and which exercised only administrative powers rather than legislative powers was not subject to the principle of the apportionment ruling.[145] *Avery v. Midland County*[146] held that when a State delegates lawmaking power to local government and provides for the election by district of the officials to whom the power is delegated, the districts must be established of substantially equal populations. But in *Hadley v. Junior College District*,[147] the Court abandoned much of the limitation which was explicit in these two decisions and held that whenever a State chooses to vest "governmental functions" in a body and to elect the members of that body from districts, the districts must have substantially equal populations. The "governmental functions" should not be characterized as "legislative" or "administrative" or necessarily important or unimportant; it is the fact that members of the body are elected from districts which triggers the application.[148]

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[144] Id. at 577.

[145] Sailors v. Board of Education, 387 U.S. 105 (1967).

[146] 390 U.S. 474 (1968). Justice Harlan continued his dissent from the *Reynolds* line of cases, id. at 486, while Justices Fortas and Stewart called for a more discerning application and would not have applied the principle to the county council here. Id. at 495, 509.

[147] 397 U.S. 50 (1970). The governmental body here was the board of trustees of a junior college district. Justices Harlan and Stewart and Chief Justice Burger dissented. Id. at 59, 70.

[148] The Court observed that there might be instances "in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* supra, might not be required. . . ." Id. at 56. For cases involving such units, *see* Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719 (1973); Associated Enterprises v. Toltec Watershed Imp. Dist., 410 U.S. 743 (1973); Ball v. James, 451 U.S. 355 (1981). Judicial districts need not comply with *Reynolds*. Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), aff'd. *per curiam*, 409 U.S. 1095 (1973).

The second issue has been largely but not precisely resolved. In *Swann v. Adams,*[149] the Court set aside a lower court ruling "for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts. . . . *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy." Two congressional district cases were disposed of on the basis of *Swann,*[150] but when the Court ruled that no congressional districting could be approved without a "good-faith effort to achieve precise mathematical equality" or the justification of "each variance, no matter how small,[151] it did not then purport to utilize this standard in judging legislative apportionment and districting.[152] And in *Abate v. Mundt*[153] the Court approved a plan for apportioning a county governing body which permitted a substantial population disparity, explaining that in the absence of a built-in bias tending to favor any particular area or interest, a plan could take account of localized factors in justifying deviations from equality which might in other circumstances cause the invalidation of a plan.[154] The total population deviation allowed in *Abate* was 11.9%; the Court refused,

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[149] 385 U.S. 440, 443–44 (1967). *See also* Kilgarlin v. Hill, 386 U.S. 120 (1967).

[150] Kirkpatrick v. Preisler, 385 U.S. 450 (1967); Duddleston v. Grills, 385 U.S. 455 (1967).

[151] Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969). Supra, pp. 107–08. The Court has continued to adhere to this strict standard for congressional districting, voiding a plan in which the maximum deviation between largest and smallest district was 0.7%, or 3,674 persons. Karcher v. Daggett, 462 U.S. 725 (1983) (rejecting assertion that deviations less than estimated census error are necessarily permissible).

[152] The Court relied on *Swann* in disapproving of only slightly smaller deviations (roughly 28% and 25%) in Whitcomb v. Chavis, 403 U.S. 124, 161–63 (1971). In Connor v. Williams, 404 U.S. 549, 550 (1972), the Court said of plaintiffs' reliance on *Preisler* and *Wells* that "these decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment."

[153] 403 U.S. 182 (1971).

[154] It should also be noted that while the Court has used total population figures for purposes of computing variations between districts, it did approve in Burns v. Richardson, 384 U.S. 73 (1966), the use of eligible voter population as the basis for apportioning in the context of a State with a large transient military population, but with the caution that such a basis would be permissible only so long as the results did not diverge substantially from that obtained by using a total population base. Merely discounting for military populations was disapproved in Davis v. Mann, 377 U.S. 678, 691 (1964), but whether some more precise way of distinguishing between resident and nonresident population would be constitutionally permissible is unclear. Kirkpatrick v. Preisler, 394 U.S. 526, 534 (1969); Hadley v. Junior College Dist., 397 U.S. 50, 57 n.9 (1970).

however, to extend *Abate* to approve a total deviation of 78% resulting from an apportionment plan providing for representation of each of New York City's five boroughs on the New York City Board of Estimate.[155]

Nine years after *Reynolds v. Sims*, the Court reexamined the population equality requirement of the apportionment cases. Relying upon language in prior decisions that distinguished legislative apportionment from congressional districting as possibly justifying different standards of permissible deviations from equality, the Court held that more flexibility is constitutionally permissible with respect to the former than to the latter.[156] But it was in determining how much greater flexibility was permissible that the Court moved in new directions. First, applying the traditional standard of rationality rather than the strict test of compelling necessity, the Court held that a maximum 16.4% deviation from equality of population was justified by the State's policy of maintaining the integrity of political subdivision lines, or according representation to subdivisions *qua* subdivisions, because the legislature was responsible for much local legislation.[157] Second, just as the first case "demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justified and legally sustainable. It is now time to recognize . . . that minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious

[155] New York City Bd. of Estimate v. Morris, 489 U.S. 688 (1989). Under the plan each of the City's five boroughs was represented on the board by its president and each of these members had one vote; three citywide elected officials (the mayor, the comptroller, and the president of the city council) were also placed on the board and given two votes apiece (except that the mayor had no vote on the acceptance or modification of his budget proposal). The Court also ruled that, when measuring population deviation for a plan that mixes at-large and district representation, the at-large representation must be taken into account. Id. at 699–701.

[156] Mahan v. Howell, 410 U.S. 315, 320–25 (1973).

[157] Id. at 325–30. The Court indicated that a 16.4% deviation "may well approach tolerable limits." Id. at 329. Dissenting, Justices Brennan, Douglas, and Marshall would have voided the plan; additionally, they thought the deviation was actually 23.6% and that the plan discriminated geographically against one section of the State, an issue not addressed by the Court. In Chapman v. Meier, 420 U.S. 1, 21–26 (1975), holding that a 20% variation in a court-developed plan was not justified, the Court indicated that such a deviation in a legislatively-produced plan would be quite difficult to justify. *See also* Summers v. Cenarrusa, 413 U.S. 906 (1973) (vacating and remanding for further consideration the approval of a 19.4% deviation). In Brown v. Thomson, 462 U.S. 835 (1983), the Court held that a consistent state policy assuring each county at least one representative can justify substantial deviation from population equality when only the marginal impact of representation for the state's least populous county was challenged (the effect on plaintiffs, voters in larger districts, was that they would elect 28 of 64 members rather than 28 of 63), but there was indication in Justice O'Connor's concurring opinion that a broader-based challenge to the plan, which contained a 16% average deviation and an 89% maximum deviation, could have succeeded.

discrimination under the Fourteenth Amendment so as to require justification by the State."[158] This recognition of a *de minimis* deviation, below which no justification was necessary, was mandated, the Court felt, by the margin of error in census statistics, by the population change over the ten-year life of an apportionment, and by the relief it afforded federal courts able thus to avoid over-involvement in essentially a political process. The "goal of fair and effective representation" is furthered by eliminating gross population variations among districts, but it is not achieved by mathematical equality solely. Other relevant factors are to be taken into account.[159] But when a judicially-imposed plan is to be formulated upon state default, it "must ordinarily achieve the goal of population equality with little more than *de minimis* variation" and deviations from approximate population equality must be supported by enunciation of historically significant state policy or unique features.[160]

Gerrymandering and the permissible use of multimember districts present examples of the third major issue. It is clear that racially based gerrymandering is unconstitutional under the Fifteenth Amendment, at least when it is accomplished through the manipulation of district lines.[161] Partisan gerrymandering raised more difficult issues. Several lower courts ruled that the issue was beyond judicial cognizance,[162] and the Supreme Court itself, upholding an apportionment plan frankly admitted to have been drawn with the intent to achieve a rough approximation of the

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[158] Gaffney v. Cummings, 412 U.S. 735, 745 (1973). The maximum deviation was 7.83%. The Court did not precisely indicate at what point a deviation had to be justified, but it applied the *de minimis* standard in White v. Regester, 412 U.S. 755 (1973), in which the maximum deviation was 9.9%. "Very likely, larger differences between districts would not be tolerable without justifications." Id. at 764. Justices Brennan, Douglas, and Marshall dissented. *See also* Brown v. Thomson, 462 U.S. 835, 842 (1983): "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations [insufficient to make out a *prima facie* case]."

[159] Gaffney v. Cummings, 412 U.S. 735, 748 (1973). By contrast, the Court has held that estimated margin of error for census statistics does not justify deviation from population equality in congressional districting. Karcher v. Daggett, 462 U.S. 725 (1983).

[160] Chapman v. Meier, 420 U.S. 1, 21–27 (1975). The Court did say that court-ordered reapportionment of a state legislature need not attain the mathematical preciseness required for congressional redistricting. Id. at 27 n.19. Apparently, therefore, the Court's reference to both "*de minimis*" variations and "approximate population equality" must be read as referring to some range approximating the *Gaffney* principle. *See also* Connor v. Finch, 431 U.S. 407 (1977).

[161] Gomillion v. Lightfoot, 364 U.S. 339 (1960); Wright v. Rockefeller, 376 U.S. 52 (1964); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court).

[162] E.g., WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y. 1965) (three-judge court), aff'd, 382 U.S. 4 (1965); Sincock v. Gately, 262 F. Supp. 739 (D. Del. 1967) (three-judge court).

statewide political strengths of the two parties, recognized the goal as legitimate and observed that, while the manipulation of apportionment and districting is not wholly immune from judicial scrutiny, "we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States."[163]

More recently, however, in a decision of potentially major import reminiscent of *Baker v. Carr*, the Court in *Davis v. Bandemer*[164] ruled that partisan gerrymandering in state legislative redistricting is justiciable under the Equal Protection Clause. But although the vote was 6 to 3 in favor of justiciability, a majority of Justices could not agree on the proper test for determining whether particular gerrymandering is unconstitutional, and the lower court's holding of unconstitutionality was reversed by vote of 7 to 2.[165] Thus, while courthouse doors are now ajar for claims of partisan gerrymandering, it is unclear what it will take to succeed on the merits. On the justiciability issue, the Court viewed the "political question" criteria as no more applicable than they had been in *Baker v. Carr*. Because *Reynolds v. Sims* had declared "fair and effective representation for all citizens"[166] to be "the basic aim of legislative apportionment," and because racial gerrymandering issues had been treated as justiciable, the Court viewed the representational issues raised by partisan gerrymandering as indistinguishable. Agreement as to the existence of "judicially discoverable and manageable standards for resolving" gerrymandering issues, however, did not result in a consensus as to what those standards are.[167] While a majority of Justices agreed that discriminatory ef-

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[163] Gaffney v. Cummings, 412 U.S. 735, 751, 754 (1973).

[164] 478 U.S. 109 (1986). The vote on justiciability was 6–3, with Justice White's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, Powell, and Stevens. This represented an apparent change of view by 3 of the majority Justices, who just 2 years earlier had denied that "the existence of noncompact or gerrymandered districts is by itself a constitutional violation." Karcher v. Daggett, 466 U.S. 910, 917 (1983) (Justice Brennan, joined by Justices White and Marshall, dissenting from denial of stay in challenge to district court's rejection of a remedial districting plan on the basis that it contained "an intentional gerrymander").

[165] Only Justices Powell and Stevens thought the Indiana redistricting plan void; Justice White, joined by Justices Brennan, Marshall, and Blackmun, thought the record inadequate to demonstrate continuing discriminatory impact, and Justice O'Connor, joined by Chief Justice Burger and by Justice Rehnquist, would have ruled that partisan gerrymandering is nonjusticiable as constituting a political question not susceptible to manageable judicial standards.

[166] 377 U.S. 533, 565–66 (1964). This phrase has had a life of its own in the commentary. *See* D. Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, and sources cited therein. It is not clear from its original context, however, that the phrase was coined with such broad application in mind.

[167] The quotation is from the *Baker v. Carr* measure for existence of a political question, 369 U.S. 186, 217 (1962).

fect as well as discriminatory intent must be shown, there was significant disagreement as to what constitutes discriminatory effect. Justice White's plurality opinion suggested that there need be "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."[168] Moreover, continued frustration of the chance to influence the political process can not be demonstrated by the results of only one election; there must be a history of disproportionate results or a finding that such results will continue. Justice Powell, joined by Justice Stevens, did not formulate a strict test, but suggested that "a heavy burden of proof" should be required, and that courts should look to a variety of factors as they relate to "the fairness of a redistricting plan" in determining whether it contains invalid gerrymandering. Among these factors are the shapes of the districts, adherence to established subdivision lines, statistics relating to vote dilution, the nature of the legislative process by which the plan was formulated, and evidence of intent revealed in legislative history.[169]

It had been thought that the use of multimember districts to submerge racial, ethnic, and political minorities might be treated differently,[170] but in *Whitcomb v. Chavis*[171] the Court, while dealing with the issue on the merits, so enveloped it in strict standards of proof and definitional analysis as to raise the possibility that it might be beyond judicial review.

In *Chavis* the Court held that inasmuch as the multimember districting represented a state policy of more than 100 years observance and could not therefore be said to be motivated by racial or political bias, only an actual showing that the multimember delegation in fact inadequately represented the allegedly submerged minority would suffice to raise a constitutional question. But the Court also rejected as impermissible the argument that any interest group had any sort of right to be represented in a legislative body, in proportion to its members' numbers or on some other basis, so that the failure of that group to elect anyone merely meant that alone or in combination with other groups it simply lacked the strength to obtain enough votes, whether the election be

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[168] 478 U.S. at 133. Joining in this part of the opinion were Justices Brennan, Marshall, and Blackmun.

[169] 478 U.S. at 173. A similar approach had been proposed in Justice Stevens' concurring opinion in Karcher v. Daggett, 462 U.S. 725, 744 (1983).

[170] Fortson v. Dorsey, 379 U.S. 433, 439 (1965); Burns v. Richardson, 384 U.S. 73, 88–89 (1965); Kilgarlin v. Hill, 386 U.S. 120, 125 n.3 (1967).

[171] 403 U.S. 124 (1971). Justice Harlan concurred specially, id. at 165, and Justices Douglas, Brennan, and Marshall, dissented, finding racial discrimination in the operation of the system. Id. at 171.

in single-member or in multimember districts. That fact of life was not of constitutional dimension, whether the group was composed of blacks, or Republicans or Democrats, or some other category of persons. Thus, the submerging argument was rejected, as was the argument of a voter in another county that the Court should require uniform single-member districting in populous counties because voters in counties which elected large delegations in blocs had in effect greater voting power than voters in other districts; this argument the Court found too theoretical and too far removed from the actualities of political life.

Subsequently, and surprisingly in light of *Chavis*, the Court in *White v. Regester*[172] affirmed a district court invalidation of the use of multimember districts in two Texas counties on the ground that, when considered in the totality of the circumstances of discrimination in registration and voting and in access to other political opportunities, such use denied African Americans and Mexican Americans the opportunity to participate in the election process in a reliable and meaningful manner.[173]

Doubt was cast on the continuing vitality of *White v. Regester*, however, by the badly split opinion of the Court in *City of Mobile v. Bolden*.[174] A plurality undermined the earlier case in two respects, although it is not at all clear that a majority of the Court had been or could be assembled on either point. First, the plurality argued that an intent to discriminate on the part of the redistricting body must be shown before multimember districting can be held to violate the equal protection clause.[175] Second, the plurality read *White v. Regester* as being consistent with this principle and the various factors developed in that case to demonstrate the existence of unconstitutional discrimination to be in fact indicia of intent; however, the plurality seemingly disregarded the totality of

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[172] 412 U.S. 755, 765–70 (1973).

[173] "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Id. at 765–66.

[174] 446 U.S. 55 (1980). On Congress' response to the case, *see* supra, pp. 1818–19; infra, p. 1936.

[175] Id. at 65–68 (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger). On intent versus impact analysis, *see* supra, pp. 1815–20. Justices Blackmun and Stevens concurred on other grounds, id. at 80, 83, and Justices White, Brennan, and Marshall dissented. Id. at 94, 103. Justice White agreed that purposeful discrimination must be found, id. at 101, while finding it to have been shown, Justice Blackmun assumed that intent was required, and Justices Stevens, Brennan, and Marshall would not so hold.

circumstances test utilized in *Regester* and evaluated instead whether each factor alone was sufficient proof of intent.[176]

Again switching course, the Court in *Rogers v. Lodge*[177] approved the findings of the lower courts that a multimember electoral system for electing a county board of commissioners was being maintained for a racially discriminatory purpose, although it had not been instituted for that purpose. Applying a totality of the circumstances test, and deferring to lower court factfinding, the Court, in an opinion by one of the *Mobile* dissenters, canvassed a range of factors which it held could combine to show a discriminatory motive, and largely overturned the limitations which the *Mobile* plurality had attempted to impose in this area. With the enactment of federal legislation specifically addressed to the issue of multimember districting and dilution of the votes of racial minorities, however, it may be that the Court will have little further opportunity to develop the matter in the context of constitutional litigation.[178] In *Thornburg v. Gingles*,[179] the Court held that multimember districting violates § 2 of the Voting Rights Act by diluting the voting power of a racial minority when that minority is "sufficiently large and geographically compact to constitute a majority in a single-member district," when it is politically cohesive, and when block voting by the majority "usually" defeats preferred candidates of the minority.

Finally, it should be said that the Court has approved the discretionary exercise of equity powers by the lower federal courts in drawing district boundaries and granting other relief in districting and apportionment cases,[180] although that power is bounded by

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[176] Id. at 68–74. Four Justices rejected this view of the plurality, while Justice Stevens also appeared to do so but followed a mode of analysis significantly different than that of any other Justice.

[177] 458 U.S. 613 (1982). Joining the opinion of the Court were Justices White, Brennan, Marshall, Blackmun, O'Connor, and Chief Justice Burger. Dissenting were Justices Powell and Rehnquist, id. at 628, and Justice Stevens. Id. at 631.

[178] On the legislation, *see* supra, pp. 1818–19; infra, p. 1936.

[179] 478 U.S. 30, 50–51 (1986). Use of multimember districting for purposes of political gerrymandering was at issue in Davis v. Bandemer, 478 U.S. 109 (1986), decided the same day as *Gingles*, but there was no agreement as to the appropriate constitutional standard. A plurality led by Justice White relied on the *Whitcomb v. Chavis* reasoning, suggesting that proof that multimember districts were constructed for the advantage of one political party falls short of the necessary showing of deprivation of opportunity to participate in the electoral process. 478 U.S. at 136–37. Two Justices thought the proof sufficient for a holding of invalidity, the minority party having won 46% of the vote but only 3 of 21 seats from the multimember districts, and "the only discernible pattern [being] the appearance of these districts in areas where their winner-take-all aspects can best be employed to debase [one party's] voting strength," (id. at at 179–80, Justices Powell and Stevens), and three Justices thought political gerrymandering claims to be nonjusticiable.

[180] E.g., Reynolds v. Sims, 377 U.S. 533, 586–87 (1964); Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 195–200 (1972); White v. Weiser, 412

the constitutional violations found, so that courts do not have *carte blanche,* and they should ordinarily respect the structural decisions made by state legislatures and the state constitutions.[181]

Weighing of Votes.—It is not the weighing of votes but the manner in which it is done which brings the equal protection clause into play. *Gray v. Sanders*[182] struck down the Georgia county unit system under which each county was allocated either two, four, or six votes in statewide elections and the candidate carrying the county received those votes. Since there were a few very populous counties and scores of poorly-populated ones, the rural counties in effect dominated statewide elections and candidates with popular majorities statewide could be and were defeated. But *Gordon v. Lance*[183] approved a provision requiring a 60 percent affirmative vote in a referendum election before constitutionally prescribed limits on bonded indebtedness or tax rates could be exceeded. The Court acknowledged that the provision departed from strict majority rule but stated that the Constitution did not prescribe majority rule; it instead proscribed discrimination through dilution of voting power or denial of the franchise because of some class characteristic—race, urban residency, or the like—while the provision in issue was neither directed to nor affected any identifiable class.

The Right to Travel

Durational Residency Requirements.—A durational residency requirement creates two classes of persons: those who have been within the State for the prescribed period and those who have not been.[1] But persons who have moved recently, at least from

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U.S. 783, 794–95 (1973); Upham v. Seamon, 456 U.S. 37, 41–42 (1982). When courts draw their own plans, the court is held to tighter standards than is a legislature and has to observe smaller population deviations and utilize single-member districts more than multimember ones. Connor v. Johnson, 402 U.S. 690, 692 (1971); Chapman v. Meier, 420 U.S. 1, 14–21 (1975); Wise v. Lipscomb, 437 U.S. 535, 540 (1978). *Cf.* Mahan v. Howell, 410 U.S. 315, 333 (1973).

[181] E.g., Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972) (reduction of numbers of members); Whitcomb v. Chavis, 403 U.S. 124, 160–61 (1971) (disregard of policy of multimember districts not found unconstitutional); White v. Weiser, 412 U.S. 783, 794–95 (1973); Upham v. Seamon, 406 U.S. 37 (1982). *But see* Karcher v. Daggett, 466 U.S. 910 (1983) (denying cert. over dissent's suggestion that court-adopted congressional districting plan had strayed too far from the structural framework of the legislature's invalidated plan).

[182] 372 U.S. 368 (1963).

[183] 403 U.S. 1 (1971).

[1] Dunn v. Blumstein, 405 U.S. 330, 334 (1972). Inasmuch as the right to travel is implicated by state distinctions between residents and nonresidents, the relevant constitutional provision is the privileges and immunities clause, Article IV, § 2, cl. 1.

State to State,[2] have exercised a right protected by the Constitution of the United States, and the durational residency classification either deters the exercise of the right or penalizes those who have exercised the right.[3] Any such classification is invalid "unless shown to be necessary to promote a *compelling governmental interest*."[4] The constitutional right to travel has long been recognized,[5] but it is only relatively recently that the strict standard of equal protection review has been applied to nullify those durational residency provisions which have been brought before the Court.

Thus, in *Shapiro v. Thompson*,[6] durational residency requirements conditioning eligibility for welfare assistance on one year's residence in the State[7] were voided. If the purpose of the requirements was to inhibit migration by needy persons into the State or to bar the entry of those who came from low-paying States to higher-paying ones in order to collect greater benefits, the Court said, the purpose was impermissible.[8] If on the other hand the purpose was to serve certain administrative and related governmental objectives—the facilitation of the planning of budgets, the provision of an objective test of residency, minimization of opportunity for fraud, and encouragement of early entry of new residents into the labor force—the requirements were rationally related to the pur-

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[2] Intrastate travel is protected to the extent that the classification fails to meet equal protection standards in some respect. *Compare* Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970) (three-judge court), aff'd. per curiam, 405 U.S. 1035 (1972), *with* Arlington County Bd. v. Richards, 434 U.S. 5 (1977). The same principle applies in the commerce clause cases, in which discrimination may run against in-state as well as out-of-state concerns. *Cf.* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[3] Shapiro v. Thompson, 394 U.S. 618, 629–31, 638 (1969); Dunn v. Blumstein, 405 U.S. 330, 338–42 (1972); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Jones v. Helms, 452 U.S. 412, 420–21 (1981). *See also* Oregon v. Mitchell, 400 U.S. 112, 236–39 (1970) (Justices Brennan, White, and Marshall), and id. at 285–92 (Justices Stewart and Blackmun and Chief Justice Burger).

[4] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis by Court); Graham v. Richardson, 403 U.S. 365, 375–76 (1971).

[5] Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Edwards v. California, 314 U.S. 160 (1941) (both cases in context of direct restrictions on travel). The source of the right to travel and the reasons for reliance on the equal protection clause are questions puzzled over and unresolved by the Court. United States v. Guest, 383 U.S. 745, 758, 759 (1966), and id. at 763–64 (Justice Harlan concurring and dissenting), id. at 777 n.3 (Justice Brennan concurring and dissenting); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969), and id. at 671 (Justice Harlan dissenting); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 31–32 (1973); Jones v. Helms, 452 U.S. 412, 417–19 (1981); Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and id. at 66–68 (Justice Brennan concurring), 78–81 (Justice O'Connor concurring).

[6] 394 U.S. 618 (1969).

[7] The durational residency provision established by Congress for the District of Columbia was also voided. Id. at 641–42.

[8] Id. at 627–33. Gaddis v. Wyman, 304 F. Supp. 717 (N.D.N.Y. 1969), aff'd sub nom. Wyman v. Bowens, 397 U.S. 49 (1970), struck down a provision construed so as to bar only persons who came into the State solely to obtain welfare assistance.

pose but they were not *compelling* enough to justify a classification which infringed on a fundamental interest.[9] Similarly, in *Dunn v. Blumstein*,[10] where the durational residency requirements denied the franchise to newcomers, the assertion of such administrative justifications was constitutionally insufficient to justify the classification.

However, a state one-year durational residency requirement for the initiation of a divorce proceeding was sustained in *Sosna v. Iowa*.[11] While it is not clear what the precise basis of the ruling is, it appears that the Court found that the State's interest in requiring that those who seek a divorce from its courts be genuinely attached to the State and its desire to insulate divorce decrees from the likelihood of collateral attack justified the requirement.[12] Similarly, durational residency requirements for lower in-state tuition at public colleges have been held constitutionally justifiable, again, however, without a clear statement of reason.[13]

A state scheme for returning to its residents a portion of the income earned from the vast oil deposits discovered within Alaska foundered upon the formula for allocating the dividends; that is, each adult resident received one unit of return for each year of residency subsequent to 1959, the first year of Alaska's statehood. The law thus created fixed, permanent distinctions between an ever-in-

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[9] 394 U.S. at 633–38. *Shapiro* was reaffirmed in Graham v. Richardson, 403 U.S. 365 (1971) (striking down durational residency requirements for aliens applying for welfare assistance), and in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (voiding requirement of one year's residency in county as condition to indigent's receiving nonemergency hospitalization or medical care at county's expense). When Connecticut and New York reinstituted the requirements, pleading a financial emergency as the compelling state interest, they were summarily rebuffed. Rivera v. Dunn, 329 F. Supp. 554 (D. Conn. 1971), aff'd per curiam, 404 U.S. 1054 (1972); Lopez v. Wyman, Civ. No. 1971–308 (W.D.N.Y. 1971), aff'd per curiam, 404 U.S. 1055 (1972). The source of the funds, state or federal, is irrelevant to application of the principle. Pease v. Hansen, 404 U.S. 70 (1971).

[10] 405 U.S. 330 (1972). *But see* Marston v. Lewis, 410 U.S. 679 (1973), and Burns v. Fortson, 410 U.S. 686 (1973). Durational residency requirements of five and seven years respectively for candidates for elective office were sustained in Kanapaux v. Ellisor, 419 U.S. 891 (1974), and Sununu v. Stark, 420 U.S. 958 (1975).

[11] 419 U.S. 393 (1975). Justices Marshall and Brennan dissented on the merits. Id. at 418.

[12] Id. at 409. But the Court also indicated that the plaintiff was not absolutely barred from the state courts, but merely required to wait for access (which was true in the prior cases as well and there held immaterial), and that possibly the state interests in marriage and divorce were more exclusive and thus more immune from federal constitutional attack than were the matters at issue in the previous cases. The Court also did not indicate whether it was using strict or traditional scrutiny.

[13] Starns v. Malkerson, 326 F. Supp. 234 (D.Minn. 1970), aff'd per curiam, 401 U.S. 985 (1971). *Cf.* Vlandis v. Kline, 412 U.S. 441, 452 & n.9 (1973), and id. at 456, 464, 467 (dicta). In Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974), the Court, noting the results, stated that "some waiting periods . . . may not be penalties" and thus would be valid.

creasing number of classes of bona fide residents based on how long they had been in the State. The differences between the durational residency cases previously decided did not alter the bearing of the right to travel principle upon the distribution scheme, but the Court's decision went off on the absence of any permissible purpose underlying the apportionment classification and it thus failed even the rational basis test.[14]

Unresolved still are issues such as durational residency requirements for occupational licenses and other purposes.[15] Too, it should be noted that this line of cases does not apply to state residency requirements themselves, as distinguished from durational provisions,[16] and the cases do not inhibit the States when, having reasons for doing so, they bar travel by certain persons.[17]

Marriage and Familial Relations

In *Zablocki v. Redhail*,[18] importing into equal protection analysis the doctrines developed in substantive due process, the Court identified the right to marry as a "fundamental interest" that necessitates "critical examination" of governmental restrictions which "interfere directly and substantially" with the right.[19] Struck down was a statute that prohibited any resident under an obligation to support minor children from marrying without a court order; such order could only be obtained upon a showing that the support obligation had been and was being complied with and that the children were not and were not likely to become public charges. The plaintiff was an indigent wishing to marry but prevented from doing so because he was not complying with a court order to pay support to an illegitimate child he had fathered, and because the child was re-

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[14] Zobel v. Williams, 457 U.S. 55 (1982). Somewhat similar was the Court's invalidation on equal protection grounds of a veterans preference for state employment limited to persons who were state residents when they entered military service; four Justices also thought the preference penalized the right to travel. Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986).

[15] La Tourette v. McMaster, 248 U.S. 465 (1919), upholding a two-year residence requirement to become an insurance broker, must be considered of questionable validity. Durational periods for admission to the practice of law or medicine or other professions have evoked differing responses by lower courts.

[16] E.g., McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976) (ordinance requiring city employees to be and to remain city residents upheld). *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 255 (1974). *See also* Martinez v. Bynum, 461 U.S. 321 (1983) (bona fide residency requirement for free tuition to public schools).

[17] Jones v. Helms, 452 U.S. 412 (1981) (statute made it a misdemeanor to abandon a dependent child but a felony to commit the offense and then leave the State).

[18] 434 U.S. 374 (1978).

[19] Although the Court's due process decisions have broadly defined a protected liberty interest in marriage and family, no previous case had held marriage to be a fundamental right occasioning strict scrutiny. Id. at 396, 397 (Justice Powell concurring).

ceiving public assistance. Applying "critical examination," the Court observed that the statutory prohibition could not be sustained unless it was justified by sufficiently important state interests and was closely tailored to effectuate only those interests.[20] Two interests were offered that the Court was willing to accept as legitimate and substantial: requiring permission under the circumstances furnished an opportunity to counsel applicants on the necessity of fulfilling support obligations, and the process protected the welfare of children who needed support, either by providing an incentive to make support payments or by preventing applicants from incurring new obligations through marriage. The first interest was not served, the Court found, there being no provision for counseling and no authorization of permission to marry once counseling had taken place. The second interest was found not to be effectuated by the means. Alternative devices to collect support existed, the process simply prevented marriage without delivering any money to the children, and it singled out obligations incurred through marriage without reaching any other obligations.

Other restrictions that relate to the incidents of or prerequisites for marriage were carefully distinguished by the Court as neither entitled to rigorous scrutiny nor put in jeopardy by the decision.[21] For example, in *Califano v. Jobst*,[22] a unanimous Court sustained a Social Security provision that revoked disabled dependents' benefits of any person who married, except when the person married someone who was also entitled to receive disabled dependents' benefits. Plaintiff, a recipient of such benefits, married someone who was also disabled but not qualified for the benefits, and his benefits were terminated. He sued, alleging that distinguishing between classes of persons who married eligible persons and who married ineligible persons infringed upon his right to marry. The Court rejected the argument, finding that benefit entitlement was not based upon need but rather upon actual dependency upon the insured wage earner; marriage, Congress could have assumed, generally terminates the dependency upon a parent-wage earner. Therefore, it was permissible as an administrative convenience to make marriage the terminating point but to make an exception

[20] Id. at 388. Although the passage is not phrased in the usual compelling interest terms, the concurrence and the dissent so viewed it without evoking disagreement from the Court. Id. at 396 (Justice Powell), 403 (Justice Stevens), 407 (Justice Rehnquist). Justices Powell and Stevens would have applied intermediate scrutiny to void the statute, both for its effect on the ability to marry and for its impact upon indigents. Id. at 400, 406 n.10.

[21] Id. at 386–87. Chief Justice Burger thought the interference here was "intentional and substantial," whereas the provision in *Jobst* was neither. Id. at 391 (concurring).

[22] 434 U.S. 47 (1977).

when both marriage partners were receiving benefits, as a means of lessening hardship and recognizing that dependency was likely to continue. The marriage rule was therefore not to be strictly scrutinized or invalidated "simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby."[23]

It seems obvious, therefore, that the determination of marriage and familial relationships as fundamental will be a fruitful beginning of litigation in the equal protection area.[24]

Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection

Generally.—Whatever may be the status of wealth distinctions *per se* as a suspect classification,[25] there is no doubt that when the classification affects some area characterized as or considered to be fundamental in nature in the structure of our polity—the ability of criminal defendants to obtain fair treatment throughout the system, the right to vote, to name two examples—then the classifying body bears a substantial burden in justifying what it has done. The cases begin with *Griffin v. Illinois*,[26] surely one of the most seminal cases in modern constitutional law. There, the State conditioned full direct appellate review, review as to which all convicted defendants were entitled, on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. "In criminal trials," Justice Black wrote in the plurality opinion, "a State can no more discriminate on account of pov-

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[23] Id. at 54. *See also* Mathews v. De Castro, 429 U.S. 181 (1976) (provision giving benefits to a married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying them to a divorced woman under 62 with dependents represents a rational judgment by Congress with respect to likely dependency of married but not divorced women and does not deny equal protection); Califano v. Boles, 443 U.S. 282 (1979) (limitation of certain Social Security benefits to widows and divorced wives of wage earners does not deprive mother of illegitimate child who was never married to wage earner of equal protection).

[24] *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246 (1978) (State's giving to father of legitimate child who is divorced or separated from mother while denying to father of illegitimate child a veto over the adoption of the child by another does not under the circumstances deny equal protection. The circumstances were that the father never exercised custody over the child or shouldered responsibility for his supervision, education, protection, or care, although he had made some support payments and given him presents). *Accord*, Lehr v. Robertson, 463 U.S. 248 (1983).

[25] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[26] 351 U.S. 12 (1956). The opinion of the court was joined by Justices Black, Douglas, and Clark, and Chief Justice Warren. Justice Frankfurter concurred. Id. at 20. Justices Burton, Minton, Reed, and Harlan dissented. Id. at 26, 29.

erty than on account of religion, race, or color." While the State was not obligated to provide an appeal at all, when it does so it may not structure its system "in a way that discriminates against some convicted defendants on account of their poverty." The system's fault was that it treated defendants with money differently than it treated defendants without money. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[27]

The principle of *Griffin* was extended in *Douglas v. California*,[28] in which the court held to be a denial of due process and equal protection a system whereby in the first appeal as of right from a conviction counsel was appointed to represent indigents only if the appellate court first examined the record and determined that counsel would be of advantage to the appellant. "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself."[29]

From the beginning, Justice Harlan opposed reliance on the equal protection clause at all, arguing that a due process analysis was the proper criterion to follow. "It is said that a State cannot discriminate between the 'rich' and the 'poor' in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. . . . All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." A fee system neutral on its face was not a classification forbidden by the equal protection clause.

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[27] Id. at 17, 18, 19. Although Justice Black was not explicit, it seems clear that the system was found to violate both the due process and the equal protection clauses. Justice Frankfurter's concurrence dealt more expressly with the premise of the Black opinion. "It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course, a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed." Id. at 23.

[28] 372 U.S. 353 (1963). Justice Clark dissented, protesting the Court's "new fetish for indigency," id. at 358, 359, and Justices Harlan and Stewart dissented. Id. at 360.

[29] Id. at 357–58.

"[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against 'indigents' by name would be unconstitutional."[30] As he protested in *Douglas*: "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely."[31]

Due process furnished the standard, Justice Harlan felt, for determining whether fundamental fairness had been denied. Where an appeal was barred altogether by the imposition of a fee, the line might have been crossed to unfairness, but on the whole he did not see that a system which merely recognized differences between and among economic classes, which as in *Douglas* made an effort to ameliorate the fact of the differences by providing appellate scrutiny of cases of right, was a system which denied due process.[32]

The Court has reiterated that both due process and equal protection concerns are implicated by restrictions on indigents' exercise of the right of appeal. "In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal."[33]

Criminal Procedure.—"[I]t is now fundamental that, once established . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[34] "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds. . . ."[35] No State may condition the right to appeal[36] or the right to file a petition for *habeas cor-*

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[30] Griffin v. Illinois, 351 U.S. 12, 34, 35 (1956).

[31] Douglas v. California, 372 U.S. 353, 361 (1963).

[32] Id. at 363–67.

[33] Evitts v. Lucey, 469 U.S. 387, 405 (1985) (holding that due process requires that counsel provided for appeals as of right must be effective).

[34] Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

[35] Draper v. Washington, 372 U.S. 487, 496 (1963).

[36] Burns v. Ohio, 360 U.S. 252 (1959); Douglas v. Green, 363 U.S. 192 (1960).

pus[37] or other form of postconviction relief upon the payment of a docketing fee or some other type of fee when the petitioner has no means to pay. Similarly, although the States are not required to furnish full and complete transcripts of their trials to indigents when exerpted versions or some other adequate substitute is available, if a transcript is necessary to adequate review of a conviction, either on appeal or through procedures for postconviction relief, the transcript must be provided to indigent defendants or to others unable to pay.[38] This right may not be denied by drawing a felony-misdemeanor distinction or by limiting it to those cases in which confinement is the penalty.[39] A defendant's right to counsel is to be protected as well as the similar right of the defendant with funds.[40] The right to counsel on appeal necessarily means the right to *effective* assistance of counsel.[41]

But, deciding a point left unresolved in *Douglas*, the Court held that neither the due process nor the equal protection clause required a State to furnish counsel to a convicted defendant seeking, after he had exhausted his appeals of right, to obtain discretionary review of his case in the State's higher courts or in the United States Supreme Court. Due process fairness does not re-

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[37] Smith v. Bennett, 365 U.S. 708 (1961).

[38] Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958) (unconstitutional to condition free transcript upon trial judge's certification that "justice will thereby be promoted"); Draper v. Washington, 372 U.S. 487 (1963) (unconstitutional to condition free transcript upon judge's certification that the allegations of error were not "frivolous"); Lane v. Brown, 372 U.S. 477 (1963) (unconstitutional to deny free transcript upon determination of public defender that appeal was in vain); Long v. District Court, 385 U.S. 192 (1966) (indigent prisoner entitled to free transcript of his habeas corpus proceeding for use on appeal of adverse decision therein); Gardner v. California, 393 U.S. 367 (1969) (on filing of new habeas corpus petition in appellate court upon an adverse nonappealable habeas ruling in a lower court where transcript was needed, one must be provided an indigent prisoner). *See also* Rinaldi v. Yeager, 384 U.S. 305 (1966). For instances in which a transcript was held not to be needed, see Britt v. North Carolina, 404 U.S. 266 (1971); United States v. MacCollom, 426 U.S. 317 (1976).

[39] Williams v. Oklahoma City, 395 U.S. 458 (1969); Mayer v. City of Chicago, 404 U.S. 189 (1971).

[40] Douglas v. California, 372 U.S. 353 (1963); Swenson v. Bosler, 386 U.S. 258 (1967); Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967). A rule requiring a court-appointed appellate counsel to file a brief explaining reasons why he concludes that a client's appeal is frivolous does not violate the client's right to assistance of counsel on appeal. McCoy v. Court of Appeals, 486 U.S. 429 (1988). The right is violated if the court allows counsel to withdraw by merely certifying that the appeal is "meritless" without also filing an *Anders* brief supporting the certification. Penson v. Ohio, 488 U.S. 75 (1988). On the other hand, since there is no constitutional right to counsel for indigent prisoners seeking postconviction collateral relief, there is no requirement that withdrawal be justified in an *Anders* brief if a state has provided counsel for postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987) (counsel advised the court that there were no arguable bases for collateral relief).

[41] Evitts v. Lucey, 469 U.S. 387 (1985).

quire that after an appeal has been provided the State must always provide counsel to indigents at every stage. "Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty." That essentially equal protection issue was decided against the defendant in the context of an appellate system in which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.[42] Not even death row inmates have a constitutional right to an attorney to prepare a petition for collateral relief in state court.[43]

This right to legal assistance, especially in the context of the constitutional right to the writ of habeas corpus, means that in the absence of other adequate assistance, as through a functioning public defender system, a State may not deny prisoners legal assistance of another inmate[44] and it must make available certain minimal legal materials.[45]

The Criminal Sentence.—A convicted defendant may not be imprisoned solely because of his indigency. *Williams v. Illinois*[46] held that it was a denial of equal protection for a State to extend the term of imprisonment of a convicted defendant beyond the statutory maximum provided because he was unable to pay the fine which was also levied upon conviction. And *Tate v. Short*[47] held that in situations in which no term of confinement is prescribed for an offense but only a fine, the court may not jail persons who cannot pay the fine, unless it is impossible to develop an alternative, such as installment payments or fines scaled to ability to pay. Willful refusal to pay may, however, be punished by confinement.

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[42] Ross v. Moffitt, 417 U.S. 600 (1974). *See also* Fuller v. Oregon, 417 U.S. 40 (1974) (statute providing, under circumscribed conditions, that indigent defendant, who receives state-compensated counsel and other assistance for his defense, who is convicted, and who subsequently becomes able to repay costs, must reimburse State for costs of his defense in no way operates to deny him assistance of counsel or the equal protection of the laws).

[43] Murray v. Giarratano, 492 U.S. 1 (1989) (upholding Virginia's system under which "unit attorneys" assigned to prisons are available for some advice prior to the filing of a claim, and a personal attorney is assigned if an inmate succeeds in filing a petition with at least one non-frivolous claim).

[44] Johnson v. Avery, 393 U.S. 483 (1969).

[45] Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1977).

[46] 399 U.S. 235 (1970).

[47] 401 U.S. 395 (1971). The Court has not yet treated a case in which the permissible sentence is "$30 or 30 days" or some similar form where either confinement or a fine will satisfy the State's penal policy.

Voting.—Treatment of indigency in a civil type of "fundamental interest" analysis came in *Harper v. Virginia Board of Elections*,[48] in which it was held that "a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." The Court emphasized both the fundamental interest in the right to vote and the suspect character of wealth classifications. "[W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."[49]

The two factors—classification in effect along wealth lines and adverse effect upon the exercise of the franchise—were tied together in *Bullock v. Carter*[50] in which the setting of high filing fees for certain offices was struck down upon analysis by a stricter standard than the traditional equal protection standard but apparently a somewhat lesser standard than the compelling state interest test. The Court held that the high filing fees were not rationally related to the State's interest in allowing only serious candidates on the ballot since some serious candidates could not pay the fees while some frivolous candidates could and that the State could not finance the costs of holding the elections from the fees when the voters were thereby deprived of their opportunity to vote for candidates of their preferences.

Extending *Bullock*, the Court has held it impermissible for a State to deny indigents, and presumably other persons unable to pay filing fees, a place on the ballot for failure to pay filing fees, however reasonable in the abstract the fees may be. A State must provide such persons a reasonable alternative for getting on the ballot.[51] Similarly, a sentencing court in revoking probation must consider alternatives to incarceration if the reason for revocation is the inability of the indigent to pay a fine or restitution.[52]

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[48] 383 U.S. 663, 666 (1966). The poll tax required to be paid as a condition of voting was $1.50 annually. Justices Black, Harlan, and Stewart dissented. Id. at 670, 680.

[49] Id. at 668. The Court observed that "the right to vote is too precious, too fundamental to be so burdened or conditioned." Id. at 670.

[50] 405 U.S. 134 (1972).

[51] Lubin v. Panish, 415 U.S. 709 (1974). Note that the Court indicated that *Bullock* was decided on the basis of restrained review. Id. at 715.

[52] Bearden v. Georgia, 461 U.S. 660 (1983).

Access to Courts.—In *Boddie v. Connecticut*,[53] Justice Harlan carried a majority of the Court with him in utilizing a due process analysis to evaluate the constitutionality of a State's filing fees in divorce actions which a group of welfare assistance recipients attacked as preventing them from obtaining divorces. The Court found that when the State monopolized the avenues to a pacific settlement of a dispute over a fundamental matter such as marriage—only the State could terminate the marital status—then it denied due process by inflexibly imposing fees which kept some persons from using that avenue. Justice Harlan's opinion averred that a facially neutral law or policy which did in fact deprive an individual of a protected right would be held invalid even though as a general proposition its enforcement served a legitimate governmental interest. The opinion concluded with a cautioning observation that the case was not to be taken as establishing a general right to access to the courts.

The *Boddie* opinion left unsettled whether a litigant's interest in judicial access to effect a pacific settlement of some dispute was an interest entitled to some measure of constitutional protection as a value of independent worth or whether a litigant must be seeking to resolve a matter involving a fundamental interest in the only forum in which any resolution was possible. Subsequent decisions established that the latter answer was the choice of the Court. In *United States v. Kras*,[54] the Court held that the imposition of filing fees which blocked the access of an indigent to a discharge of his debts in bankruptcy denied the indigent neither due process nor equal protection. The marital relationship in *Boddie* was a fundamental interest, the Court said, and upon its dissolution depended associational interests of great importance; however, an interest in the elimination of the burden of debt and in obtaining a new start in life, while important, did not rise to the same constitutional level as marriage. Moreover, a debtor's access to relief in bankruptcy had not been monopolized by the government to the same degree as dissolution of a marriage; one may, "in theory, and often in actuality," manage to resolve the issue of his debts by some other means, such as negotiation. While the alternatives in many cases, such as *Kras*, seem barely likely of successful pursuit, the Court seemed to be suggesting that absolute preclusion was a necessary element before a right of access could be considered.[55]

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[53] 401 U.S. 371 (1971).

[54] 409 U.S. 434 (1973).

[55] Id. at 443–46. The equal protection argument was rejected by utilizing the traditional standard of review, bankruptcy legislation being placed in the area of economics and social welfare, and the use of fees to create a self-sustaining bankruptcy system being considered to be a rational basis. Dissenting, Justice Stewart

Subsequently, on the initial appeal papers and without hearing oral argument, the Court summarily upheld the application to indigents of filing fees that in effect precluded them from appealing decisions of a state administrative agency reducing or terminating public assistance.[56]

Educational Opportunity.—Making even clearer its approach in *de facto* wealth classification cases, the Court in *San Antonio School District v. Rodriguez*[57] rebuffed an intensive effort with widespread support in lower court decisions to invalidate the system prevalent in 49 of the 50 States of financing schools primarily out of property taxes, with the consequent effect that the funds available to local school boards within each state were widely divergent. Plaintiffs had sought to bring their case within the strict scrutiny—compelling state interest doctrine of equal protection review by claiming that under the tax system there resulted a *de facto* wealth classification that was "suspect" or that education was a "fundamental" right and the disparity in educational financing could not therefore be justified. The Court held, however, that there was neither a suspect classification nor a fundamental interest involved, that the system must be judged by the traditional restrained standard, and that the system was rationally related to the State's interest in protecting and promoting local control of education.[58]

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the Court noted that plaintiffs had not identified the "class of dis-

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argued that *Boddie* required a different result, denied that absolute preclusion of alternatives was necessary, and would have evaluated the importance of an interest asserted rather than providing that it need be fundamental. Id. at 451. Justice Marshall's dissent was premised on an asserted constitutional right to be heard in court, a constitutional right of access regardless of the interest involved. Id. at 458. Justices Douglas and Brennan concurred in Justice Stewart's dissent, as indeed did Justice Marshall.

[56] Ortwein v. Schwab, 410 U.S. 656 (1973). The division was the same 5-to–4 that prevailed in *Kras. See also* Lindsey v. Normet, 405 U.S. 56 (1972). But cases involving the *Boddie* principle do continue to arise. Little v. Streater, 452 U.S. 1 (1981) (in paternity suit that State required complainant to initiate, indigent defendant entitled to have State pay for essential blood grouping test); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (recognizing general right of appointed counsel in indigent parents when State seeks to terminate parental status, but using balancing test to determine that right was not present in this case).

[57] 411 U.S. 1 (1973). The opinion by Justice Powell was concurred in by the Chief Justice and Justices Stewart, Blackmun, and Rehnquist. Justices Douglas, Brennan, White, and Marshall dissented. Id. at 62, 63, 70.

[58] Id. at 44–55. Applying the rational justification test, Justice White would have found that the system did not use means rationally related to the end sought to be achieved. Id. at 63.

advantaged 'poor'" in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however defined, did not correlate with property-tax-poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did property-rich districts, except in random instances. Second, the Court held, there must be an absolute deprivation of some right or interest rather than merely a relative one before the deprivation because of inability to pay will bring into play strict scrutiny. "The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[59] No such class had been identified here and more importantly no one was being absolutely denied an education; the argument was that it was a lower quality education than that available in other districts. Even assuming that to be the case, however, it did not create a suspect classification.

Education is an important value in our society, the Court agreed, being essential to the effective exercise of freedom of expression and intelligent utilization of the right to vote. But a right to education is not expressly protected by the Constitution, continued the Court, nor should it be implied simply because of its undoubted importance. The quality of education increases the effectiveness of speech or the ability to make informed electoral choice but the judiciary is unable to determine what level of quality would be sufficient. Moreover, the system under attack did not deny educational opportunity to any child, whatever the result in that case might be; it was attacked for providing relative differences in spending and those differences could not be correlated with differences in educational quality.[60]

Rodriguez clearly promised judicial restraint in evaluating challenges to the provision of governmental benefits when the effect is relatively different because of the wealth of some of the recipients or potential recipients and when the results, what is obtained, vary in relative degrees. Wealth or indigency is not a *per se* suspect classification but it must be related to some interest that is fundamental, and *Rodriguez* doctrinally imposed a considerable

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[59] Id. at 20. *But see* id. at 70, 117–24 (Justices Marshall and Douglas dissenting).

[60] Id. at 29–39. *But see* id. at 62 (Justice Brennan dissenting), 70, 110–17 (Justices Marshall and Douglas dissenting).

barrier to the discovery or creation of additional fundamental interests. As the decisions reviewed earlier with respect to marriage and the family reveal, that barrier has not held entirely firm, but within a range of interests, such as education,[61] the case remains strongly viable. Relying on *Rodriguez* and distinguishing *Plyler*, the Court in *Kadrmas v. Dickinson Public Schools*[62] rejected an indigent student's equal protection challenge to a state statute permitting school districts to charge a fee for school bus service, in the process rejecting arguments that either "strict" or "heightened" scrutiny is appropriate. Moreover, the Court concluded, there is no constitutional obligation to provide bus transportation, or to provide it for free if it is provided at all.[63]

Abortion.—*Rodriguez* furnished the principal analytical basis for the Court's subsequent decision in *Maher v. Roe*,[64] holding that a State's refusal to provide public assistance for abortions that were not medically necessary under a program that subsidized all medical expenses otherwise associated with pregnancy and childbirth did not deny to indigent pregnant women equal protection of the laws. As in *Rodriguez*, it was held that the indigent are not a suspect class.[65] Again, as in *Rodriguez* and in *Kras*, it was held that when the State has not monopolized the avenues for relief and the burden is only relative rather than absolute, a governmental failure to offer assistance, while funding alternative actions, is not undue governmental interference with a fundamental right.[66] Expansion of this area of the law of equal protection seems especially limited.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting

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[61] *Cf.* Plyler v. Doe, 457 U.S. 202 (1982). The case is also noted for its proposition that there were only two equal protection standards of review, a proposition even the author of the opinion has now abandoned.

[62] 487 U.S. 450 (1988). This was a 5–4 decision, with Justice O'Connor's opinion of the Court being joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy, and with Justices Marshall, Brennan, Stevens, and Blackmun dissenting.

[63] 487 U.S. at 462. The plaintiff child nonetheless continued to attend school, so the requirement was reviewed as an additional burden but not a complete obstacle to her education.

[64] 432 U.S. 464 (1977).

[65] Id. at 470–71.

[66] Id. at 471–74. *See also* Harris v. McRae, 448 U.S. 297, 322–23 (1980). Total deprivation was the theme of *Boddie* and was the basis of concurrences by Justices Stewart and Powell in Zablocki v. Redhail, 434 U.S. 374, 391, 396 (1978), in that the State imposed a condition indigents could not meet and made no exception for them. The case also emphasized that Dandridge v. Williams, 397 U.S. 471 (1970), imposed a rational basis standard in equal protection challenges to social welfare cases. *But see* Califano v. Goldfarb, 430 U.S. 199 (1977), where the majority rejected the dissent's argument that this should always be the same.

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

APPORTIONMENT OF REPRESENTATION

With the abolition of slavery by the Thirteenth Amendment, the African Americans formerly counted as three-fifths of persons would be fully counted in the apportionment of seats in the House of Representatives, increasing as well the electoral vote, there appeared the prospect that politically the readmitted Southern States would gain the advantage in Congress when combined with Democrats from the North. Inasmuch as the South was adamantly opposed to African American suffrage, all the congressmen would be elected by whites. Many wished to provide for the enfranchisement of the African American and proposals to this effect were voted on in both the House and the Senate, but only a few Northern States permitted African Americans to vote and a series of referenda on the question in Northern States revealed substantial white hostility to the proposal. Therefore, a compromise was worked out, to effect a reduction in the representation of any State which discriminated against males in the franchise.[67]

No serious effort was ever made in Congress to effectuate § 2, and the only judicial attempt was rebuffed.[68] With subsequent constitutional amendments adopted and the utilization of federal coer-

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[67] *See generally* J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956).

[68] Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946).

cive powers to enfranchise persons, the section is little more than an historical curiosity.[69]

However, in *Richardson v. Ramirez*,[70] the Court relied upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state interests involved and to evaluate the necessity of the rule, holding rather that because of § 2 the equal protection clause was simply inapplicable.

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 obliga-

[69] The section did furnish a basis to Justice Harlan to argue that inasmuch as § 2 recognized a privilege to discriminate subject only to the penalty provided, the Court was in error in applying § 1 to questions relating to the franchise. *Compare* Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (Justice Harlan concurring and dissenting), *with* id. at 229, 250 (Justice Brennan concurring and dissenting). The language of the section recognizing 21 as the usual minimum voting age no doubt played some part in the Court's decision in *Oregon v. Mitchell* as well. It should also be noted that the provision relating to "Indians not taxed" is apparently obsolete now in light of an Attorney General ruling that all Indians are subject to taxation. 39 Op. Att'y Gen. 518 (1940).

[70] 418 U.S. 24 (1974). Justices Marshall, Douglas, and Brennan dissented. Id. at 56, 86.

tion incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

DISQUALIFICATION AND PUBLIC DEBT

The right to remove disabilities imposed by this section was exercised by Congress at different times on behalf of enumerated individuals.[71] In 1872, the disabilities were removed, by a blanket act, from all persons "except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States."[72] Twenty-six years later, Congress enacted that "the disability imposed by section 3 . . . incurred heretofore, is hereby removed."[73]

Although § 4 "was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. . . . '[T]he validity of the public debt'. . . [embraces] whatever concerns the integrity of the public obligations," and applies to government bonds issued after as well as before adoption of the Amendment.[74]

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ENFORCEMENT

Generally.—In the aftermath of the Civil War, Congress, in addition to proposing to the States the Thirteenth, Fourteenth, and

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[71] E.g., and notably, the Private Act of December 14, 1869, ch.1, 16 Stat. 607.

[72] Ch. 193, 17 Stat. 142.

[73] Act of June 6, 1898, ch. 389, 30 Stat. 432. Legislation by Congress providing for removal was necessary to give effect to the prohibition of § 3, and until removed in pursuance of such legislation persons in office before promulgation of the Fourteenth Amendment continued to exercise their functions lawfully. Griffin's Case, 11 Fed. Cas. 7 (C.C.D.Va. 1869) (No. 5815). Nor were persons who had taken part in the Civil War and had been pardoned by the President before the adoption of this Amendment precluded by this section from again holding office under the United States. 18 Op. Att'y Gen. 149 (1885). On the construction of "engaged in rebellion," *see* United States v. Powell, 27 Fed. Cas. 605 (C.C.D.N.C. 1871) (No. 16,079).

[74] Perry v. United States, 294 U.S. 330, 354 (1935), in which the Court concluded that the Joint Resolution of June 5, 1933, insofar as it attempted to override the gold-clause obligation in a Fourth Liberty Loan Gold Bond "went beyond the congressional power." On a Confederate bond problem, *see* Branch v. Haas, 16 F. 53 (C.C.M.D. Ala. 1883) (citing Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439 (1873), and Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869)). *See also* The Pietro Campanella, 73 F. Supp. 18 (D. Md. 1947).

Fifteenth Amendments, enacted seven statutes designed in a variety of ways to implement the provisions of these Amendments.[75] Several of these laws were general civil rights statutes which broadly attacked racial and other discrimination on the part of private individuals and groups as well as by the States, but the Supreme Court declared unconstitutional or rendered ineffective practically all of these laws over the course of several years.[76] In the end, Reconstruction was abandoned and with rare exceptions no cases were brought under the remaining statutes until fairly recently.[77] Beginning with the Civil Rights Act of 1957, however, Congress generally acted pursuant to its powers under the commerce clause[78] until Supreme Court decisions indicated an expansive concept of congressional power under the Civil War Amendments,[79] which culminated in broad provisions against private interference with civil rights in the 1968 legislation.[80] The story of these years is largely an account of the "state action" doctrine in terms of its limitation on congressional powers;[81] lately, it is the still-unfolding history of the lessening of the doctrine combined with a judicial vesting of discretion in Congress to reinterpret the scope and content of the rights guaranteed in these three constitutional amendments.

State Action.—In enforcing by appropriate legislation the Fourteenth Amendment guarantees against state denials, Congress

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[75] Civil Rights Act of 1866, ch. 31, 14 Stat. 27; the Enforcement Act of 1870, ch. 114, 16 Stat. 140; Act of February 28, 1871, ch. 99, 16 Stat. 433; the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875; 18 Stat. 335. The modern provisions surviving of these statutes are 18 U.S.C. §§ 241, 242, 42 U.S.C. §§ 1981–83, 1985–1986, and 28 U.S.C. § 1343. Two lesser statutes were the Slave Kidnapping Act of 1866, ch. 86, 14 Stat. 50, and the Peonage Abolition Act, ch. 187, 14 Stat. 546, 18 U.S.C. §§ 1581–88, and 42 U.S.C. § 1994.

[76] *See generally* R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947).

[77] For cases under 18 U.S.C. §§ 241 and 242 in their previous codifications, *see* United States v. Mosley, 238 U.S. 383 (1915); United States v. Gradwell, 243 U.S. 476 (1917); United States v. Bathgate, 246 U.S. 220 (1918); United States v. Wheeler, 254 U.S. 281 (1920). The resurgence of the use of these statutes began with United States v. Classic, 313 U.S. 299 (1941), and Screws v. United States, 325 U.S. 91 (1945).

[78] The 1957 and 1960 Acts primarily concerned voting; the public accommodations provisions of the 1964 Act and the housing provisions of the 1968 Act were premised on the commerce power.

[79] United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966). The development of congressional enforcement powers in these cases was paralleled by a similar expansion of the enforcement powers of Congress with regard to the Thirteenth Amendment, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), supra, pp. 1554–55, and the Fifteenth Amendment. South Carolina v. Katzenbach, 383 U.S. 301 (1966), infra, pp. 1946–50.

[80] 82 Stat. 73, 18 U.S.C. § 245. The statute has yet to receive its constitutional testing.

[81] On the "state action" doctrine in the context of the direct application of 1 of the Fourteenth Amendment, *see* supra, pp. 1786–1802.

has the discretion to adopt remedial measures, such as authorizing persons being denied their civil rights in state courts to remove their cases to federal courts,[82] and to provide criminal[83] and civil[84] liability for state officials and agents[85] or persons associated with them[86] who violate protected rights. These statutory measures designed to eliminate discrimination "under color of law"[87] present no problems of constitutional foundation, although there may well be other problems of application.[88] But the Reconstruction Congresses did not stop with statutory implementation of rights guaranteed against state infringement, moving as well against private interference.

Thus, in the Civil Rights Act of 1875 [89] Congress had proscribed private racial discrimination in the admission to and use of inns, public conveyances, theaters, and other places of public amusement. The *Civil Rights Cases*[90] found this enactment to be beyond Congress' power to enforce the Fourteenth Amendment. It was observed that § 1 was prohibitory only upon the States and did not reach private conduct. Therefore, Congress' power under § 5 to enforce § 1 by appropriate legislation was held to be similarly limited. "It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of

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[82] Section 3 of the Civil Rights Act of 1866, 14 Stat. 27, 28 U.S.C. § 1443. *See* Virginia v. Rives, 100 U.S. 313, 318 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880). The statute is of limited utility because of the interpretation placed on it almost from the beginning. *Compare* Georgia v. Rachel, 384 U.S. 780 (1966), *with* City of Greenwood v. Peacock, 384 U.S. 808 (1966).

[83] 18 U.S.C. §§ 241, 242. *See* Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); United States v. Guest, 383 U.S. 745 (1966); United States v. Price, 383 U.S. 787 (1966); United States v. Johnson, 390 U.S. 563 (1968).

[84] 42 U.S.C. § 1983. *See* Monroe v. Pape, 365 U.S. 167 (1961); *see also* 42 U.S.C. § 1985(3), construed in Griffin v. Breckenridge, 403 U.S. 88 (1971).

[85] Ex parte Virginia, 100 U.S. 339 (1880).

[86] United States v. Price, 383 U.S. 787 (1966).

[87] Both 18 U.S.C. § 242 and 42 U.S.C. § 1983 contain language restricting application to deprivations under color of state law, whereas 18 U.S.C. § 241 lacks such language. The newest statute, 18 U.S.C. § 245, contains, of course, no such language. On the meaning of "custom" as used in the "under color of" phrase, *see* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[88] E.g., the problem of "specific intent" in Screws v. United States, 325 U.S. 91 (1945), and Williams v. United States, 341 U.S. 97 (1951), and the problem of what "right or privilege" is "secured" to a person by the Constitution and laws of the United States, which divided the Court in United States v. Williams, 341 U.S. 70 (1951), and which was resolved in United States v. Price, 383 U.S. 787 (1966).

[89] 18 Stat. 335, §§ 1, 2.

[90] 109 U.S. 3 (1883). The Court also rejected the Thirteenth Amendment foundation for the statute, a foundation revived by Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[91] The holding in this case had already been preceded by *United States v. Cruikshank*[92] and by *United States v. Harris*[93] in which the Federal Government had prosecuted individuals for killing and injuring African Americans. The Amendment did not increase the power of the Federal Government vis-a-vis individuals, the Court held, only with regard to the States themselves.[94]

Cruikshank did, however, recognize a small category of federal rights which Congress could protect against private deprivation, rights which the Court viewed as deriving particularly from one's status as a citizen of the United States and which Congress had a general police power to protect.[95] These rights included the right to vote in federal elections, general and primary,[96] the right to federal protection while in the custody of federal officers,[97] and the right to inform federal officials of violations of federal law.[98] The right of interstate travel is a basic right derived from the Federal Constitution which Congress may protect.[99] In *United States v. Williams*,[100] in the context of state action, the Court divided four-to-four over whether the predecessor of 18 U.S.C. § 241 in its reference to a "right or privilege secured . . . by the Constitution or laws of the United States" encompassed rights guaranteed by the Fourteenth Amendment, or was restricted to those rights "which Congress can beyond doubt constitutionally secure against inter-

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[91] 109 U.S. at 11. Justice Harlan's dissent reasoned that Congress had the power to protect rights secured by the Fourteenth Amendment against invasion by both state and private action, but also viewed places of public accommodation as serving a quasi-public function which satisfied the state action requirement in any event. Id. at 46–48, 56–57.

[92] 92 U.S. 542 (1876). The action was pursuant to § 6 of the 1870 Enforcement Act, ch. 114, 16 Stat. 140, the predecessor of 18 U.S.C. § 241.

[93] 106 U.S. 629 (1883). The case held unconstitutional a provision of § 2 of the 1871 Act, ch. 22, 17 Stat. 13.

[94] *See also* Baldwin v. Franks, 120 U.S. 678 (1887); Hodges v. United States, 203 U.S. 1 (1906); United States v. Wheeler, 254 U.S. 281 (1920). Under the Fifteenth Amendment, *see* James v. Bowman, 190 U.S. 127 (1903).

[95] United States v. Cruikshank, 92 U.S. 542, 552–53, 556 (1876). The rights which the Court assumed the United States could protect against private interference were the right to petition Congress for a redress of grievances and the right to vote free of interference on racial grounds in a federal election.

[96] Ex parte Yarbrough, 110 U.S. 651 (1884); United States v. Classic, 313 U.S. 299 (1941).

[97] Logan v. United States, 144 U.S. 263 (1892).

[98] In re Quarles, 158 U.S. 532 (1895). *See also* United States v. Waddell, 112 U.S. 76 (1884) (right to homestead).

[99] United States v. Guest, 383 U.S. 745 (1966); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[100] 341 U.S. 70 (1951).

ference by private individuals." This issue was again reached in *United States v. Price*[101] and *United States v. Guest*,[102] again in the context of state action, in which the Court concluded that the statute included within its scope rights guaranteed by the due process and equal protection clauses.

Inasmuch as both *Price* and *Guest* concerned conduct which the Court found implicated with sufficient state action, it did not then have to reach the question of § 241's constitutionality when applied to private action interfering with rights not the subject of a general police power. But Justice Brennan, responding to what he apparently intepreted as language in the opinion of the Court construing Congress' power under § 5 of the Fourteenth Amendment to be limited by the state action requirement, appended a lengthy statement, which a majority of the Justices joined, arguing that Congress' power was broader.[103] "Although the Fourteenth Amendment itself . . . 'speaks to the State or to those acting under the color of its authority,' legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection."[104] The Justice throughout the opinion refers to "Fourteenth Amendment rights," by which he meant rights which, in the words of 18 U.S.C. § 241, are "secured . . . by the Constitution," i.e., by the Fourteenth Amendment through prohibitory words addressed only to governmental officers. Thus, the equal protection clause commands that all "public facilities owned or operated by or on behalf of the State," be available equally to all persons; that ac-

[101] 383 U.S. 787 (1966) (due process clause).

[102] 383 U.S. 745 (1966) (equal protection clause).

[103] Justice Brennan's opinion, id. at 774, was joined by Chief Justice Warren and Justice Douglas. His statement that "[a] majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy," id. at 782 (emphasis by the Justice), was based upon the language of Justice Clark, joined by Justices Black and Fortas, id. at 761, that inasmuch as Justice Brennan reached the issue the three Justices were also of the view "that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." Id. at 762. In the opinion of the Court, Justice Stewart disclaimed any intention of speaking of Congress' power under § 5. Id. at 755.

[104] Id. at 782.

cess is a right granted by the Constitution, and § 5 is viewed "as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." Within this discretion is the "power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals" who would deny such access.[105]

It is not clear, following changes in Court personnel and in the absence of definitive adjudication, whether this expansion of Congress' power still commands a majority of the Court.[106] If the Court adheres to the expansion, it is not clear what the limits and potentialities of the expansion are, whether it is only with regard to "state facilities" that Congress may reach private interfering conduct, and what "rights" are reasonably and properly encompassed within the concept of "Fourteenth Amendment rights."

Congressional Definition of Fourteenth Amendment Rights.—In the *Civil Rights Cases*,[107] the Court observed that "the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation," that is, laws to counteract and overrule those state laws which § 1 forbade the States to adopt. And the Court was quite clear that under its responsibilities of judicial re-

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[105] Id. at 777–79, 784.

[106] The civil statute paralleling the criminal statute held unconstitutional in United States v. Harris, 106 U.S. 629 (1883), is 42 U.S.C. § 1985(3), similarly derived from § 2 of the 1871 Act, 17 Stat. 13, and it too lacks a "color of law" requirement. This provision was read into it in Collins v. Hardyman, 341 U.S. 651 (1951), to avoid what the Court then saw as a substantial constitutional problem. In Griffin v. Breckenridge, 403 U.S. 88 (1971), "color of law" was read out of the statute. While it might be "difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State." Id. at 97. What the language actually required, said the unanimous Court, was an "intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." Id. at 102. As so construed, the statute was held constitutional as applied in the complaint before the Court on the basis of the Thirteenth Amendment and the right to travel; there was no necessity therefore, to consider Congress' § 5 powers. Id. at 107.

The lower courts are quite divided with respect to what constitutes a nonrace, class-based animus within the requisite for § 1985(3) coverage and whether a private conspiracy may be reached. *See, e.g.*, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Great American Fed. S. & L. Ass'n v. Novotny, 584 F.2d 1235 (3d Cir. 1978) (en banc), rev'd, 442 U.S. 366 (1979); Scott v. Moore, 680 F.2d 979 (5th Cir. 1982) (en banc). The Supreme Court's *Novotny* decision was based solely on statutory interpretation and avoided both questions, although both Justices Powell and Stevens would require a showing of state action. 442 U.S. at 378, 381 (concurring).

[107] 109 U.S. 3, 13–14 (1883).

view, it was the body which would determine that a state law was impermissible and that a federal law passed pursuant to § 5 was necessary and proper to enforce § 1.[108] But in *United States v. Guest*,[109] Justice Brennan protested that this view "attributes a far too limited objective to the Amendment's sponsors, that in fact "the primary purpose of the Amendment was to augment the power of Congress, not the judiciary."

In *Katzenbach v. Morgan*,[110] Justice Brennan, this time speaking for the Court, in effect overrode the limiting view and posited a doctrine by which Congress was to define the substance of what the legislation enacted pursuant to § 5 must be appropriate to. That is, in upholding the constitutionality of a provision of the Voting Rights Act of 1965 [111] barring the application of English literacy requirements to a certain class of voters, the Court rejected a state argument "that an exercise of congressional power under § 5 . . . that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce."[112] Inasmuch as the Court had previously upheld an English literacy requirement under equal protection challenge,[113] acceptance of the argument would have doomed the federal law. But, said Justice Brennan, Congress itself might have questioned the justifications put forward by the State in defense of its law and might have concluded that instead of being supported by acceptable reasons the requirements were unrelated to those justifications and discriminatory in intent and effect. The Court would not evaluate the competing considerations which might have led Congress to its conclusion; since Congress "brought a specially informed legislative competence" to an appraisal of voting requirements, "it was Congress' prerogative to weigh" the considerations and the Court would sustain the conclusion if "we perceive a basis upon which Congress

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[108] *Cf.* Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[109] 383 U.S. 745, 783 and n.7 (1966) (concurring and dissenting).

[110] 384 U.S. 641 (1966). Besides the ground of decision discussed here, Morgan also advanced an alternative ground for upholding the statute. That is, Congress might have overridden the state law not because the law itself violated the equal protection clause but because being without the vote meant the class of persons was subject to discriminatory state and local treatment and giving these people the ballot would afford a means of correcting that situation. The statute therefore was an appropriate means to enforce the equal protection clause under "necessary and proper" standards. Id. at 652–653. A similar "necessary and proper" approach underlay South Carolina v. Katzenbach, 383 U.S. 301 (1966), under the Fifteenth Amendment's enforcement clause.

[111] 79 Stat. 439, 42 U.S.C. § 1973b(e).

[112] 384 U.S. at 648.

[113] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

might predicate a judgment" that the requirements constituted invidious discrimination.[114]

In dissent, Justice Harlan protested that "[i]n effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court."[115] Justice Brennan rejected this reasoning. "We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[116] Congress responded, however, in both fashions. On the one hand, in the 1968 Civil Rights Act it relied on *Morgan* in expanding federal powers to deal with private violence that is racially motivated, and to some degree in outlawing most private housing discrimination;[117] on the other hand, it enacted provisions of law purporting to overrule the Court's expansion of the self-incrimination and right-to-counsel clauses of the Bill of Rights, expressly invoking *Morgan*.[118]

Congress' power under *Morgan* returned to the Court's consideration when several States challenged congressional legislation[119] lowering the voting age in all elections to 18 and prescribing residency and absentee voting requirements for the conduct of presidential elections. In upholding the latter provision and in dividing over the former, the Court revealed that *Morgan's* vitality was in some considerable doubt, at least with regard to the reach which many observers had previously seen.[120] Four Justices accepted *Morgan* in full,[121] while one Justice rejected it totally[122] and an-

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[114] Katzenbach v. Morgan, 384 U.S. 641, 653–56 (1966).

[115] Id. at 668. Justice Stewart joined this dissent.

[116] Id. at 651 n.10. Justice O'Connor for the Court quoted and reiterated Justice Brennan's language in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731–33 (1982).

[117] 82 Stat. 73, 18 U.S.C. § 245. *See* S. Rep. No. 721, 90th Congress, 1st Sess. 6–7 (1967). *See also* 82 Stat. 81, 42 U.S.C. § 3601 et seq.

[118] Title II, Omnibus Safe Streets and Crime Control Act, 82 Stat. 210, 18 U.S.C. §§ 3501, 3502. *See* S. Rep. No. 1097, 90th Congress, 2d Sess. 53–63 (1968). The cases which were subjects of the legislation were Miranda v. Arizona, 384 U.S. 436 (1966), and United States v. Wade, 388 U.S. 218 (1967), insofar as federal criminal trials were concerned.

[119] Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. §§ 1973aa–1, 1973bb.

[120] Oregon v. Mitchell, 400 U.S. 112 (1970).

[121] Id. at 229, 278–81 (Justices Brennan, White, and Marshall), 135, 141–44 (Justice Douglas).

[122] Id. at 152, 204–09 (Justice Harlan).

other would have limited it to racial cases.[123] The other three Justices seemingly restricted *Morgan* to its alternate rationale in passing on the age reduction provision but the manner in which they dealt with the residency and absentee voting provision afforded Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.[124]

More recent decisions read broadly Congress' power to make determinations that appear to be substantive decisions with respect to constitutional violations.[125] Acting under both the Fourteenth and Fifteenth Amendments, Congress has acted to reach state electoral practices that "result" in diluting the voting power of minorities, although the Court apparently requires that it be shown that electoral procedures must have been created or maintained with a discriminatory animus before they may be invalidated under the two Amendments.[126] Moreover, movements have been initiated in Congress by opponents of certain of the Court's decisions, notably the abortion rulings, to utilize § 5 powers to curtail the rights the Court has derived from the due process clause and other provisions of the Constitution.[127]

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[123] Id. at 119, 126–31 (Justice Black).

[124] The age reduction provision could be sustained "only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are 'compelling.'" Id. at 296 (Justices Stewart and Blackmun and Chief Justice Burger). In their view, Congress did not have that power and *Morgan* did not confer it. But in voting to uphold the residency and absentee provision, the Justices concluded that "Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State" without reaching an independent determination of their own that the requirements did in fact have that effect. Id. at 286.

[125] *See* City of Rome v. United States, 446 U.S. 156, 173–83 (1980), under the Fifteenth Amendment. Infra, pp. 1948–50. *See also* Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980) (plurality opinion by Chief Justice Burger), and id. at 500–02 (Justice Powell concurring).

[126] The Voting Rights Act Amendments of 1982, Pub. L. 97–205, 96 Stat. 131, amending 42 U.S.C. § 1973, were designed to overturn City of Mobile v. Bolden, 446 U.S. 55 (1980). A substantial change of direction in Rogers v. Lodge, 458 U.S. 613 (1982), handed down coextensively with congressional enactment, seems to have brought Congress and the Court into essential alignment, thus avoiding a possible constitutional conflict.

[127] *See* The Human Life Bill, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 97th Congress, lst sess. (1981). An elaborate constitutional analysis of the bill appears in Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333 (1982).