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FOURTEENTH AMENDMENT

RIGHTS GUARANTEED

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FOURTEENTH AMENDMENT

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

THE FOURTEENTH AMENDMENT AND STATES' RIGHTS

Amendment of the Constitution during the post-Civil War Reconstruction period resulted in a fundamental shift in the relationship between the Federal Government and the states. The Civil War had been fought over issues of states' rights, particularly the right to control the institution of slavery.[1] In the wake of the war, the Congress submitted, and the states ratified the Thirteenth Amendment (making slavery illegal), the Fourteenth Amendment (defining and granting broad rights of national citizenship), and the Fifteenth Amendment (forbidding racial discrimination in elections). The Fourteenth Amendment was the most controversial and far-reaching of these three "Reconstruction Amendments."

CITIZENS OF THE UNITED STATES

The citizenship provisions of the Fourteenth Amendment may be seen as a repudiation of one of the more politically divisive cases of the nineteenth century. Under common law, free persons born within a state or nation were citizens thereof. In the *Dred Scott* case,[2] however, Chief Justice Taney, writing for the Court, ruled that

[1] "Since the 1950s most professional historians have come to agree with Lincoln's assertion that slavery 'was, somehow, the cause of the war.'" James M. McPherson, *Southern Comfort*, THE NEW YORK REVIEW OF BOOKS (Apr. 12, 2001), quoting Lincoln's second inaugural address.

[2] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The controversy, political as well as constitutional, that this case stirred and still stirs is exemplified and analyzed in the material collected in S. KUTLER, THE DRED SCOTT DECISION: LAW OR POLI-

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this rule did not apply to freed slaves. The Court held that United States citizenship was enjoyed by only two classes of people: (1) white persons born in the United States as descendants of "persons, who were at the time of the adoption of the Constitution recognised 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.[3] Freed slaves fell into neither of these categories.

The Court further held that, although a state could confer state citizenship upon whomever it chose, it could not make the recipient of such status a citizen of the United States. Thus, the "Negro," as an enslaved race, was ineligible to attain United States citizenship, either from a state or by virtue of birth in the United States. Even a free man descended from a Negro residing as a free man in one of the states at the date of ratification of the Constitution was held ineligible for citizenship.[4] Congress subsequently repudiated this concept of citizenship, first in section 1[5] of the Civil Rights Act of 1866[6] and then in section 1 of the Fourteenth Amendment. In doing so, Congress set aside the *Dred Scott* holding, and restored the traditional precepts of citizenship by birth.[7]

Based on the first sentence of section 1,[8] the Court has held that a child born in the United States of Chinese parents who were ineligible to be naturalized themselves is nevertheless a citizen of the United States entitled to all the rights and privileges of citizen-

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TICS? (1967). *See also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); M. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); EARL M. MALTZ, DRED SCOTT AND THE POLITICS OF SLAVERY (2007); Symposium, *150th Anniversary of the Dred Scott Decision*, 82 CHI.-KENT L. REV. 1–455 (2007).

[3] 60 U.S. (19 How.) at 406, 418.

[4] 60 U.S. (19 How.) at 404–06, 417–18, 419–20 (1857).

[5] 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).

[6] "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s] . . . ." Ch. 31, 14 Stat. 27.

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

[8] "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

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ship.[9] The requirement that a person be "subject to the jurisdiction thereof," however, excludes its application to children born of diplomatic representatives of a foreign state, children born of alien enemies in hostile occupation,[10] or children of members of Indian tribes subject to tribal laws.[11] In addition, the citizenship of children born on vessels in United States territorial waters or on the high seas has generally been held by the lower courts to be determined by the citizenship of the parents.[12] 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.[13]

In *Afroyim v. Rusk*,[14] a divided Court extended the force of this first sentence beyond prior holdings, ruling that it withdrew from the government of the United States the power to expatriate United States citizens against their will for any reason. "[T]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States,

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

[10] 169 U.S. at 682 (these are recognized exceptions to the common-law rule of acquired citizenship by birth).

[11] 169 U.S. at 680–82; Elk v. Wilkins, 112 U.S. 94, 99 (1884).

[12] 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).

[13] 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 that secures the privileges and immunities of citizens of the United States against abridgment by state legislation. 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. Burley Growers' Coop. Marketing Ass'n,, 276 U.S. 71, 89 (1928); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

[14] 387 U.S. 253 (1967). Though the Court had previously upheld the involuntary expatriation of a woman citizen of the United States during her marriage to a foreign citizen in Mackenzie v. Hare, 239 U.S. 299 (1915), the subject first received extended judicial treatment in Perez v. Brownell, 356 U.S. 44 (1958), in which the Court, by a five-to-four decision, upheld a statute denaturalizing a native-born citizen for having voted in a foreign election. For the Court, Justice Frankfurter reasoned that Congress's power to regulate foreign affairs carried with it the authority to sever the relationship of this country with one of its citizens to avoid national implication in acts of that citizen which might embarrass relations with a foreign nation. Id. at 60–62. Three of the dissenters denied that Congress had any power to denaturalize. *See* discussion of "Expatriation" under Article I, *supra*. In the years before *Afroyim*, a series of decisions had curbed congressional power.

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or any other government unit."[15] In a subsequent decision, however, the Court held that persons who were statutorily naturalized by being born abroad of at least one American parent could not claim the protection of the first sentence of section 1 and that Congress could therefore impose a reasonable and non-arbitrary condition subsequent upon their continued retention of United States citizenship.[16] Between these two decisions is a tension that should call forth further litigation efforts to explore the meaning of the citizenship sentence of the Fourteenth Amendment.

PRIVILEGES OR IMMUNITIES

Unique among constitutional provisions, the clause prohibiting state abridgement of the "privileges or immunities" of United States citizens was rendered a "practical nullity" by a single decision of the Supreme Court issued within five years of its ratification. In the *Slaughter-House Cases*,[17] the Court evaluated a Louisiana statute that conferred a monopoly upon a single corporation to engage in the business of slaughtering cattle. In determining whether this statute abridged the "privileges" of other butchers, the Court frustrated the aims of the most aggressive sponsors of the privileges or immunities Clause. According to the Court, these sponsors had sought to centralize "in the hands of the Federal Government large powers hitherto exercised by the States" by converting the rights of the citizens of each state at the time of the adoption of the Fourteenth Amendment into protected privileges and immunities of United States citizenship. This interpretation would have allowed business to develop unimpeded by state interference by limiting state laws "abridging" these privileges.

According to the Court, however, such an interpretation would have "transfer[red] the security and protection of all the civil rights . . . to the Federal Government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," and would "constitute this court a per-

[15] Afroyim v. Rusk, 387 U.S. 253, 262–63 (1967). The Court went on to say, "It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes. . . . This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted." Four dissenters, Justices Harlan, Clark, Stewart, and White, controverted the Court's reliance on the history and meaning of the Fourteenth Amendment and reasserted Justice Frankfurter's previous reasoning in *Perez*. Id. at 268.

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

[17] 83 U.S. (16 Wall.) 36, 71, 77–78 (1873).

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petual 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 which proposed these amendments, nor by the legislatures of the States which ratified them," and that the "one pervading purpose" of this and the other War Amendments was "the freedom of the slave race."

Based on these conclusions, the Court held that none of the rights alleged by the competing New Orleans butchers to have been violated were derived from the butchers' national citizenship; insofar as the Louisiana law interfered with their pursuit of the business of butchering animals, the privilege was one that "belong to the citizens of the States as such." Despite the broad language of this clause, the Court held that the privileges and immunities of state citizenship had been "left to the State governments for security and protection" and had not been placed by the clause "under the special care of the Federal government." The only privileges that 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."[18] These privileges, however, had been available to United States citizens and protected from state interference by operation of federal supremacy even prior to the adoption of the Fourteenth Amendment. The *Slaughter-House Cases*, therefore, reduced the Privileges or Immunities Clause to a superfluous reiteration of a prohibition already operative against the states.

Although the Court in the *Slaughter-House Cases* expressed a reluctance to enumerate those privileges and immunities of United States citizens that are protected against state encroachment, it nevertheless felt obliged to suggest some. Among those that it 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

[18] 83 U.S. at 78, 79.

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United States, and rights secured by treaty.[19] In *Twining v. New Jersey*,[20] the Court recognized "among the rights and privileges" of national citizenship the right to pass freely from state to state,[21] the right to petition Congress for a redress of grievances,[22] the right to vote for national officers,[23] the right to enter public lands,[24] the right to be protected against violence while in the lawful custody of a United States marshal,[25] and the right to inform the United States authorities of violation of its laws.[26] 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."[27]

In modern times, the Court has continued the minor role accorded to the clause, only occasionally manifesting a disposition to enlarge the restraint that it imposes upon state action.[28] In *Hague v. CIO*,[29] two and perhaps three justices thought that the freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peace-

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[19] 83 U.S. at 79–80.

[20] 211 U.S. 78, 97 (1908).

[21] *Citing* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). It was observed in United States v. Wheeler, 254 U.S. 281, 299 (1920), that the statute at issue in *Crandall* was actually held to burden directly the performance by the United States of its governmental functions. *Cf.* Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283, 491–92 (1849) (Chief Justice Taney dissenting). Four concurring Justices in Edwards v. California, 314 U.S. 160, 177, 181 (1941), would have grounded a right of interstate travel on the privileges or immunities clause. More recently, the Court declined to ascribe a source but was content to assert the right to be protected. United States v. Guest, 383 U.S. 745, 758 (1966); Shapiro v. Thompson, 394 U.S. 618, 629–31 (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).

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

[23] *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).

[24] *Citing* United States v. Waddell, 112 U.S. 76 (1884).

[25] *Citing* Logan v. United States, 144 U.S. 263 (1892).

[26] *Citing In re* Quarles and Butler, 158 U.S. 532 (1895).

[27] Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

[28] Colgate v. Harvey, 296 U.S. 404 (1935), which was overruled five years later, *see* Madden v. Kentucky, 309 U.S. 83, 93 (1940), represented the first attempt by the Court since adoption of the Fourteenth Amendment to convert the Privileges or Immunities Clause into a source of protection of other than those "interests growing out of the relationship between the citizen and the national government." In *Harvey*, the Court declared that the right of a citizen to engage in lawful business in other states, such as by entering into contracts or by loaning money, was a privilege of national citizenship, and this privilege was abridged by a state income tax law which excluded interest received on money from loans from taxable income only if the loan was made within the state.

[29] 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.

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fully 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*,[30] four Justices were prepared to rely on the clause.[31] In many other respects, however, claims based on this clause have been rejected.[32]

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[30] 314 U.S. 160, 177–83 (1941).

[31] *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).

[32] *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 State Law to secure attendance of witnesses from within or without a state in criminal proceedings); James v. Valtierra, 402 U.S. 137 (1971)

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In *Oyama v. California*,[33] the Court, in a single sentence, agreed with the contention of a native-born youth that a state Alien Land Law that resulted in the forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible for citizenship and precluded from owning land, deprived him "of his privileges as an American citizen." The right to acquire and retain property had previously not been set forth in any of the enumerations as one of the privileges protected against 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.[34]

In a doctrinal shift of uncertain significance, the Court will apparently evaluate challenges to durational residency requirements, previously considered as violations of the right to travel derived from the Equal Protection Clause,[35] as a potential violation of the Privileges or Immunities Clause. Thus, where a California law restricted the level of welfare benefits available to Californians who have been residents for less than a year to the level of benefits available in the state of their prior residence, the Court found a violation of the right of newly arrived citizens to be treated the same as other state citizens.[36] Despite suggestions that this opinion will open the door to "guaranteed equal access to all public benefits,"[37] it seems more likely that the Court is protecting the privilege of being treated immediately as a full citizen of the state one chooses for permanent residence.[38]

DUE PROCESS OF LAW

Generally

Due process under the Fourteenth Amendment can be broken down into two categories: procedural due process and substantive due process. Procedural due process, based on principles of "fundamental fairness," addresses which legal procedures are required to

(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).

[33] 332 U.S. 633, 640 (1948).

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

[35] *See* The Right to Travel, *infra*.

[36] Saenz v. Roe, 526 U.S. 489 (1999).

[37] 526 U.S. at 525 (Thomas, J., dissenting).

[38] The right of United States citizens to choose their state of residence is specifically protected by the first sentence of the 14th Amendment "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

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be followed in state proceedings. Relevant issues, as discussed in detail below, include notice, opportunity for hearing, confrontation and cross-examination, discovery, basis of decision, and availability of counsel. Substantive due process, although also based on principles of "fundamental fairness," is used to evaluate whether a law can be applied by states at all, regardless of the procedure followed. Substantive due process has generally dealt with specific subject areas, such as liberty of contract or privacy, and over time has alternately emphasized the importance of economic and noneconomic matters. In theory, the issues of procedural and substantive due process are closely related. In reality, substantive due process has had greater political import, as significant portions of a state legislature's substantive jurisdiction can be restricted by its application.

Although the extent of the rights protected by substantive due process may be controversial, its theoretical basis is firmly established and forms the basis for much of modern constitutional case law. Passage of the Reconstruction Amendments (13th, 14th, and 15th) gave the federal courts the authority to intervene when a state threatened fundamental rights of its citizens,[39] and one of the most important doctrines flowing from this is the application of the Bill of Rights to the states through the Due Process Clause.[40] Through the process of "selective incorporation," most of the provisions of the first eight Amendments, such as free speech, freedom of religion, and protection against unreasonable searches and seizures, are applied against the states as they are against the federal government. Though application of these rights against the states is no longer controversial, the incorporation of other substantive rights, as is discussed in detail below, has been.

Definitions

"Person".—The Due Process Clause provides that no states shall deprive any "person" of "life, liberty or property" without due process of law. A historical controversy has been waged concerning whether the framers of the Fourteenth Amendment intended the word "person" to mean only natural persons, or whether the word

[39] The Privileges or Immunities Clause, more so than the Due Process Clause, appears at first glance to speak directly to the issue of state intrusions on substantive rights and privileges—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." *See* AKHIL REED AMAR, THE BILL OF RIGHTS 163–180 (1998). As discussed earlier, however, the Court limited the effectiveness of that clause soon after the ratification of the 14th Amendment. *See* Privileges or Immunities, *supra*. Instead, the Due Process Clause, though selective incorporation, became the basis for the Court to recognize important substantive rights against the states.

[40] See Bill of Rights, Fourteenth Amendment, *supra*.

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was substituted for the word "citizen" with a view to protecting corporations from oppressive state legislation.[41] As early as the 1877 *Granger Cases*[42] the Supreme Court upheld various regulatory state laws without raising any question as to whether a corporation could advance due process claims. Further, there is no doubt that a corporation may not be deprived of its property without due process of law.[43] Although various decisions have held that the "liberty" guaranteed by the Fourteenth Amendment is the liberty of natural,[44] not artificial, persons,[45] nevertheless, in 1936, a newspaper corporation successfully objected that a state law deprived it of liberty of the press.[46]

A separate question is the ability of a government official to invoke the Due Process Clause to protect the interests of his office. Ordinarily, the mere official interest of a public officer, such as the interest in enforcing a law, has not been deemed adequate to enable him to challenge the constitutionality of a law under the Fourteenth Amendment.[47] Similarly, municipal corporations have no standing "to invoke the provisions of the Fourteenth Amendment in

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

[42] 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).

[43] 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).

[44] As to the natural persons protected by the due process clause, these include all human beings regardless of race, color, or citizenship. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Terrace v. Thompson, 263 U.S. 197, 216 (1923). *See* Hellenic Lines v. Rhodetis, 398 U.S. 306, 309 (1970).

[45] 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."

[46] 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).

[47] 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 & Greenville Ry. v. Miller, 283 U.S. 96 (1931).

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opposition to the will of their creator," the state.[48] 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 statutes in relation to which they have official duties," and, accordingly, may apply to federal courts "to review decisions of state courts declaring state statutes, which [they] seek to enforce, to be repugnant to the [Fourteenth Amendment of] the Federal Constitution . . . ."[49]

"Property" and Police Power.—States have an inherent "police power" to promote public safety, health, morals, public convenience, and general prosperity,[50] but the extent of the power may vary based on the subject matter over which it is exercised.[51] If a police power regulation goes too far, it will be recognized as a tak-

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[48] 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 a state).

[49] Coleman v. Miller, 307 U.S. 433, 445, 442, 443 (1939); Boynton v. Hutchinson Gas Co., 291 U.S. 656 (1934); South Carolina Highway Dep't 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).

[50] This power is not confined to the suppression of what is offensive, disorderly, or unsanitary. Long ago Chief Justice Marshall described the police power as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824). *See* California Reduction Co. v. Sanitary Works, 199 U.S. 306, 318 (1905); Chicago B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 592 (1906); Bacon v. Walker, 204 U.S. 311 (1907); Eubank v. City of 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).

[51] 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 Co. v. Highway Comm'n, 294 U.S. 613 (1935). "It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise." Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548 (1914).

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ing of property for which compensation must be paid.[52] Thus, the means employed to effect its exercise may be neither arbitrary nor oppressive but must bear a real and substantial relation to an end that is public, specifically, the public health, safety, or morals, or some other aspect of the general welfare.[53]

An ulterior public advantage, however, may justify a comparatively insignificant taking of private property for what seems to be a private use.[54] 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."[55] Moreover, it is elementary that enforcement of a law passed in the legitimate exertion of the police power is not a taking without due process of law, even if the cost is borne by the regulated.[56] Initial compliance with a regulation that is valid when adopted, however, does not preclude later protest if that regulation subsequently becomes confiscatory in its operation.[57]

"Liberty".—As will be discussed in detail below, the substantive "liberty" guaranteed by the Due Process Clause has been variously defined by the Court. In the early years, it meant almost exclusively "liberty of contract," but with the demise of liberty of contract came a general broadening of "liberty" to include personal, political and social rights and privileges.[58] Nonetheless, the Court is generally chary of expanding the concept absent statutorily recognized rights.[59]

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[52] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Welch v. Swasey, 214 U.S. 91, 107 (1909). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980). *See* also analysis of "Regulatory Takings" under the Fifth Amendment. Although the Fourteenth Amendment does not contain a "takings" provisions such as is found in the Fifth Amendment, the Court has held that such provision has been incorporated. Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 159 (1980).

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

[54] Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) (bank may be required to contribute to fund to guarantee the deposits of contributing banks).

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

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

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

[58] *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.

[59] *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

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The Rise and Fall of Economic Substantive Due Process: Overview

Long before the passage of the 14th Amendment, the Due Process Clause of the Fifth Amendment was recognized as a restraint upon the Federal Government, but only in the narrow sense that a legislature needed to provide procedural "due process" for the enforcement of law.[60] Although individual Justices suggested early on that particular legislation could be so in conflict with precepts of natural law as to render it wholly unconstitutional,[61] the potential of the Due Process Clause of the 14th Amendment as a substantive restraint on state action appears to have been grossly underestimated in the years immediately following its adoption.[62]

Thus, early invocations of "substantive" due process were unsuccessful. In the *Slaughter-House Cases*,[63] discussed previously in the context of the Privileges or Immunities Clause,[64] a group of butchers challenged a Louisiana statute conferring the exclusive privilege of butchering cattle in New Orleans to one corporation. In reviewing the validity of this monopoly, the Court noted that the

due process-liberty analysis. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 482 (1972). For more recent cases, *see* DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (no due process violation for failure of state to protect an abused child from his parent, even though abuse had been detected by social service agency); Collins v. City of Harker Heights, 503 U.S. 115 (1992) (failure of city to warn its employees about workplace hazards does not violate due process; the due process clause does not impose a duty on the city to provide employees with a safe working environment); County of Sacramento v. Lewis, 523 U.S. 833 (1998) (high-speed automobile chase by police officer causing death through deliberate or reckless indifference to life would not violate the Fourteenth Amendment's guarantee of substantive due process). *But see* Chavez v. Martinez, 538 U.S. 760 (2003) (case remanded to federal circuit court to determine whether coercive questioning of severely injured suspect gave rise to a compensable violation of due process).

[60] The conspicuous exception to this was the holding in the *Dred Scott* case that former slaves, as non-citizens, could not claim the protections of the clause. 60 U.S. (19 How.) 393, 450 (1857).

[61] *See*, *e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("An act of the legislature (for I cannot call it a law), contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority") (Chase, J.).

[62] In the years following the ratification of the 14th Amendment, the Court often observed that the Due Process Clause "operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment," Hibben v. Smith, 191 U.S. 310, 325 (1903), and that "ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth," Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 (1905). *See also* French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901). There is support for the notion, however, that the proponents of the 14th Amendment envisioned a more expansive substantive interpretation of that Amendment than had developed under the Fifth Amendment. See Akhil Reed Amar, The Bill of Rights 181–197 (1998).

[63] 83 U.S. (16 Wall.) 36 (1873).

[64] *See* Privileges or Immunities Clause.

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prohibition against a deprivation of property without due process "has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some forms of expression in the constitutions 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."[65]

Four years later, in *Munn v. Illinois*,[66] the Court reviewed the regulation of rates charged for the transportation and warehousing of grain, and again refused to interpret the due process clause as invalidating substantive state legislation. Rejecting contentions that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its use and by transferring an interest in a private enterprise to the public, Chief Justice Waite emphasized that "the great office of statutes is to remedy defects in the common law as they are developed. . . . We know that this power [of rate regulation] may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

In *Davidson v. New Orleans*,[67] Justice Miller also counseled against a departure from these conventional applications of due process, although he acknowledged the difficulty of arriving at a precise, all-inclusive definition of the clause. "It is not a little remarkable," he observed, "that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property

[65] 83 U.S. (16 Wall.) at 80–81.
[66] 94 U.S. 113, 134 (1877).
[67] 96 U.S. 97, 103–04 (1878).

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without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental 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, we think, 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, with the reasoning on which such decisions may be founded."

A bare half-dozen years later, however, in *Hurtado v. California*,[68] the Justices gave warning of an impending modification of their views. Justice Mathews, speaking for the Court, noted that due process under the United States Constitution differed from due process in English common law in that the latter applied only to executive and judicial acts, whereas the former also applied to legislative acts. Consequently, the limits of the due process under the 14th Amendment could not be appraised solely in terms of the "sanction of settled usage" under common law. The Court then declared that "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." By this language, the states were put on notice that all types

[68] 110 U.S. 516, 528, 532, 536 (1884).

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of state legislation, whether dealing with procedural or substantive rights, were now subject to the scrutiny of the Court when questions of essential justice were raised.

What induced the Court to overcome its fears of increased judicial oversight and of upsetting the balance of powers between the Federal Government and the states was state remedial social legislation, enacted in the wake of industrial expansion, and the impact of such legislation on property rights. The added emphasis on the Due Process Clause also afforded the Court an opportunity to compensate for its earlier nullification of much of the privileges or immunities clause of the Amendment. Legal theories about the relationship between the government powers and private rights were available to demonstrate the impropriety of leaving to the state legislatures the same ample range of police power they had enjoyed prior to the Civil War. In the meantime, however, the *Slaughter-House Cases* and *Munn v. Illinois* had to be overruled at least in part.

About twenty years were required to complete this process, in the course of which two strands of reasoning were developed. The first was a view advanced by Justice Field in a dissent in *Munn v. Illinois*,[69] namely, that state police power is solely a power to prevent injury to the "peace, good order, morals, and health of the community."[70] This reasoning was adopted by the Court in *Mugler v. Kansas*,[71] where, despite upholding a state alcohol regulation, the Court held that "[i]t does not at all follow that every statute enacted ostensibly for the promotion of [public health, morals or safety] is to be accepted as a legitimate exertion of the police powers of the state." The second strand, which had been espoused by Justice Bradley in his dissent in the *Slaughter-House Cases*,[72] tentatively transformed ideas embodying the social compact and natural rights

[69] 94 U.S. 113, 141–48 (1877).

[70] "It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose." 94 U.S. at 145–46.

[71] 123 U.S. 623, 661 (1887).

[72] 83 U.S. (16 Wall.) 36, 113–14, 116, 122 (1873).

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into constitutionally enforceable limitations upon government.[73] The consequence was that the states in exercising their police powers could foster only those purposes of health, morals, and safety which the Court had enumerated, and could employ only such means as would not unreasonably interfere with fundamental natural rights of liberty and property. As articulated by Justice Bradley, these rights were equated with freedom to pursue a lawful calling and to make contracts for that purpose.[74]

Having narrowed the scope of the state's police power in deference to the natural rights of liberty and property, the Court proceeded to incorporate into due process theories of *laissez faire* economics, reinforced by the doctrine of Social Darwinism (as elaborated by Herbert Spencer). Thus, "liberty" became synonymous with governmental non-interference in the field of private economic relations. For instance, in *Budd v. New York*,[75] Justice Brewer declared in *dictum*: "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."

Next, the Court watered down the accepted maxim that a state statute must be presumed valid until clearly shown to be otherwise, by shifting focus to whether facts existed to justify a particular law.[76] The original position could be seen in earlier cases such as *Munn v. Illinois*,[77] in which the Court sustained the legislation before it by presuming that such facts existed: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed." Ten years later, however, in *Mugler*

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[73] Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (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 . . . ."

[74] "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).

[75] 143 U.S. 517, 551 (1892).

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

[77] 94 U.S. 113, 123, 182 (1877).

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v. Kansas,[78] rather than presume the relevant facts, the Court sustained a statewide anti-liquor law based on the proposition that the deleterious social effects of the excessive use of alcoholic liquors were sufficiently notorious for the Court to be able to take notice of them.[79] This opened the door for future Court appraisals of the facts that had induced the legislature to enact the statute.[80]

Mugler was significant because it implied that, unless the Court found by judicial notice the existence of justifying fact, it would invalidate a police power regulation as bearing no reasonable or adequate relation to the purposes to be subserved by the latter—namely, health, morals, or safety. Interestingly, the Court found the rule of presumed validity quite serviceable for appraising state legislation affecting neither liberty nor property, but for legislation constituting governmental interference in the field of economic relations, especially labor-management relations, the Court found the principle of judicial notice more advantageous. In litigation embracing the latter type of legislation, the Court would also tend to shift the burden of proof, which had been with litigants challenging legislation, to the state seeking enforcement. Thus, the state had the task of demonstrating that a statute interfering with a natural right of liberty or property was in fact "authorized" by the Constitution, and not merely that the latter did not expressly prohibit enactment of the same. As will be discussed in detail below, this approach was used from the turn of the century through the mid-1930s to strike down numerous laws that were seen as restricting economic liberties.

As a result of the Depression, however, the *laissez faire* approach to economic regulation lost favor to the dictates of the New Deal. Thus, in 1934, the Court in *Nebbia v. New York*[81] discarded this approach to economic legislation. The modern approach is exemplified by the 1955 decision, *Williamson v. Lee Optical Co.*,[82] which upheld a statutory scheme regulating the sale of eyeglasses that favored ophthalmologists and optometrists in private professional

[78] 123 U.S. 623 (1887).

[79] 123 U.S. at 662. "We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact . . . that . . . pauperism, and crime . . . are, in some degree, at least, traceable to this evil."

[80] The following year the Court, confronted with an act restricting the sale of oleomargarine, of which the Court could not claim a like measure of common knowledge, briefly retreated to the doctrine of presumed validity, declaring that "it does not appear upon the face of the statute, or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law." Powell v. Pennsylvania, 127 U.S. 678, 685 (1888).

[81] 291 U.S. 502 (1934).

[82] 348 U.S. 483 (1955).

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practice and disadvantaged opticians and those employed by or using space in business establishments. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"[83] The Court went on to assess the reasons that might have justified the legislature in prescribing the regulation at issue, leaving open the possibility that *some* regulation might be found unreasonable.[84] More recent decisions have limited this inquiry to whether the legislation is arbitrary or irrational, and have abandoned any requirement of "reasonableness."[85]

Regulation of Labor Conditions

Liberty of Contract.—One of the most important concepts used during the ascendancy of economic due process was liberty of contract. The original idea of economic liberties was advanced by Justices Bradley and Field in the *Slaughter-House Cases*,[86] and elevated to the status of accepted doctrine in *Allgeyer v. Louisiana,*[87] It was then used repeatedly during the early part of this century to strike down state and federal labor regulations. "The liberty men-

[83] 348 U.S. at 488.

[84] 348 U.S. at 487, 491.

[85] The Court has pronounced a strict "hands-off" standard of judicial review, whether of congressional or state legislative efforts to structure and accommodate the burdens and benefits of economic life. Such legislation is to be "accorded the traditional presumption of constitutionality generally accorded economic regulations" and is to be "upheld absent proof of arbitrariness or irrationality on the part of Congress." That the accommodation among interests which the legislative branch has struck "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 83–84 (1978). *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976); Hodel v. Indiana, 452 U.S. 314, 333 (1981); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124–25 (1978); Brotherhood of Locomotive Firemen v. Chicago, R.I. & P. R.R., 393 U.S. 129 (1968); Ferguson v. Skrupa, 372 U.S. 726, 730, 733 (1963).

[86] 83 U.S. (16 Wall.) 36 (1873).

[87] 165 U.S. 578 (1897). Freedom of contract was also alluded to as a property right, as is evident in the language of the Court in Coppage v. Kansas, 236 U.S. 1, 14 (1915). "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

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tioned 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."[88]

The Court, however, did sustain some labor regulations by acknowledging that freedom of contract was "a qualified and not an absolute right. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests 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."[89]

Still, the Court was committed to the principle that freedom of contract is the general rule and that legislative authority to abridge it could be justified only by exceptional circumstances. To serve this end, the Court intermittently employed the rule of judicial notice in a manner best exemplified by a comparison of the early cases of *Holden v. Hardy*[90] and *Lochner v. New York*.[91] In *Holden v. Hardy*,[92] the Court, relying on the principle of presumed validity, allowed the burden of proof to remain with those attacking a Utah act limiting the period of labor in mines to eight hours per day. Recognizing the fact that labor below the surface of the earth was attended by risk to person and to health and for these reasons had long been the subject of state intervention, the Court registered its willingness to sustain a law that the state legislature had adjudged "necessary for the preservation of health of employees," and for which there were "reasonable grounds for believing that . . . [it was] supported by the facts."

Seven years later, however, a radically altered Court was predisposed in favor of the doctrine of judicial notice. In *Lochner v.*

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[88] 165 U.S. at 589.

[89] 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).

[90] 169 U.S. 366 (1898).

[91] 198 U.S. 45 (1905).

[92] 169 U.S. 366, 398 (1898).

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New York,[93] the Court found that a law restricting employment in bakeries to ten hours per day and 60 hours per week was not a true health measure, but was merely a labor regulation, and thus was an unconstitutional interference with the right of adult laborers, *sui juris*, to contract for their means of livelihood. Denying that the Court was substituting its own judgment for that of the legislature, Justice Peckham nevertheless maintained that whether the act was within the police power of the state was a "question that must be answered by the Court." Then, in disregard of the medical evidence proffered, the Justice stated: "In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. . . . 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?"[94]

Justice Harlan, in dissent, asserted that the law was a health regulation, pointing to the abundance of medical testimony tending to show that the life expectancy of bakers was below average, that their capacity to resist diseases was low, and that they were peculiarly prone to suffer irritations of the eyes, lungs, and bronchial passages. He concluded that the very existence of such evidence left the reasonableness of the measure open to discussion and thus within the discretion of the legislature. "The responsibility therefor rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . [L]egislative 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."[95]

A second dissenting opinion, written by Justice Holmes, has received the greater measure of attention as a forecast of the line of reasoning the Court was to follow 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

[93] 198 U.S. 45 (1905).
[94] 198 U.S. at 59.
[95] 198 U.S. at 74 (quoting Atkin v. Kansas, 191 U.S. 207, 223 (1903)).

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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 relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution. . . . 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." [96]

Justice Holmes did not reject the basic concept of substantive due process, but rather the Court's presumption against economic regulation.[97] Thus, Justice Holmes whether consciously or not, was prepared to support, along with his opponents in the majority, a "perpetual censorship" over state legislation. The basic distinction, therefore, between the positions taken by Justice Peckham for the majority and Justice Holmes, for what was then the minority, was the use of the doctrine of judicial notice by the former and the doctrine of presumed validity by the latter.

Holmes' dissent soon bore fruit in *Muller v. Oregon* [98] and *Bunting v. Oregon*,[99] which allowed, respectively, regulation of hours worked by women and by men in certain industries. The doctrinal approach employed was to find that the regulation was supported by evidence despite the shift in the burden of proof entailed by application of the principle of judicial notice. Thus, counsel defending the constitutionality of social legislation developed the practice of

[96] 198 U.S. at 75–76.

[97] Thus, Justice Holmes' criticism of his colleagues was unfair, as even a "rational and fair man" would be guided by some preferences or "economic predilections."

[98] 208 U.S. 412 (1908).

[99] 243 U.S. 426 (1917).

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submitting voluminous factual briefs, known as "Brandeis Briefs,"[100] 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,[101] it generally intimated that the facts thus submitted by way of justification had been authenticated sufficiently for it to take judicial cognizance thereof. On the other hand, whenever it chose to invalidate comparable legislation, such as enactments establishing a minimum wage for women and children,[102] 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 replaced by the belief that it is peculiarly the duty of government to help those who are unable to help themselves. To sustain this remedial legislation, the Court had to extensively revise its previously formulated concepts of "liberty" under the Due Process Clause. Thus, the Court, in overturning prior holdings and sustaining minimum wage legislation,[103] took judicial notice of the demands for relief arising from the Depression. And, in upholding state legislation designed to protect workers in their efforts to organize and bargain collectively, the Court reconsidered the scope of an employer's liberty of contract, and recognized a correlative liberty of employees that state legislatures could protect.

To the extent that it acknowledged that liberty of the individual may be infringed by the coercive conduct of private individuals no less than by public officials, the Court in effect transformed the Due Process Clause into a source of encouragement to state legislatures to intervene affirmatively to mitigate the effects of such coercion. By such modification of its views, liberty, in the constitutional sense of freedom resulting from restraint upon government,

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[100] Named for attorney (later Justice) Louis Brandeis, who presented voluminous documentation to support the regulation of women's working hours in Muller v. Oregon, 208 U.S. 412 (1908).

[101] *E.g.*, Muller v. Oregon; Bunting v. Oregon.

[102] *See*, *e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[103] 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).

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was replaced by the civil liberty which an individual enjoys by virtue of the restraints which government, in his behalf, imposes upon his neighbors.

Laws Regulating Working Conditions and Wages.—As noted, even during the *Lochner* era, the Due Process Clause was construed as permitting enactment by the states of maximum hours laws applicable to women workers[104] and to all workers in specified lines of work thought to be physically demanding or otherwise worthy of special protection.[105] Similarly, the regulation of how wages were to be paid was allowed, including the form of payment,[106] its frequency,[107] and how such payment was to be calculated.[108] And, because of the almost plenary powers of the state and its municipal subdivisions to determine the conditions for work on public projects, statutes limiting the hours of labor on public works were also upheld at a relatively early date.[109] Further, states could prohibit the employment of persons under 16 years of age in dangerous occupations and require employers to ascertain whether their employees were in fact below that age.[110]

The regulation of mines represented a further exception to the *Lochner* era's anti-discrimination tally. As such health and safety regulation was clearly within a state's police power, a state's laws providing for mining inspectors (paid for by mine owners),[111] licens-

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[104] 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).

[105] *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).

[106] Statute requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages did not violate liberty of contract. Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901); Dayton Coal and Iron Co. v. Barton, 183 U.S. 23 (1901); Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914).

[107] Laws requiring railroads to pay their employees semimonthly, Erie R.R. v. Williams, 233 U.S. 685 (1914), or to pay them on the day of discharge, without abatement or reduction, any funds due them, St. Louis, I. Mt. & S.P. Ry. v. Paul, 173 U.S. 404 (1899), do not violate due process.

[108] Freedom of contract was held not to be infringed by an act requiring that miners, whose compensation was fixed on the basis of weight, be paid according to coal in the mine car rather than at a certain price per ton for coal screened after it has been brought to the surface, and conditioning such payment on the presence of no greater percentage of dirt or impurities than that ascertained as unavoidable by the State Industrial Commission. Rail Coal Co. v. Ohio Industrial Comm'n, 236 U.S. 338 (1915). *See also* McLean v. Arkansas, 211 U.S. 539 (1909).

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

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

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

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ing mine managers and mine examiners, and imposing liability upon mine owners for failure to furnish a reasonably safe place for workmen, were upheld during this period.[112] Other similar regulations that were sustained included laws requiring that underground passageways meet or exceed a minimum width,[113] that boundary pillars be installed between adjoining coal properties as a protection against flood in case of abandonment,[114] and that wash houses be provided for employees.[115]

One of the more significant negative holdings of the *Lochner* era was that states could not regulate how much wages were to be paid to employees.[116] As with the other working condition and wage issues, however, concern for the welfare of women and children seemed to weigh heavily on the justices, and restrictions on minimum wages for these groups were discarded in 1937.[117] Ultimately, the reasoning of these cases was extended to more broadly based minimum wage laws, as the Court began to offer significant deference to the states to enact economic and social legislation benefitting labor.

The modern theory regarding substantive due process and wage regulation was explained by Justice Douglas in 1952 in the following terms: "Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits. . . . But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."[118]

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

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

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

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

[116] 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).

[117] 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).

[118] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (sustaining a Missouri statute giving employees the right to absent themselves for four hours while the polls were open on election day without deduction of wages for their absence). The Court in *Day-Brite Lighting, Inc.* recognized that the legislation in question served as a form of wage control for men, which had previously found unconstitutional. Justice Douglas, however, wrote that "the protection of the right of suffrage under our scheme of things is basic and fundamental," and hence within the states' police power.

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The Justice further noted that "many forms of regulation reduce the net return of the enterprise. . . . Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases."[119]

Workers' Compensation Laws.—Workers' compensation laws also evaded the ravages of *Lochner*. The Court "repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee."[120] Accordingly, a state statute that provided an exclusive system to govern the liabilities of employers for disabling injuries and death caused by accident in certain hazardous occupations,[121] irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow-servants, was held not to vio-

[119] 342 U.S. at 424–25. *See also* Dean v. Gadsden Times Pub. Co., 412 U.S. 543 (1973) (sustaining statute providing that employee excused for jury duty should be entitled to full compensation from employer, less jury service fee).

[120] New York Cent. R.R. v. White, 243 U.S. 188, 200 (1917). "These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change." *Arizona Employers' Liability Cases*, 250 U.S. 400, 419–20 (1919).

[121] 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).

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late due process.[122] Likewise, an act that allowed an injured employee, though guilty of contributory negligence, an election of remedies between restricted recovery under a compensation law or full compensatory damages under the Employers' Liability Act, did not deprive an employer of his property without due process of law.[123] A variety of other statutory schemes have also been upheld.[124]

Even the imposition upon coal mine operators of the liability of compensating *former* employees who terminated work in the industry before passage of the law for black lung disabilities was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.[125] Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, *i.e.,* that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law. Consequently, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster.

Collective Bargaining.—During the *Lochner* era, liberty of contract, as translated into what one Justice labeled the *Allgeyer-Lochner-*

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[122] Nor does it violate due process to deprive an employee or his dependents of the higher damages that, in some cases, might be rendered under these doctrines. New York Central R.R. v. White, 243 U.S. 188 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

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

[124] Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549 (1911) (prohibiting contracts limiting liability for injuries and stipulating that acceptance of benefits under such contracts shall not constitute satisfaction of a claim); Alaska Packers Ass'n v. Industrial Accident Comm'n,, 294 U.S. 532 (1935) (forbidding contracts exempting employers hired-in-state from liability for injuries outside the state); Thornton v. Duffy, 254 U.S. 361 (1920) (required contribution to a state insurance fund by an employer even though employer had obtained protection from an insurance company under previous statutory scheme); Booth Fisheries v. Industrial Comm'n, 271 U.S. 208 (1926) (finding of fact of an industrial commission conclusive if supported by any evidence regardless of its preponderance, right to come under a workmen's compensation statute is optional with employer); Staten Island Ry. v. Phoenix Co., 281 U.S. 98 (1930) (wrongdoer is obliged to indemnify employer or the insurance carrier of the employer in the amount which the latter were required to contribute into special compensation funds); Sheehan Co. v. Shuler, 265 U.S. 371 (1924) (where an injured employee dies without dependents, employer or carrier required to make payments into special funds to be used for vocational rehabilitation or disability compensation of injured workers of other establishments); New York State Rys. v. Shuler, 265 U.S. 379 (1924) (same holding as above case); New York Cent. R.R. v. Bianc, 250 U.S. 596 (1919) (attorneys are not deprived of property or their liberty of contract by restriction imposed by the state on the fees they may charge in cases arising under the workmen's compensation law); Yeiser v. Dysart, 267 U.S. 540 (1925) (compensation need not be based exclusively on loss of earning power, and award authorized for injuries resulting in disfigurement of the face or head, independent of compensation for inability to work).

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

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Adair-Coppage doctrine,[126] was used to strike down legislation calculated to enhance the bargaining capacity of workers as against that already possessed by their employers.

[127] The Court did, however, on occasion sustain measures affecting the employment relationship, such as a statute requiring every corporation to furnish a departing employee a letter setting forth the nature and duration of the employee's service and the true cause for leaving.[128] In *Senn v. Tile Layers Union*,[129] however, the Court

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[126] 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."

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

[128] Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922). Added provisions that such letters should be on plain paper selected by the employee, signed in ink and sealed, and free from superfluous figures and words, were also sustained as not amounting to any unconstitutional deprivation of liberty and property. Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922). In conjunction with its approval of this statute, the Court also sanctioned judicial enforcement of a local policy rule which rendered illegal an agreement of several insurance companies having a local monopoly of a line of insurance, to the effect that no company would employ within two years anyone who had been discharged from, or left, the service of any of the others. On the ground that the right to strike is not absolute, the Court in a similar manner upheld a statute under which a labor union official was punished for having ordered a strike for the purpose of coercing an employer to pay a wage claim of a former employee. Dorchy v. Kansas, 272 U.S. 306 (1926).

[129] 301 U.S. 486 (1937).

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began to show a greater willingness to defer to legislative judgment as to the wisdom and need of such enactments.

The significance of *Senn* [130] was, in part, that the case upheld a statute that was not appreciably different from a statute voided five years earlier in *Truax v. Corrigan*.[131] In *Truax,* the Court had found that a statute forbidding injunctions on labor protest activities was unconstitutional as applied to a labor dispute involving picketing, libelous statements, and threats. The statute that the Court subsequently upheld in *Senn*, by contrast, authorized publicizing labor disputes, declared peaceful picketing and patrolling lawful, and prohibited the granting of injunctions against such conduct.[132] The difference between these statutes, according to the Court, was that the law in *Senn* applied to "peaceful" picketing only, whereas the law in *Truax* "was . . . applied to legalize conduct which was not simply peaceful picketing." Because the enhancement of job opportunities for members of the union was a legitimate objective, the state was held competent to authorize the fostering of that end by peaceful picketing, and the fact that the sustaining of the union in its efforts at peaceful persuasion might have the effect of preventing Senn from continuing in business as an independent entrepreneur was declared to present an issue of public policy exclusively for legislative determination.

Years later, after regulations protective of labor allowed unions to amass enormous economic power, many state legislatures attempted to control the abuse of this power, and the Court's newfound deference to state labor regulation was also applied to restrictions on unions. Thus, the Court upheld state prohibitions on racial discrimination by unions, rejecting claims that the measure interfered unlawfully with the union's right to choose its members, abridged its property rights, or violated its liberty of contract. Because the union "[held] itself out to represent the general business needs of employees" and functioned "under the protection of the State," the

[130] 301 U.S. 468 (1937).

[131] 257 U.S. 312 (1921).

[132] 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.

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union was deemed to have forfeited the right to claim exemption from legislation protecting workers against discriminatory exclusion.[133]

Similarly, state laws outlawing closed shops were upheld in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company*[134] and *AFL v. American Sash & Door Co.*[135] When labor unions attempted to invoke freedom of contract, the Court, speaking through Justice Black, announced its refusal "to return . . . to . . . [a] due process philosophy that has been deliberately discarded. . . . The due process clause," it maintained, does not "forbid a State to pass laws clearly designed to safeguard the opportunity of nonunion workers to get and hold jobs, free from discrimination against them because they are nonunion workers."[136]

And, in *UAW v. WERB*,[137] the Court upheld the Wisconsin Employment Peace Act, which had been used to proscribe unfair labor practices by a union. In *UAW*, the union, acting after collective bargaining negotiations had become deadlocked, had attempted to coerce an employer through calling frequent, irregular, and unannounced union meetings during working hours, resulting in a slowdown in production. "No one," declared the Court, can question "the State's power to police coercion by . . . methods" that involve "considerable injury to property and intimidation of other employees by threats."[138]

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[133] 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.

[134] 335 U.S. 525 (1949).

[135] 335 U.S. 538 (1949).

[136] 335 U.S. at 534, 537. In a lengthy opinion, in which he registered his concurrence with both decisions, Justice Frankfurter set forth extensive statistical data calculated to prove that labor unions not only were possessed of considerable economic power but by virtue of such power were no longer dependent on the closed shop for survival. He would therefore leave to the legislatures the determination "whether it is preferable in the public interest that trade unions should be subjected to state intervention or left to the free play of social forces, whether experience has disclosed 'union unfair labor practices,' and if so, whether legislative correction is more appropriate than self-discipline and pressure of public opinion. . . ." Id. at 538, 549–50.

[137] 336 U.S. 245 (1949).

[138] 336 U.S. at 253. *See also* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (upholding state law forbidding agreements in restraint of trade as applied to union ice peddlers picketing wholesale ice distributor to induce the latter not to sell to nonunion peddlers). Other cases regulating picketing are treated under the First Amendment topics, "Picketing and Boycotts by Labor Unions" and "Public Issue Picketing and Parading," *supra*.

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Regulation of Business Enterprises: Price Controls

In examining whether the Due Process Clause allows the regulation of business prices, the Supreme Court, almost from the inception of the Fourteenth Amendment, has devoted itself to the examination of two questions: (1) whether the clause restricted such regulation to certain types of business, and (2) the nature of the regulation allowed as to those businesses.

Types of Businesses That May be Regulated.—For a brief interval following the ratification of the Fourteenth Amendment, the Supreme Court found the Due Process Clause to impose no substantive restraint on the power of states to fix rates chargeable by any industry. Thus, in *Munn v. Illinois*,[139] the first of the "*Granger Cases*," maximum charges established by a state for Chicago grain elevator companies were challenged, not as being confiscatory in character, but rather as a regulation beyond the power of any state agency to impose.[140] The Court, in an opinion that was largely *dictum*, declared that the Due Process Clause did not operate as a safeguard against oppressive rates, and that, if regulation was permissible, the severity of it 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, and by 1890[141] it had fully converted the Due Process Clause into a restriction on the power of state agencies to impose rates that, in a judge's estimation, were arbitrary or unreasonable. This state of affairs continued for more than fifty years.

Prior to 1934, unless a business was "affected with a public interest," control of its prices, rates, or conditions of service was viewed as an unconstitutional deprivation of liberty and property without due process of law. During the period of its application, however, the phrase, "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 that 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:[142] "(1) Those [businesses] which are carried on under the authority of a public grant of privileges which

[139] 94 U.S. 113 (1877). *See also* Davidson v. New Orleans, 96 U.S. 97 (1878); Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877);

[140] 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.

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

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

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either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Through application of this formula, the Court sustained state laws regulating charges made by grain elevators,[143] stockyards,[144] and tobacco warehouses,[145] as well as fire insurance rates[146] and commissions paid to fire insurance agents.[147] The Court also voided statutes regulating business not "affected with a public interest," including state statutes fixing the price at which gasoline may be sold,[148] regulating the prices for which ticket brokers may resell theater tickets,[149] and limiting competition in the manufacture and sale of ice through the withholding of licenses to engage in such business.[150]

In the 1934 case of *Nebbia v. New York*,[151] however, the Court finally shelved the concept of "a business affected with a public interest,"[152] upholding, by a vote of five-to-four, a depression-induced

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[143] 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).

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

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

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

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

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

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

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

[151] 291 U.S. 502 (1934).

[152] 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

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New York statute fixing fluid milk prices. "Price control, like any other form of regulation, is 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."[153] 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 is to be viewed merely as an exercise by the government of its police power, and as such is subject only to the restrictions that due process imposes on arbitrary interference with liberty and property. "The due process clause makes no mention of sales or of prices. . . ."[154]

Having thus concluded that it is no longer the nature of the business that determines the validity of a price regulation, the Court had little difficulty in upholding a state law prescribing the maximum commission that private employment agencies may charge. Rejecting contentions that the need for such protective legislation had not been shown, the Court, in *Olsen v. Nebraska ex rel. Western Reference and Bond Ass'n*[155] 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.[156]

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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."

[153] 291 U.S. at 502. Older decisions overturning price regulation were now viewed as resting upon this basis, *i.e.*, that due process was violated because the laws were arbitrary in their operation and effect.

[154] 291 U.S. at 531, 532. Justice McReynolds, dissenting, labeled the controls imposed by the challenged statute as a "fanciful scheme . . . to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold!" 291 U.S. at 558. Intimating that the New York statute was as efficacious as a safety regulation that required "householders to pour oil on their roofs as a means of curbing the spread of fire when discovered in the neighborhood," Justice McReynolds insisted that "this Court must have regard to the wisdom of the enactment," and must "decide whether the means proposed have reasonable relation to something within legislative power." 291 U.S. at 556.

[155] 313 U.S. 236, 246 (1941).

[156] The older case of Ribnik v. McBride, 277 U.S. 350 (1928), which had invalidated similar legislation upon the now obsolete concept of a "business affected with a public interest," was expressly overruled. Adams v. Tanner, 244 U.S. 590 (1917),

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Substantive Review of Price Controls.—Ironically, private businesses, once they had been found subject to price regulation, seemed to have less protection than public entities. Thus, unlike operators of public utilities who, in return for a government grant of virtually monopolistic privileges must provide continuous service, proprietors of other businesses receive no similar special advantages and accordingly are unrestricted in their right to liquidate and close. Owners of ordinary businesses, therefore, are at liberty to escape the consequences of publicly imposed charges by dissolution, and have been found less in need of protection through judicial review. Thus, case law upholding challenges to price controls deals predominantly with governmentally imposed rates and charges for public utilities.

In 1886, Chief Justice Waite, in the *Railroad Commission Cases*,[157] warned that the "power to regulate is not a power to destroy, and . . . the State cannot . . . do that which in law amounts to a taking of property for public use without just compensation, or without due process of law." In other words, a confiscatory rate could not be imposed by government on a regulated entity. By treating "due process of law" and "just compensation" as equivalents,[158] the Court 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 power and became one of eminent domain. Nevertheless, even this doctrine proved inadequate to satisfy public utilities, as it allowed courts to intervene only to prevent imposition of a confiscatory rate, *i.e.,* a rate so low as to be productive of a loss and to amount to taking of property without just compensation. The utilities sought nothing less than a judicial acknowledgment that courts could review the "reasonableness" of legislative rates.

Although as late as 1888 the Court doubted that it possessed the requisite power to challenge this doctrine,[159] it finally acceded to the wishes of the utilities in 1890 in *Chicago, M. & St. P. Railway v. Minnesota*.[160] In this case, the Court ruled that "[t]he question of the reasonableness of a rate . . . , 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

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's hearing argument on it.

[157] 116 U.S. 307, 331 (1886).

[158] This was contrary to its earlier holding in Davidson v. New Orleans, 96 U.S. 97 (1877).

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

[160] 134 U.S. 418, 458 (1890).

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is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law. . . ."

Although the Court made a last-ditch attempt to limit the ruling of *Chicago, M. & St. P. Railway v. Minnesota* to rates fixed by a commission as opposed to rates imposed by a legislature,[161] the Court in *Reagan v. Farmers' Loan & Trust Co.*[162] finally removed all lingering doubts over the scope of judicial intervention. In *Reagan*, the Court declared that, "if a carrier . . . attempted to charge a shipper an unreasonable sum," the Court, in accordance with common law principles, would pass on the reasonableness of its rates, and has "jurisdiction . . . to award the shipper any amount exacted . . . in excess of a reasonable rate . . . . The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates."[163] Reiterating virtually the same principle in *Smyth v. Ames*,[164] the 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 further determines whether the rate permits the utility to earn a fair return on a fair valuation of its investment.

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

[162] 154 U.S. 362 (1894).

[163] 154 U.S. at 397. 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.

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

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Early Limitations on Review.—Even while reviewing the reasonableness of rates, the Court recognized some limits on judicial review. As early as 1894, the Court asserted that "[t]he courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still 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."[165] One can also infer from these early holdings a distinction between unreviewable fact questions that relate only to the wisdom or expediency of a rate order, and reviewable factual determinations that bear on a commission's power to act.[166]

Further, the Court placed various obstacles in the path of the complaining litigant. Thus, not only must a person challenging a rate assume the burden of proof,[167] but he must present a case of "manifest constitutional invalidity."[168] And, if, notwithstanding this effort, the question of confiscation remains in doubt, no relief will be granted.[169] Moreover, even the Court was inclined to withhold judgment on the application of a rate until its practical effect could be surmised.[170]

In the course of time this distinction solidified. Thus, the Court initially adopted the position that it would not disturb findings of

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[165] Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 397 (1894). And later, in 1910, the Court made a similar observation that courts may not, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside" an order of the commission merely because such power was unwisely or expediently exercised. ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910). This statement, made in the context of federal ratemaking, appears to be equally applicable to judicial review of state agency actions.

[166] This distinction was accorded adequate emphasis by the Court in Louisville & Nashville R.R. v. Garrett, 231 U.S. 298, 310–13 (1913), in which it declared that "the appropriate question for the courts" is simply whether a "commission," in establishing a rate, "acted within the scope of its power" and did not violate "constitutional rights . . . by imposing confiscatory requirements." The carrier contesting the rate was not entitled to have a court also pass upon a question of fact regarding the reasonableness of a higher rate the carrier charged prior to the order of the commission. All that need concern a court, it said, is the fairness of the proceeding 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.

[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] Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909). However, a public utility that has petitioned a commission for relief from allegedly confiscatory rates need not await indefinitely for the commission's decision before applying to a court for equitable relief. Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926).

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fact insofar as such findings were supported by substantial evidence. For instance, in *San Diego Land Company v. National City*,[171] the Court declared that "the courts cannot, after [a legislative body] has fairly and fully investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. . . . [J]udicial 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 regulations 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, later, in a similar case,[172] the Court expressed even more clearly its reluctance to reexamine ordinary factual determinations, writing, "we do not feel bound to reexamine and weigh all the evidence . . . or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached." [173]

These standards of review were, however, abruptly rejected by the Court in *Ohio Valley Water Co. v. Ben Avon Borough* [174] as being no longer sufficient to satisfy the requirements of due process, ushering in a long period during which courts substantively evaluated the reasonableness of rate settings. The U.S. Supreme Court

[171] 174 U.S. 739, 750, 754 (1899). *See also* Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 433 (1913).

[172] 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).

[173] Moreover, in reviewing orders of the Interstate Commerce Commission, the Court, at least in earlier years, chose to be guided by approximately the same standards it had originally formulated for examining regulations of state commissions. The following excerpt from its holding in ICC v. Union Pacific R.R., 222 U.S. 541, 547–48 (1912) represents an adequate summation of the law as it stood prior to 1920: "[Q]uestions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that . . . the rate is so low as to be confiscatory . . . ; or if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or . . . if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling . . . [The Commission's] conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision . . . can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *See also* ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910).

[174] 253 U.S. 287 (1920).

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in *Ben Avon* concluded that the Pennsylvania "Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment . . . ."[175] 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."[176]

History of the Valuation Question.—For almost fifty years the Court wandered through a maze of conflicting formulas and factors for valuing public service corporation property, including "fair value,"[177] "reproduction cost,"[178] "prudent investment,"[179] "depre-

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[175] 253 U.S. at 289 (the "question of confiscation" was the question whether the rates set by the Public Service Commission were so low as to constitute confiscation). 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. In injunctive proceedings, evidence is freshly introduced, whereas in the cases received on appeal from state courts, the evidence is found within the record.

[176] 253 U.S. at 289. Without departing from the ruling previously enunciated in Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298 (1913), that the failure of a state to grant a statutory right of judicial appeal from a commission's regulation does not violate due process as long as relief is obtainable by a bill in equity for injunction, the Court also held that the alternative remedy of injunction expressly provided by state law did not afford an adequate opportunity for testing a confiscatory rate order. It conceded the principle stressed by the dissenting Justices that, "[w]here a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review." 253 U.S. at 295.

[177] Smyth v. Ames, 169 U.S. 466, 546–47 (1898) ("fair value" necessitated consideration of original cost of construction, permanent improvements, amount and market value of bonds and stock, replacement cost, probable earning capacity, and operating expenses).

[178] Various valuation cases emphasized reproduction costs, *i.e.*, the present as compared with the original cost of construction. *See*, *e.g.*, San Diego Land Co. v. National City, 174 U.S. 739, 757 (1899); San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 443 (1903).

[179] Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291–92, 302, 306–07 (1923) (Brandeis, J., concurring) (cost includes both operating expenses and capital charges, *i.e.*, interest for the use of capital, allowance for the risk incurred, funds to attract capital). This method would require "adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return." As a method of valuation, the prudent investment theory was not accorded any acceptance until the Depression of the 1930s. The sharp decline in prices that occurred during this period doubtless contributed to the loss of affection for reproduction costs. In Los Angeles Gas Co. v. Railroad

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ciation,"[180] "going concern value and good will,"[181] "salvage value,"[182] and "past losses and gains,"[183] only to emerge from this maze in 1944 at a point not very far removed from *Munn v. Illinois* and its deference to rate-making authorities.[184] By holding in *FPC v. Natural Gas Pipeline Co.*[185] that "[t]he Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas," and in *FPC v. Hope Natural Gas Co.*[186] that "it is the result reached not the method employed which is controlling, . . . [that] [i]t is not the theory but the impact of the rate order which

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.

[180] Knoxville v. Water Co., 212 U.S. 1, 9–10 (1909) (considering depreciation as part of cost). Notwithstanding its early recognition as an allowable item of deduction in determining value, depreciation continued to be the subject of controversy arising out of the difficulty of ascertaining it and of computing annual allowances to cover the same. Indicative of such controversy was the disagreement as to whether annual allowances shall be in such amount as will permit the replacement of equipment at current costs, *i.e.*, present value, or at original cost. In the FPC v. Hope Natural Gas Co. case, 320 U.S. 591, 606 (1944), the Court reversed United Railways v. West, 280 U.S. 234, 253–254 (1930), insofar as that holding rejected original cost as the basis of annual depreciation allowances.

[181] Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 165 (1915) (finding "going concern value" in an assembled and established plant, doing business and earning money, over one not thus advanced). Franchise value and good will, on the other hand, have been consistently excluded from valuation; the latter presumably because a utility invariably enjoys a monopoly and consumers have no choice in the matter of patronizing it. The latter proposition has been developed in the following cases: Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909); Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 163–64 (1915); Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922); Los Angeles Gas Co. v. Railroad Comm'n, 289 U.S. 287, 313 (1933).

[182] Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 562, 564 (1945) (where a street-surface railroad had lost all value except for scrap or salvage it was permissible for a commission to consider the price at which the utility offered to sell its property to a citizen); Denver v. Denver Union Water Co., 246 U.S. 178 (1918) (where water company franchise has expired, but where there is no other source of supply, its plant should be valued as actually in use rather than at what the property would bring for some other use in case the city should build its own plant).

[183] FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942) ("The Constitution [does not] require that the losses of . . . [a] business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned"). Nor can past losses be used to enhance the value of the property to support a claim that rates for the future are confiscatory. Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922), any more than profits of the past can be used to sustain confiscatory rates 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).

[184] 94 U.S. 113 (1877).

[185] 315 U.S. 575, 586 (1942).

[186] 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.

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counts, [and that] [i]f 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.[187] Without surrendering the judicial power to declare rates unconstitutional on the basis of a substantive deprivation of due process,[188] 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."[189]

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

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

[188] 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 "[t]he 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 and not the legislature. Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U.S. 418 [1890]."

[189] 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), in which 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, labeled 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).

The Court reaffirmed *Hope Natural Gas's* emphasis on the bottom line: "The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public." Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989) (rejecting takings challenge to Pennsylvania rule preventing utilities from amortizing costs of canceled nuclear plants).

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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."[190]

Regulation of Public Utilities and Common Carriers

In General.—Because of the nature of the business they carry on and the public's interest in it, public utilities and common carriers are subject to state regulation, whether exerted directly by legislatures or under authority delegated to administrative bodies.[191] But because the property of these entities remains under the full protection of the Constitution, it follows that due process is violated when the state regulates in a manner that infringes the right of ownership in what the Court considers to be an "arbitrary" or "unreasonable" way.[192] Thus, when a street railway company lost its franchise, the city could not simply take possession of its equipment,[193] although it could 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.[194] Likewise, a city wanting to establish a lighting system of its own may not remove, without compensation, the fixtures of a lighting company already occupying the streets under a franchise,[195] although a city may compete with a company that has no exclusive charter.[196] However, a municipal ordinance that demanded, as a condition for placing poles and conduits in city streets, that a telegraph company carry the

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[190] FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) (citing Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345–46 (1892); and Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291 (1923)).

[191] 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 Co., 211 U.S. 210 (1908) ; Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919).

[192] 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).

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

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

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

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

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city's wires free of charge, and that required that conduits be moved at company expense, was constitutional.[197]

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 that has elected to enter a state that requires that it operate its local private pipe line as a common carrier. Such a foreign corporation is viewed as having waived its constitutional right to be secure against the imposition of conditions that amount to a taking of property without due process of law.[198]

Compulsory Expenditures: Grade Crossings, and the Like.—Generally, the enforcement of uncompensated obedience to a regulation for the public health and safety is not an unconstitutional taking of property in violation of due process.[199] Thus, where a water company laid its lines on an ungraded street, and the applicable rule at the time of the granting of its charter compelled the company to furnish connections at its own expense to one residing on such a street, due process is not violated.[200] Or, where a gas company laid its pipes under city streets, it may validly be obligated to assume the cost of moving them to accommodate a municipal drainage system.[201] Or, railroads may be required to help fund the elimination of grade crossings, even though commercial highway users, who make no contribution whatsoever, benefit from such improvements.

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

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

[199] Norfolk Turnpike Co. v. Virginia, 225 U.S. 264 (1912) (requiring a turnpike company to suspend tolls until the road is put in good order does not violate due process of law, notwithstanding that present patronage does not yield revenue sufficient to maintain the road in proper condition); International Bridge Co. v. New York, 254 U.S. 126 (1920) (in the absence of proof that the addition will not yield a reasonable return, a railroad bridge company is not deprived of its property when it is ordered to widen its bridge by inclusion of a pathway for pedestrians and a roadway for vehicles.); Chicago, B. & Q. R.R. v. Nebraska, 170 U.S. 57 (1898) (railroads may be required to repair viaduct under which they operate); Chicago, B. & Q. Ry. v. Drainage Comm'n, 200 U.S. 561 (1906) (reconstruct a bridge or provide means for passing water for drainage through their embankment); Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915) (drainage requirements); Lake Shore & Mich. So. Ry. v. Clough, 242 U.S. 375 (1917) (drainage requirements); Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919) (requirement to sprinkle street occupied by railroad.). *But see* Chicago, St. P., Mo. & O. Ry. v. Holmberg, 282 U.S. 162 (1930) (due process violated by a requirement that an underground cattle-pass is be constructed, not as a safety measure but as a convenience to farmers).

[200] Consumers' Co. v. Hatch, 224 U.S. 148 (1912). However, if pipe and telephone lines are located on a right of way owned by a pipeline company, the latter cannot, without a denial of due process, be required to relocate such equipment at its own expense. Panhandle Eastern Pipeline Co. v. Highway Comm'n, 294 U.S. 613 (1935).

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

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Although the power of the state in this respect is not unlimited, and an "arbitrary" and "unreasonable" imposition on these businesses may be set aside, the Court's modern approach to substantive due process analysis makes this possibility far less likely than it once was. For instance, a 1935 case invalidated a requirement that railroads share 50% of the cost of grade separation, irrespective of the value of such improvements to the railroad, suggesting that railroads could not be required to subsidize competitive transportation modes.[202] But in 1953 the Court distinguished this case, ruling that the costs of grade separation improvements need not be allocated solely on the basis of benefits that would accrue to railroad property.[203] Although the Court cautioned that "allocation of costs must be fair and reasonable," it was deferential to local governmental decisions, stating that, in the exercise of the police power to meet transportation, safety, and convenience needs of a growing community, "the cost of such improvements *may be* allocated all to the railroads."[204]

Compellable Services.—A state may require that common carriers such as railroads provide services in a manner suitable for the convenience of the communities they serve.[205] Similarly, a primary duty of a public utility is to serve all those who desire the service it renders, and so it follows that a company cannot pick and choose to serve only those portions of its territory that it finds most profitable. Therefore, compelling a gas company to continue serving specified cities as long as it continues to do business in other parts of the state does not constitute an unconstitutional depriva-

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[202] 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).

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

[204] 346 U.S. at 352.

[205] Atchison, T. & S. F. Ry. v. Public Utility Comm'n, 346 U.S. at 394–95 (1953). *See* Minneapolis & St. L. R.R. v. Minnesota, 193 U.S. 53 (1904) (obligation to establish stations at places convenient for patrons); Gladson v. Minnesota, 166 U.S. 427 (1897) (obligation to stop all their intrastate trains at county seats); Missouri Pac. Ry. v. Kansas, 216 U.S. 262 (1910) (obligation to run a regular passenger train instead of a mixed passenger and freight train); Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603 (1917) (obligation to furnish passenger service on a branch line previously devoted exclusively to carrying freight); Lake Erie & W.R.R. v. Public Util. Comm'n, 249 U.S. 422 (1919) (obligation to restore a siding used principally by a particular plant but available generally as a public track, and to continue, even though not profitable by itself, a sidetrack); Western & Atlantic R.R. v. Public Comm'n, 267 U.S. 493 (1925) (same); Alton R.R. v. Illinois Commerce Comm'n, 305 U.S. 548 (1939) (obligation for upkeep of a switch track leading from its main line to industrial plants.). *But see* Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910) (requirement, without indemnification, to install switches on the application of owners of grain elevators erected on right-of-way held void).

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tion.[206] Likewise, requiring a railway to continue the service of a branch or part of a line is acceptable, even if that portion of the operation is an economic drain.[207] A company, however, cannot be compelled to operate its franchise at a loss, but must be at liberty to surrender it and discontinue operations.[208]

As the standard for regulation of a utility is whether a particular directive is reasonable, the question of whether a state order requiring the provision of services is reasonable could include a consideration of the likelihood of pecuniary loss, the nature, extent and productiveness of the carrier's intrastate business, the character of the service required, the public need for it, and its effect upon service already being rendered.[209] An example of the kind of regulation where the issue of reasonableness would require an evaluation of numerous practical and economic factors is one that requires railroads to lay tracks and otherwise provide the required equipment to facilitate the connection of separate track lines.[210]

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[206] 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).

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

[208] 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).

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

[210] "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 use 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 volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier." Washington ex rel. Oregon R.R. & Nav. Co. v. Fairchild, 224 U.S. 510, 528–29 (1912). *See also* Michigan Cent. R.R. v. Michigan R.R. Comm'n, 236 U.S. 615 (1915); Seaboard Air Line R.R. v. Georgia R.R. Comm'n, 240 U.S. 324, 327 (1916).

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Generally, regulation of a utility's service to commercial customers attracts less scrutiny[211] than do regulations intended to facilitate the operations of a competitor,[212] and governmental power to regulate in the interest of safety has long been conceded.[213] Requirements for service having no substantial relation to a utility's regulated function, however, have been voided, such as requiring railroads to maintain scales to facilitate trading in cattle, or prohibiting letting down an unoccupied upper berth on a rail car while the lower berth was occupied.[214]

Imposition of Statutory Liabilities and Penalties Upon Common Carriers.—Legislators have considerable latitude to impose legal burdens upon common carriers, as long as the carriers are not

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[211] Due process is not denied when two carriers, who wholly own and dominate a small connecting railroad, are prohibited from exacting higher charges from shippers accepting delivery over said connecting road than are collected from shippers taking delivery at the terminals of said carriers. Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass'n, 247 U.S. 490 (1918). Nor are railroads denied due process when they are forbidden to exact a greater charge for a shorter distance than for a longer distance. Louisville & Nashville R.R. v. Kentucky, 183 U.S. 503, 512 (1902); Missouri Pacific Ry. v. McGrew Coal Co., 244 U.S. 191 (1917). Nor is it "unreasonable" or "arbitrary" to require a railroad to desist from demanding advance payment on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment. Wadley Southern Ry. v. Georgia, 235 U.S. 651 (1915).

[212] Although a carrier is under a duty to accept goods tendered at its station, it cannot be required, upon payment simply for the service of carriage, to accept cars offered at an arbitrary connection point near its terminus by a competing road seeking to reach and use the former's terminal facilities. Nor may a carrier be required to deliver its cars to connecting carriers without adequate protection from loss or undue detention or compensation for their use. Louisville & Nashville R.R. v. Stock Yards Co., 212 U.S. 132 (1909). But a carrier may be compelled to interchange its freight cars with other carriers under reasonable terms, Michigan Cent. R.R. v. Michigan R.R. Comm'n, 236 U.S. 615 (1915), and to accept cars already loaded and in suitable condition for reshipment over its lines to points within the state. Chicago, M. & St. P. Ry. v. Iowa, 233 U.S. 334 (1914).

[213] The following cases all concern the operation of railroads: Railroad Co. v. Richmond, 96 U.S. 521 (1878) (prohibition against operation on certain streets); Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548 (1914) (restrictions on speed and operations in business sections); Great Northern Ry. v. Minnesota ex rel. Clara City, 246 U.S. 434 (1918) (restrictions on speed and operations in business section); Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919) (or removal of a track crossing at a thoroughfare); Nashville, C. & St. L. Ry. v. White, 278 U.S. 456 (1929) (compelling the presence of a flagman at a crossing notwithstanding that automatic devices might be cheaper and better); Nashville, C. & St. L. Ry. v. Alabama, 128 U.S. 96 (1888) (compulsory examination of employees for color blindness); Chicago, R.I. & P. Ry. v. Arkansas, 219 U.S. 453 (1911) (full crews on certain trains); St. Louis I. Mt. & So. Ry. v. Arkansas, 240 U.S. 518 (1916) (same); Missouri Pacific R.R. v. Norwood, 283 U.S. 249 (1931) (same); Firemen v. Chicago, R.I. & P.R.R., 393 U.S. 129 (1968) (same); Atlantic Coast Line R.R. v. Georgia, 234 U.S. 280 (1914) (specification of a type of locomotive headlight); Erie R.R. v. Solomon, 237 U.S. 427 (1915) (safety appliance regulations); New York, N.H. & H. R.R. v. New York, 165 U.S. 628 (1897) (prohibition on the heating of passenger cars from stoves or furnaces inside or suspended from the cars).

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

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precluded from shifting such burdens. Thus, a statute may make an initial rail carrier,[215] or the connecting or delivering carrier,[216] liable to the shipper for the nondelivery of goods which results from the fault of another, as long as the carrier has a subrogated right to proceed against the carrier at fault. Similarly, a railroad may be held responsible for damages to the owner of property injured by fire caused by locomotive engines, as the statute also granted the railroad an insurable interest in such property along its route, allowing the railroad to procure insurance against such liability.[217] Equally consistent with the requirements of due process are enactments imposing on all common carriers a penalty for failure to settle claims for freight lost or damaged in shipment within a reasonable specified period.[218]

The Court has, however, established some limits on the imposition of penalties on common carriers. During the *Lochner* era, the Court invalidated an award of $500 in liquidated damages plus reasonable attorney's fees imposed on a carrier that had collected transportation charges in excess of established maximum rates as disproportionate. The Court also noted that the penalty was exacted under conditions not affording the carrier an adequate opportunity to test the constitutionality of the rates before liability attached.[219] Where the carrier did have an opportunity to challenge the reasonableness of the rate, however, the Court indicated that the validity of the penalty imposed need not be determined by comparison with the amount of the overcharge. Inasmuch as a penalty is imposed as punishment for violation of law, the legislature may adjust its amount to the public wrong rather than the private injury, and the only limitation which the Fourteenth Amendment imposes is that the penalty prescribed shall not be "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable."[220]

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

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

[217] St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1 (1897).

[218] Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922) (penalty imposed if claimant subsequently obtained by suit more than the amount tendered by the railroad). *But see* Kansas City Ry. v. Anderson, 233 U.S. 325 (1914) (levying double damages and an attorney's fee upon a railroad for failure to pay damage claims only where the plaintiff had not demanded more than he recovered in court); St. Louis, I. Mt. & So. Ry. v. Wynne, 224 U.S. 354 (1912) (same); Chicago, M. & St. P. Ry. v. Polt, 232 U.S. 165 (1914) (same).

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

[220] In accordance with this standard, a statute granting an aggrieved passenger (who recovered $100 for an overcharge of 60 cents) the right to recover in a civil suit not less than $50 nor more than $300 plus costs and a reasonable attorney's

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Regulation of Businesses, Corporations, Professions, and Trades

Generally.—States may impose significant regulations on businesses without violating due process. "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. . . . Statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State's competency."[221] Still, the fact that the state reserves the power to amend or repeal corporate charters does not support the taking of corporate property without due process of law, as termination of the corporate structure merely results in turning over corporate property to the stockholders after liquidation.[222]

Foreign (out-of-state) corporations also enjoy protection under the Due Process Clauses, but this does not grant them an unconditional right to enter another state or to continue to do business in it. Language in some early cases suggested that states had plenary power to exclude or to expel a foreign corporation.[223] This power is clearly limited by the modern doctrine of the "negative" commerce clause, which constrains states' authority to discriminate against foreign corporations in favor of local commerce. Still, it has always been acknowledged that states may subject corporate entry or continued operation to reasonable, non-discriminatory conditions. Thus, for instance, a state law that requires the filing of articles with a local official as a prerequisite to the validity of conveyances of local realty to such corporations does not violate due process.[224] In addition, statutes that require a foreign insurance company to maintain reserves computed by a specific percentage of premiums (includ-

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fee was upheld. St. Louis, I. Mt. & So. Ry. v. Williams, 251 U.S. 63, 67 (1919). *See also* Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885) (statute requiring railroads to erect and maintain fences and cattle guards subject to award of double damages for failure to so maintain them upheld); Minneapolis & St. L. Ry. v. Beckwith, 129 U.S. 26 (1889) (same); Chicago, B. & Q.R.R. v. Cram, 228 U.S. 70 (1913) (required payment of $10 per car per hour to owner of livestock for failure to meet minimum rate of speed for delivery upheld). *But see* Southwestern Tel. Co. v. Danaher, 238 U.S. 482 (1915) (fine of $3,600 imposed on a telephone company for suspending service of patron in arrears in accordance with established and uncontested regulations struck down as arbitrary and oppressive).

[221] 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).

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

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

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

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ing membership fees) received in all states,[225] or to consent to direct actions filed against it by persons injured in the host state, are valid.[226]

Laws Prohibiting Trusts, Restraint of Trade or Fraud.—Even during the period when the Court was invalidating statutes under liberty of contract principles, it recognized the right of states to prohibit combinations in restraint of trade.[227] Thus, states could prohibit agreements to pool and fix prices, divide net earnings, and prevent competition in the purchase and sale of grain.[228] Further, the Court held that the Fourteenth Amendment does not preclude a state from adopting a policy prohibiting competing corporations from combinations, even when such combinations were induced by good intentions and from which benefit and no injury have resulted.[229] The Court also upheld a variety of statutes prohibiting activities taken by individual businesses intended to harm competitors[230] or restrain the trade of others.[231]

Laws and ordinances tending to prevent frauds by requiring honest weights and measures in the sale of articles of general consump-

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

[226] Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954). Similarly a statute requiring a foreign hospital corporation to dispose of farm land not necessary to the conduct of their business was invalid even though the hospital, because of changed economic conditions, was unable to recoup its original investment from the sale. New Orleans Debenture Redemption Co. v. Louisiana, 180 U.S. 320 (1901).

[227] *See*, *e.g.*, Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910) (statute prohibiting retail lumber dealers from agreeing not to purchase materials from wholesalers selling directly to consumers in the retailers' localities upheld); Aikens v. Wisconsin, 195 U.S. 194 (1904) (law punishing combinations for "maliciously" injuring a rival in the same business, profession, or trade upheld).

[228] 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.

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

[230] Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912) (prohibition on intentionally destroying competition of a rival business by making sales at a lower rate, after considering distance, in one section of the State than in another upheld). *But cf.* Fairmont Co. v. Minnesota, 274 U.S. 1 (1927) (invalidating on liberty of contract grounds similar statute punishing dealers in cream who pay higher prices in one locality than in another, the Court finding no reasonable relation between the statute's sanctions and the anticipated evil).

[231] Old Dearborn Co. v. Seagram Corp., 299 U.S. 183 (1936) (prohibition of contracts requiring that commodities identified by trademark will not be sold by the vendee or subsequent vendees except at prices stipulated by the original vendor upheld); Pep Boys v. Pyroil, 299 U.S. 198 (1936) (same); Safeway Stores v. Oklahoma Grocers, 360 U.S. 334 (1959) (application of an unfair sales act to enjoin a retail grocery company from selling below statutory cost upheld, even though competitors were selling at unlawful prices, as there is no constitutional right to employ retaliation against action outlawed by a state and appellant could enjoin illegal activity of its competitors).

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tion have long been considered lawful exertions of the police power.[232] 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.[233] 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.[234]

A variety of other business regulations that tend to prevent fraud have withstood constitutional scrutiny. Thus, a state may require that the nature of a product be fairly set forth, despite the right of a manufacturer to maintain secrecy as to his compounds.[235] Or, a statute providing that the purchaser of harvesting or threshing machinery for his own use shall have a reasonable time after delivery for inspecting and testing it, and may rescind the contract if the machinery does not prove reasonably adequate, does not violate the Due Process Clause.[236] Further, 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 the good repute of the applicants, and permit, subject to judicial review of his findings, revocation of the license.[237]

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[232] Schmidinger v. City of Chicago, 226 U.S. 578, 588 (1913) (citing McLean v. Arkansas, 211 U.S. 539, 550 (1909)). *See* Hauge v. City of Chicago, 299 U.S. 387 (1937) (municipal ordinance requiring that commodities sold by weight be weighed by a public weighmaster within the city valid even as applied to one delivering coal from state-tested scales at a mine outside the city); Lemieux v. Young, 211 U.S. 489 (1909) (statute requiring merchants to record sales in bulk not made sin the regular course of business valid); Kidd, Dater Co. v. Musselman Grocer Co., 217 U.S. 461 (1910) (same).

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

[234] Pacific States Co. v. White, 296 U.S. 176 (1935) (administrative order prescribing the dimensions, form, and capacity of containers for strawberries and raspberries is not arbitrary as the form and dimensions bore a reasonable relation to the protection of the buyers and the preservation in transit of the fruit); Schmidinger v. City of Chicago, 226 U.S. 578 (1913) (ordinance fixing standard sizes is not unconstitutional); Armour & Co. v. North Dakota, 240 U.S. 510 (1916) (law that lard not sold in bulk should be put up in containers holding one, three, or five pounds weight, or some whole multiple of these numbers valid); Petersen Baking Co. v. Bryan, 290 U.S. 570 (1934) (regulations that imposed a rate of tolerance for the minimum weight for a loaf of bread upheld); *But cf.* Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (tolerance of only two ounces in excess of the minimum weight per loaf is unreasonable, given finding that it was impossible to manufacture good bread without frequently exceeding the prescribed tolerance).

[235] 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).

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

[237] 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).

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The power to regulate also includes the power to forbid certain business practices. Thus, a state may forbid the giving of options to sell or buy any grain or other commodity at a future time.[238] It may also forbid sales on margin for future delivery,[239] 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.[240] A prohibitive license fee upon the use of trading stamps is not unconstitutional,[241] nor is imposing criminal penalties for any deductions by purchasers from the actual weight of grain, hay, seed, or coal purchased, even when such deduction is made under a claim of custom or under a rule of a board of trade.[242]

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.[243] A variety of regulations have been upheld over the years. For example, state banks are not deprived of property without due process by a statute subjecting them to assessments for a depositors' guaranty fund.[244] Also, a law requiring savings banks to turn over deposits inactive for thirty years to the state (when the depositor cannot be found), with provision for payment to the depositor or his heirs on establishment of the right, does not effect an invalid taking of the property of said banks; nor does a statute requiring banks to turn over to the protective custody of the state deposits that, depending on the nature of the deposit, have been inactive ten or twenty-five years.[245]

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

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

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

[241] 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).

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

[243] Doty v. Love, 295 U.S. 64 (1935) (rights of creditors in an insolvent bank not violated by a later statute permitting re-opening under a reorganization plan approved by the court, the liquidating officer, and by three-fourths of the creditors); Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649 (1923) (Federal Reserve bank not unlawfully deprived of business rights of liberty of contract by a law which allows state banks to pay checks in exchange when presented by or through a Federal Reserve bank, post office, or express company and when not made payable otherwise by a maker).

[244] 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).

[245] 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 pre-existing statute, it cannot be said that the new statute, in suspending the right of a deposi-

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A state is acting clearly within its police power in fixing maximum rates of interest on money loaned within its border, and such regulation is within legislative discretion if not unreasonable or arbitrary.[246] Equally valid is a requirement that assignments of future wages as security for debts of less than $200, to be valid, must be accepted in writing by the employer, consented to by the assignors, and filed in public office. Such a requirement deprives neither the borrower nor the lender of his property without due process of law.[247]

Insurance.—Those engaged in the insurance business[248] as well as the business itself have been peculiarly subject to supervision and control.[249] Even during the *Lochner* era the Court recognized that government may fix insurance rates and regulate the compensation of insurance agents,[250] and over the years the Court has upheld a wide variety of regulation. For instance, a state may impose a fine on "any person 'who shall act in any manner in the negotiation or transaction of unlawful insurance . . . with a foreign insurance company not admitted to do business [within said State].'"[251] Or, a state may forbid life insurance companies and their agents to engage in the undertaking business and undertakers to serve as life insurance agents.[252] Further, foreign casualty and surety insurers were not deprived of due process by a Virginia law that prohibited the making of contracts of casualty or surety insurance except through registered agents, that required that such contracts applicable to persons or property in the state be countersigned by a registered local agent, and that prohibited such agents from sharing more than 50% of a commission with a nonresident broker.[253] And just as all banks may be required to contribute to a depositors' guaranty fund, so may automobile liability insurers be required to submit to the equitable apportionment among them of applicants who

tor 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).

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

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

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

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

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

[251] 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).

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

[253] 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 that the latter does not in fact render.

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are in good faith entitled to, but are financially unable to, procure such insurance through ordinary methods.[254]

However, the Court has discerned some limitations to such regulations. A statute that 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.[255] 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.[256]

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.[257] No unconstitutional restraint was imposed upon the liberty of contract of surety companies by a statute providing that, after enactment, any bond executed for the faithful performance of a building contract shall inure to the benefit of material men and laborers, notwithstanding any provision of the bond to the contrary.[258] 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.[259] 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.[260]

Moreover, even though it had its attorney-in-fact located in Illinois, signed all its contracts there, and forwarded from there all checks in payment of losses, a reciprocal insurance association covering real property located in New York could be compelled to com-

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[254] California Auto. Ass'n v. Maloney, 341 U.S. 105 (1951).
[255] Allgeyer v. Louisiana, 165 U.S. 578 (1897).
[256] New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).
[257] National Ins. Co. v. Wanberg, 260 U.S. 71 (1922).
[258] Hartford Accident Co. v. Nelson Co., 291 U.S. 352 (1934).
[259] Merchants Liability Co. v. Smart, 267 U.S. 126 (1925).
[260] Orient Ins. Co. v. Daggs, 172 U.S. 577 (1899) (the statute was in effect when the contract at issue was signed).

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ply with New York regulations that required maintenance of an office in that state and the countersigning of policies by an agent resident therein.[261] 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.[262]

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.[263] 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.[264] A provision that suicide, unless contemplated when the application for a policy was made, shall be no defense is equally valid.[265] When a cooperative life insurance association is reorganized so as to permit it to do a life insurance business of every kind, policyholders are not deprived of their property without due process of law.[266] 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.[267]

Miscellaneous Businesses and Professions.—The practice of medicine, using this word in its most general sense, has long been the subject of regulation.[268] A state may exclude osteopathic physi-

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[261] Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943).

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

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

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

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

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

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

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

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cians from hospitals maintained by it or its municipalities[269] and may regulate the practice of dentistry by prescribing qualifications that are reasonably necessary, requiring licenses, establishing a supervisory administrative board, or prohibiting certain advertising regardless of its truthfulness.[270] 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.[271]

Although statutes requiring pilots to be licensed[272] and setting reasonable competency standards (*e.g.*, that railroad engineers pass color blindness tests) have been sustained,[273] 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.[274] 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.[275] 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.[276]

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

[270] 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).

[271] 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.

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

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

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

[275] 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 ex rel. Western Reference and Bond Ass'n, 313 U.S. 236 (1941), "clearly undermined *Adams v. Tanner*."

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

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The Court has also upheld a variety of other licensing or regulatory legislation applicable to places of amusement,[277] grain elevators,[278] detective agencies,[279] the sale of cigarettes[280] or cosmetics,[281] and the resale of theater tickets.[282] Restrictions on advertising have also been upheld, including absolute bans on the advertising of cigarettes[283] or the use of a representation of the United States flag on an advertising medium.[284] Similarly constitutional were prohibitions on the solicitation by a layman of the business of collecting and adjusting claims,[285] the keeping of private markets within six squares of a public market,[286] the keeping of billiard halls except in hotels,[287] or the purchase by junk dealers of wire, copper, and other items, without ascertaining the seller's right to sell.[288]

Protection of State Resources

Oil and Gas.—A state may prohibit conduct that leads to the waste of natural resources.[289] Thus, for instance, where there is a limited market for natural gas acquired attendant to oil production or where the pumping of oil and gas from one location may limit the ability of others to recover oil from a large reserve, a state may require that production of oil be limited or prorated among produc-

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[277] Western Turf Ass'n v. Greenberg, 204 U.S. 359 (1907).
[278] W.W. Cargill Co. v. Minnesota, 180 U.S. 452 (1901).
[279] Lehon v. Atlanta, 242 U.S. 53 (1916).
[280] Gundling v. Chicago, 177 U.S. 183, 185 (1900).
[281] Bourjois, Inc. v. Chapman, 301 U.S. 183 (1937).
[282] Weller v. New York, 268 U.S. 319 (1925).
[283] Packer Corp. v. Utah, 285 U.S. 105 (1932).
[284] Halter v. Nebraska, 205 U.S. 34 (1907).
[285] McCloskey v. Tobin, 252 U.S. 107 (1920).
[286] Natal v. Louisiana, 139 U.S. 621 (1891).
[287] Murphy v. California, 225 U.S. 623 (1912).
[288] Rosenthal v. New York, 226 U.S. 260 (1912). The Court also upheld a state law forbidding (1) solicitation of the sale of frames, mountings, or other optical appliances, (2) solicitation of the sale of eyeglasses, lenses, or prisms by use of advertising media, (3) retailers from leasing, or otherwise permitting anyone purporting to do eye examinations or visual care to occupy space in a retail store, and (4) anyone, such as an optician, to fit lenses, or replace lenses or other optical appliances, except upon written prescription of an optometrist or ophthalmologist licensed in the state is not invalid. A state may treat all who deal with the human eye as members of a profession that should refrain from merchandising methods to obtain customers, and that should choose locations that reduce the temptations of commercialism; a state may also conclude that eye examinations are so critical that every change in frame and duplication of a lens should be accompanied by a prescription. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
[289] Cities Service Co. v. Peerless Co., 340 U.S. 179 (1950) (sustaining orders of the Oklahoma Corporation Commission fixing a minimum price for gas and requiring one producer to buy gas from another producer in the same field at a dictated price, based on a finding that low field prices for natural gas were resulting in economic and physical waste); Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190 (1950).

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ers.[290] Generally, whether a system of proration is fair is a question for administrative and not judicial judgment.[291] On the other hand, where the evidence showed that an order prorating allowed production among several wells was actually intended to compel pipeline owners to furnish a market to those who had no pipeline connections, the order was held void as a taking of private property for private benefit.[292]

A state may act to conserve resources even if it works to the economic detriment of the producer. Thus, a state may forbid certain uses of natural gas, such as the production of carbon black, where the gas is burned without fully using the heat therein for other manufacturing or domestic purposes. Such regulations were sustained even where the carbon black was more valuable than the gas from which it was extracted, and notwithstanding the fact that the producer had made significant investment in a plant for the manufacture of carbon black.[293] Likewise, for the purpose of regulating and adjusting coexisting rights of surface owners to underlying oil and gas, it is within the power of a state to prohibit the operators of wells from allowing natural gas, not conveniently necessary for other purposes, to come to the surface unless its lifting power was used to produce the greatest proportional quantity of oil.[294]

Protection of Property and Agricultural Crops.—Special precautions may be required to avoid or compensate for harm caused by extraction of natural resources. Thus, a state may require the filing of a bond to secure payment for damages to any persons or property resulting from an oil and gas drilling or production opera-

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[290] This can be done regardless of whether the benefit is to the owners of oil and gas in a common reservoir or because of the public interests involved. Thompson v. Consolidated Gas Co., 300 U.S. 55, 76–77 (1937) (citing Ohio Oil Co. v. Indiana (No. 1), 177 U.S. 190 (1900)); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911). Thus, the Court upheld against due process challenge a statute that defined waste as including, in addition to its ordinary meaning, economic waste, surface waste, and production in excess of transportation or marketing facilities or reasonable market demands, and which limited each producer's share to a prorated portion of the total production that can be taken from the common source without waste. Champlin Rfg. Co. v. Corporation Comm'n, 286 U.S. 210 (1932).

[291] Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940) (evaluating whether proration based on hourly potential is as fair as one based upon estimated recoverable reserves or some other combination of factors). *See also* Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941); Railroad Comm'n v. Humble Oil & Ref. Co., 311 U.S. 578 (1941).

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

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

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

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tion.[295] On the other hand, in *Pennsylvania Coal Co. v. Mahon*,[296] a Pennsylvania statute that forbade the mining of coal under private dwellings or streets of cities by a grantor that had reserved the right to mine was viewed as too restrictive on the use of private property and hence a denial of due process and a "taking" without compensation.[297] Years later, however, a quite similar Pennsylvania statute was upheld, the Court finding that the new law no longer involved merely a balancing of private economic interests, but instead promoted such "important public interests" as conservation, protection of water supplies, and preservation of land values for taxation.[298]

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.[299] 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.[300]

Water, Fish, and Game.—A statute making it unlawful for a riparian owner to divert water into another state was held not to deprive the property owner of due process. "The constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of

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[295] Gant v. Oklahoma City, 289 U.S. 98 (1933) (statute requiring bond of $200,000 per well-head, such bond to be executed, not by personal sureties, but by authorized bonding company).

[296] 260 U.S. 393 (1922).

[297] The "taking" jurisprudence that has stemmed from the Pennsylvania Coal Co. v. Mahon is discussed, *supra*, at "Regulatory Takings," under the Fifth Amendment.

[298] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987). The Court in *Pennsylvania Coal* had viewed that case as relating to a "a single private house." 260 U.S. at 413. Also distinguished from *Pennsylvania Coal* was a challenge to an ordinance prohibiting sand and gravel excavation near the water table and imposing a duty to refill any existing excavation below that level. The ordinance was upheld; the fact that it prohibited a business that had been conducted for over 30 years did not give rise to a taking in the absence of proof that the land could not be used for other legitimate purposes. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

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

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

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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."[301] This holding has since been disapproved, but on interstate commerce rather than due process grounds.[302] States may, however, enact and enforce a variety of conservation measures for the protection of watersheds.[303]

Similarly, a state has sufficient control over fish and wild game found within its boundaries[304] so that it may regulate or prohibit fishing and hunting.[305] 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.[306] The Court has also upheld a state law restricting a commercial reduction plant from accepting more fish than it could process without spoilage in order to conserve fish found within its waters, even allowing the application of such restriction to fish imported into the state from adjacent international waters.[307]

The Court's early decisions rested on the legal fiction that the states owned the fish and wild game within their borders, and thus could reserve these possessions for use by their own citizens.[308] The Court soon backed away from the ownership fiction,[309] and in *Hughes v. Oklahoma*[310] it formally overruled prior case law, indicating 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"

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

[302] 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).

[303] *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).

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

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

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

[307] 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).

[308] Geer v. Connecticut, 161 U.S. 519, 529 (1896).

[309] *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, Inc., 431 U.S. 265, 284 (1977) (state could not discriminate in favor of its residents against out-of-state fishermen in federally licensed ships).

[310] 441 U.S. 322 (1979) (formally overruling *Geer*).

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were still a "legitimate" basis for regulation, these concerns could not justify disproportionate burdens on interstate commerce.[311]

Subsequently, in the context of recreational rather than commercial activity, the Court reached a result more deferential to state authority, holding that access to recreational big game hunting is not within the category of rights protected by the Privileges or Immunities Clause, and that consequently a state could charge out-of-staters significantly more than in-staters for a hunting license.[312] Suffice it to say that similar cases involving a state's efforts to reserve its fish and game for its own inhabitants are likely to be challenged under commerce or privileges or immunities principles, rather than under substantive due process.

Ownership of Real Property: Rights and Limitations

Zoning and Similar Actions.—It is now well established that states and municipalities have the police power to zone land for designated uses. Zoning authority gained judicial recognition early in the 20th century. Initially, an analogy was drawn to public nuisance law, so that states and their municipal subdivisions could declare that specific businesses, although not nuisances *per se*, were nuisances in fact and in law in particular circumstances and in particular localities.[313] Thus, a state could declare the emission of dense smoke in populous areas a nuisance and restrain it, even though this affected the use of property and subjected the owner to the expense of compliance.[314] Similarly, the Court upheld an ordinance that prohibited brick making in a designated area, even though the specified land contained valuable clay deposits which could not profitably be removed for processing elsewhere, was far more valuable for brick making than for any other purpose, had been acquired before it was annexed to the municipality, and had long been used as a brickyard.[315]

With increasing urbanization came a broadening of the philosophy of land-use regulation to protect not only health and safety but also the amenities of modern living.[316] Consequently, the Court has recognized the power of government, within the loose confines of

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[311] 441 U.S. at 336, 338–39.

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

[313] 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).

[314] 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).

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

[316] *Cf. Developments in the Law: Zoning*, 91 Harv. L. Rev. 1427 (1978).

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the Due Process Clause, to zone in many ways and for many purposes. Governments may regulate the height of buildings,[317] establish building setback requirements,[318] preserve open spaces (through density controls and restrictions on the numbers of houses),[319] and preserve historic structures.[320] The Court will generally uphold a challenged land-use plan unless it determines that either the overall plan is arbitrary and unreasonable with no substantial relation to the public health, safety, or general welfare,[321] or that the plan as applied amounts to a taking of property without just compensation.[322]

Applying these principles, the Court has held that the exclusion of apartment houses, retail stores, and billboards from a "residential district" in a village is a permissible exercise of municipal power.[323] Similarly, a housing ordinance in a community of single-family dwellings, in which any number of related persons (blood, adoption, or marriage) could occupy a house but only two unrelated persons could do so, was sustained in the absence of any showing that it was aimed at the deprivation of a "fundamental interest."[324] Such a fundamental interest, however, was found to be implicated in *Moore v. City of East Cleveland*[325] by a "single family" zoning ordinance which defined a "family" to exclude a grandmother who had been living with her two grandsons of different children. Similarly, black persons cannot be forbidden to occupy houses in blocks where the greater number of houses are occupied by white persons, or vice versa.[326]

In one aspect of zoning—the degree to which such decisions may be delegated to private persons—the Court has not been consistent. Thus, for instance, it invalidated a city ordinance which conferred the power to establish building setback lines upon the own-

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

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

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

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

[321] 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).

[322] *See*, *e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and discussion of "Regulatory Taking" under the Fifth Amendment, *supra*

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

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

[325] 431 U.S. 494 (1977). A plurality of the Court struck down the ordinance as a violation of substantive due process, an infringement of family living arrangements which are a protected liberty interest, id. at 498–506, while Justice Stevens concurred on the ground that the ordinance was arbitrary and unreasonable. Id. at 513. Four Justices dissented. Id. at 521, 531, 541.

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

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ers of two thirds of the property abutting any street.[327] Or, in another case, it struck down an ordinance that permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility.[328] In a decision falling chronologically between these two, however, the Court sustained an ordinance that permitted property owners to waive a municipal restriction prohibiting the construction of billboards.[329]

In its most recent decision, the Court upheld a city charter provision permitting a petition process by which a citywide referendum could be held on zoning changes and variances. The provision required a 55% approval vote in the referendum to sustain the commission's decision, and the Court distinguished between delegating such authority to a small group of affected landowners and the people's retention of the ultimate legislative power in themselves which for convenience they had delegated to a legislative body.[330]

Estates, Succession, Abandoned Property.—The Due Process Clause does not prohibit a state from varying the rights of those receiving benefits under intestate laws. Thus, the Court held that the rights of an estate were not impaired where a New York Decedent Estate Law granted a surviving spouse the right to take as in intestacy, despite the fact that the spouse had waived any right to her husband's estate before the enactment of the law. Because rights of succession to property are of statutory creation, the Court explained, New York could have conditioned any further exercise of testamentary power upon the giving of right of election to the surviving spouse regardless of any waiver, however formally executed.[331]

Even after the creation of a testamentary trust, a state retains the power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration. For instance, the Great Depression resulted in the default of numerous

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

[328] Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928). In a later case, the Court held that the zoning power may not be delegated to a church. Larkin v. Grendel's Den, 459 U.S. 116 (1982) (invalidating under the Establishment Clause a state law permitting any church to block issuance of a liquor license for a facility to be operated within 500 feet of the church).

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

[330] City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976). Such referenda do, however, raise equal protection problems. *See*, *e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

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

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mortgages which were held by trusts, which had the affect of putting an unexpected accumulation of real property into those trusts. Under these circumstance, the Court upheld the retroactive application of a statute reallocating distribution within these trusts, even where the administration of the estate had already begun, and the new statute had the effect of taking away a remainderman's right to judicial review of the trustee's computation of income.[332]

The states have significant discretion to regulate abandoned property. For instance, states have several jurisdictional bases to allow for the lawful application of escheat and abandoned property laws to out-of-state corporations. Thus, application of New York's Abandoned Property Law to New York residents' life insurance policies, even when issued by foreign corporations, did not deprive such companies of property without due process, where the insured persons had continued to be New York residents and the beneficiaries were resident at the maturity date of the policies. The relationship between New York and its residents who abandon claims against foreign insurance companies, and between New York and foreign insurance companies doing business therein, is sufficiently close to give New York jurisdiction.[333] Or, in *Standard Oil Co. v. New Jersey*,[334] a divided Court held that due process is not violated by a state statute escheating shares of stock in a domestic corporation, including unpaid dividends, even though the last known owners were nonresidents and the stock was issued and the dividends held in another state. The state's power over the debtor corporation gives it power to seize the debts or demands represented by the stock and dividends.

A state's wide discretion to define abandoned property and dispose of abandoned property can be seen in *Texaco v. Short*,[335] which upheld an Indiana statute that terminated interests in coal, oil, gas, or other minerals that had not been used in twenty years, and that provided for reversion to the owner of the interest out of which the mining interests had been carved. The "use" of a mineral interest that could prevent its extinction included the actual or attempted extraction of minerals, the payment of rents or royalties, and any payment of taxes. Indeed, merely filing a claim with the local re-

[332] Demorest v. City Bank Co., 321 U.S. 36, 47–48 (1944). Under the peculiar facts of the case, however, the remainderman's right had been created by judicial rules promulgated after the death of the decedent, so the case is not precedent for a broad rule of retroactivity.

[333] 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.

[334] 341 U.S. 428 (1951).

[335] 454 U.S. 516 (1982).

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corder would preserve the interest.[336] The statute provided no notice to owners of interests, however, save for its own publication; nor did it require surface owners to notify owners of mineral interests that the interests were about to expire.[337] 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.[338] 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."[339]

Health, Safety, and Morals

Health.—Even under the narrowest concept of the police power as limited by substantive due process, it was generally conceded that states could exercise the power to protect the public health, safety, and morals.[340] For instance, an ordinance for incineration of garbage and refuse at a designated place as a means of protecting public health is not a taking of private property without just compensation, even though such garbage and refuse may have some elements of value for certain purposes.[341] Or, compelling property owners to connect with a publicly maintained system of sewers and enforcing that duty by criminal penalties does not violate the Due Process Clause.[342]

There are few constitutional restrictions on the extensive state regulations on the production and distribution of food and drugs.[343]

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[336] 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.

[337] The act provided a grace period and specified several actions which were sufficient to avoid extinguishment. With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office.

[338] Generally, property owners are charged with maintaining knowledge of the legal conditions of property ownership.

[339] 454 U.S. at 538. The four dissenters thought that some specific notice was required for persons holding before enactment. Id. at 540.

[340] *See*, *e.g.*, Mugler v. Kansas, 123 U.S. 623, 661 (1887), and the discussion, *supra,* under "The Development of Substantive Due Process."

[341] California Reduction Co. v. Sanitary Works, 199 U.S. 306 (1905).

[342] Hutchinson v. City of Valdosta, 227 U.S. 303 (1913).

[343] "The power of the State to . . . prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established." Sligh v. Kirkwood, 237 U.S. 52, 59–60 (1915).

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Statutes forbidding or regulating the manufacture of oleomargarine have been upheld,[344] as have statutes ordering the destruction of unsafe food[345] or confiscation of impure milk,[346] notwithstanding that, in the latter cases, such articles had a value for purposes other than food. There also can be no question of the authority of the state, in the interest of public health and welfare, to forbid the sale of drugs by itinerant vendors[347] or the sale of spectacles by an establishment where a physician or optometrist is not in charge.[348] 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.[349]

Equally valid as police power regulations are laws forbidding the sale of ice cream not containing a reasonable proportion of butter fat,[350] of condensed milk made from skimmed milk rather than whole milk,[351] or of food preservatives containing boric acid.[352] Similarly, a statute intended to prevent fraud and deception by prohibiting the sale of "filled milk" (milk to which has been added any fat or oil other than a milk fat) is valid, at least where such milk has the taste, consistency, and appearance of whole milk products. The Court reasoned that filled milk is inferior to whole milk in its nutritional content and cannot be served to children as a substitute for whole milk without producing a dietary deficiency.[353]

Even before the passage of the 21st Amendment, which granted states the specific authority to regulate alcoholic beverages, the Supreme Court had found that the states have significant authority in this regard.[354] A state may declare that places where liquor is

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[344] Powell v. Pennsylvania, 127 U.S. 678 (1888); Magnano v. Hamilton, 292 U.S. 40 (1934).

[345] North American Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

[346] Adams v. City of Milwaukee, 228 U.S. 572 (1913).

[347] Baccus v. Louisiana, 232 U.S. 334 (1914).

[348] Roschen v. Ward, 279 U.S. 337 (1929).

[349] Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41, 45 (1921).

[350] Hutchinson Ice Cream Co. v. Iowa, 242 U.S. 153 (1916).

[351] Hebe Co. v. Shaw, 248 U.S. 297 (1919).

[352] Price v. Illinois, 238 U.S. 446 (1915).

[353] Sage Stores Co. v. Kansas, 323 U.S. 32 (1944). Where health or fraud are not an issue, however, police power may be more limited. Thus, a statute forbidding the sale of bedding made with shoddy materials, even if sterilized and therefore harmless to health, was held to be arbitrary and therefore invalid. Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

[354] "[O]n account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment." Crane v. Campbell, 245 U.S. 304, 307 (1917), citing Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874); Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878); Mugler v. Kansas, 123 U.S. 623 (1887); Crowley v. Christensen, 137 U.S. 86,

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manufactured or kept are common nuisances,[355] and may even subject an innocent owner to the forfeiture of his property if he allows others to use it for the illegal production or transportation of alcohol.[356]

Safety.—Regulations designed to promote public safety are also well within a state's authority. For instance, various measures designed to reduce fire hazards have been upheld. These include municipal ordinances that prohibit the storage of gasoline within 300 feet of any dwelling,[357] require that all gas storage tanks with a capacity of more than ten gallons be buried at least three feet under ground,[358] or prohibit washing and ironing in public laundries and wash houses within defined territorial limits from 10 p.m. to 6 a.m.[359] A city's demolition and removal of wooden buildings erected in violation of regulations was also consistent with the Fourteenth Amendment.[360] Construction of property in full compliance with existing laws, however, does not confer upon the owner an immunity against exercise of the police power. Thus, a 1944 amendment to a Multiple Dwelling Law, requiring installation of automatic sprinklers in lodging houses of non-fireproof construction, can be applied to a lodging house constructed in 1940, even though compliance entails an expenditure of $7,500 on a property worth only $25,000.[361]

States exercise extensive regulation over transportation safety. Although state highways are used primarily for private purposes, they are public property, and the use of a highway for financial gain may be prohibited by the legislature or conditioned as it sees fit.[362] Consequently, a state may reasonably provide that intrastate carriers who have furnished adequate, responsible, and continuous service over a given route from a specified date in the past shall be entitled to licenses as a matter of right, but that issuance to those whose service began later shall depend upon public convenience and necessity.[363] A state may require private contract carriers for hire to obtain a certificate of convenience and necessity, and decline to

91 (1890); Purity Extract Co. v. Lynch, 226 U.S. 192 (1912); Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917); Seaboard Air Line Ry. v. North Carolina, 245 U.S. 298 (1917). *See also* Kidd v. Pearson, 128 U.S. 1 (1888); Barbour v. Georgia, 249 U.S. 454 (1919).

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

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

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

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

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

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

[361] Queenside Hills Co. v. Saxl, 328 U.S. 80 (1946).

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

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

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grant one if the service of common carriers is impaired thereby. A state may also fix minimum rates applicable to such private carriers, which are not less than those prescribed for common carriers, as a valid as a means of conserving highways.[364] In the absence of legislation by Congress, a state may, to protect public safety, deny an interstate motor carrier the use of an already congested highway.[365]

In exercising its authority over its highways, a state is not limited to the raising of revenue for maintenance and reconstruction or to regulating the manner in which vehicles shall be operated, but may also prevent the wear and hazards due to excessive size of vehicles and weight of load.[366] No less constitutional is a municipal traffic regulation that 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.[367] 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.[368] Compulsory automobile insurance is so plainly valid as to present no federal constitutional question.[369]

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[364] Stephenson v. Binford, 287 U.S. 251 (1932). But any attempt to convert private carriers into common carriers, Michigan Pub. Utils. Comm'n v. Duke, 266 U.S. 570 (1925), or to subject them to the burdens and regulations of common carriers, without expressly declaring them to be common carriers, violates due process. Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926); Smith v. Cahoon, 283 U.S. 553 (1931).

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

[366] Accordingly, a statute limiting to 7,000 pounds the net load permissible for trucks is not unreasonable. Sproles v. Binford, 286 U.S. 374 (1932).

[367] Because it is the judgment of local authorities that such advertising affects public safety by distracting drivers and pedestrians, courts are unable to hold otherwise in the absence of evidence refuting that conclusion. Railway Express Agency v. New York, 336 U.S. 106 (1949).

[368] 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).

[369] *Ex parte* Poresky, 290 U.S. 30 (1933). *See also* Packard v. Banton, 264 U.S. 140 (1924); Sprout v. City of 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).

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Morality.—Legislatures have wide discretion in regulating "immoral" activities. Thus, legislation suppressing prostitution[370] or gambling[371] will be upheld by the Court as within the police power of a state. Accordingly, a state statute may provide that judgment against a party to recover illegal gambling winnings may be enforced by a lien on the property of the owner of the building where the gambling transaction was conducted when the owner knowingly consented to the gambling.[372] Similarly, a court may order a car used in an act of prostitution forfeited as a public nuisance, even if this works a deprivation on an innocent joint owner of the car.[373] For the same reason, lotteries, including those operated under a legislative grant, may be forbidden, regardless of any particular equities.[374]

Vested and Remedial Rights

As the Due Process Clause protects against arbitrary deprivation of "property," privileges or benefits that constitute property are entitled to protection.[375] Because an existing right of action to recover damages for an injury is property, that right of action is protected by the clause.[376] Thus, where repeal of a provision that made directors liable for moneys embezzled by corporate officers was applied retroactively, it deprived certain creditors of their property without due process of law.[377] A person, however, 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 an effective procedure.[378]

Similarly, a statute creating an additional remedy for enforcing liability does not, as applied to stockholders then holding stock, vio-

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

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

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

[373] Bennis v. Michigan, 516 U.S. 442 (1996).

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

[375] *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).

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

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

[378] 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).

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late due process.[379] Nor does a law that lifts a statute of limitations and makes possible a suit, previously barred, for the value of certain securities. "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression . . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment."[380]

State Control over Local Units of Government

The Fourteenth Amendment does not deprive a state of the power to determine what duties may be performed by local officers, and whether they shall be appointed or popularly elected.[381] Nor does a statute requiring cities to indemnify owners of property damaged by mobs or during riots result in an unconstitutional deprivation of the property, even when the city could not have prevented the violence.[382] 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 that 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.[383]

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,[384] nor may taxpayers allege any unconstitutional deprivation as a result of changes in their tax burden attendant upon the consolidation of contiguous municipalities.[385] Nor is a statute requiring counties to reimburse cities of the first class but not cities of other classes for rebates allowed for prompt payment of taxes in conflict with the Due Process Clause.[386]

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

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

[381] 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 used, however, to limit a state's discretion with regard to certain matters. *See* "Fundamental Interests: The Political Process," *infra*.

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

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

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

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

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

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Taxing Power

Generally.—It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power of the states.[387] When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers,[388] and the Court will refrain from condemning a tax solely on the ground that it is excessive.[389] 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.[390]

Theoretically, public moneys cannot be expended for other than public purposes. Some early cases applied this principle by invalidating taxes judged to be imposed to raise money for purely private rather than public purposes.[391] However, modern notions of public purpose have expanded to the point where the limitation has little practical import.[392] Whether a use is public or private, although 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."[393]

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[387] Tonawanda v. Lyon, 181 U.S. 389 (1901); Cass Farm Co. v. Detroit, 181 U.S. 396 (1901). Rather, the purpose of the amendment was to extend to the residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment. Southwestern Oil Co. v. Texas, 217 U.S. 114, 119 (1910).

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

[389] 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 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).

[390] 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).

[391] Loan Association v. 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).

[392] Taxes levied for each of the following purposes have been held to be for a public use: a city coal and fuel yard, Jones v. City of Portland, 245 U.S. 217 (1917), a state bank, a warehouse, an elevator, a flour mill system, homebuilding projects, Carmichael v. Southern Coal & Coke Co., 300 U.S. 644 (1937), a society for preventing cruelty to animals (dog license tax), Nicchia v. New York, 254 U.S. 228 (1920), a railroad tunnel, Milheim v. Moffat Tunnel Dist., 262 U.S. 710 (1923), books for school children attending private as well as public schools, Cochran v. Louisiana Bd. of Educ., 281 U.S. 370 (1930), and relief of unemployment, Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 515 (1937).

[393] 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).

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The authority of states to tax income is "universally recognized."[394] 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."[395] 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,[396] and there are also situations in which courts have upheld retroactive application to the preceding year or two.[397]

A state also has broad tax authority over wills and inheritance. A state may apply an inheritance tax to the transmission of property by will or descent, or to the legal privilege of taking property by devise or descent,[398] although such tax must be consistent with other due process considerations.[399] Thus, an inheritance tax law, enacted after the death of a testator but before the distribution of

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That payment may be made to private individuals is now irrelevant. *Carmichael*, 301 U.S. at 518. *Cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (sustaining tax imposed on mine companies to compensate workers for black lung disabilities, including those contracting disease before enactment of tax, as way of spreading cost of employee liabilities).

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

[395] 300 U.S. at 313. *See also* Shaffer v. Carter, 252 U.S. 37, 49–52 (1920); and Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) (states may tax the income of nonresidents derived from property or activity within the state).

[396] *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).

[397] 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). Because "[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.

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

[399] When remainders indisputably vest at the time of the creation of a trust and a succession tax is enacted thereafter, the imposition of the tax on the transfer of such remainder is unconstitutional. Coolidge v. Long, 282 U.S. 582 (1931). The Court has noted that insofar as retroactive taxation of vested gifts has been voided, the justification therefor has been that "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the [retroactive] statute later made the taxable event . . . . Taxation . . . of a gift which . . . [the donor] might well have refrained from making had he anticipated the tax . . . [is] thought to be so arbitrary . . . as to be a denial of due process." Welch v. Henry, 305 U.S. 134, 147 (1938). But where the remaindermen's interests are contingent and do not vest until the donor's death subsequent to the adoption of the statute, the tax is valid. Stebbins v. Riley, 268 U.S. 137 (1925).

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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.[400] 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.[401]

The taxation of entities that are franchises within the jurisdiction of the governing body raises few concerns. Thus, a city ordinance imposing annual license taxes on light and power companies does not violate the Due Process Clause merely because the city has entered the power business in competition with such companies.[402] 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.[403]

States have significant discretion in how to value real property for tax purposes. Thus, assessment of properties for tax purposes over real market value is allowed as merely another way of achieving an increase in the rate of property tax, and does not violate due process.[404] Likewise, land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation.[405]

A state also has wide discretion in how to apportion real property tax burdens. Thus, a state may defray the entire expense of creating, developing, and improving a political subdivision either from funds raised by general taxation, by apportioning the burden among the municipalities in which the improvements are made, or by creating (or authorizing the creation of) tax districts to meet sanctioned outlays.[406] Or, where a state statute authorizes municipal authorities to define the district to be benefitted by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, cannot, if not arbitrary or fraudulent, be reviewed under the Fourteenth

[400] Cahen v. Brewster, 203 U.S. 543 (1906).
[401] Keeney v. New York, 222 U.S. 525 (1912).
[402] Puget Sound Co. v. Seattle, 291 U.S. 619 (1934).
[403] New York Tel. Co. v. Dolan, 265 U.S. 96 (1924).
[404] Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).
[405] Paddell v. City of New York, 211 U.S. 446 (1908).
[406] Hagar v. Reclamation Dist., 111 U.S. 701 (1884).

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Amendment upon the ground that other property benefitted by the improvement was not included.[407]

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 violates due process,[408] whereas any gains from increased traffic reasonably expected to result from a road improvement will suffice to sustain an assessment thereon.[409] Also the fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, for lack of benefits, an assessment thereon for grading, curbing, and paving.[410] 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.[411] Finally, a state may levy an assessment for special benefits resulting from an improvement already made[412] and may validate an assessment previously held void for want of authority.[413]

Jurisdiction to Tax

Generally.—The operation of the Due Process Clause as a jurisdictional limitation on the taxing power of the states has been an issue in a variety of different contexts, but most involve one of two basic questions. First, is there a sufficient relationship between the state exercising taxing power and the object of the exercise of that power? Second, is the degree of contact sufficient to justify the state's imposition of a particular obligation? Illustrative of the factual settings in which such issues arise are 1) determining the scope of the business activity of a multi-jurisdictional entity that is subject to a state's taxing power; 2) application of wealth trans-

[407] Butters v. City of Oakland, 263 U.S. 162 (1923). It is also proper to impose a special assessment for the preliminary expenses of an abandoned road improvement, even though the assessment exceeds the amount of the benefit which the assessors estimated the property would receive from the completed work. Missouri Pacific R.R. v. Road District, 266 U.S. 187 (1924). *See also* Roberts v. Irrigation Dist., 289 U.S. 71 (1933) (an assessment to pay the general indebtedness of an irrigation district is valid, even though in excess of the benefits received). Likewise a levy upon all lands within a drainage district of a tax of twenty-five cents per acre to defray preliminary expenses does not unconstitutionally take the property of landowners within that district who may not be benefitted by the completed drainage plans. Houck v. Little River Dist., 239 U.S. 254 (1915).

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

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

[410] Louisville & Nashville R.R. v. Barber Asphalt Co., 197 U.S. 430 (1905).

[411] Myles Salt Co. v. Iberia Drainage Dist., 239 U.S. 478 (1916).

[412] Wagner v. Baltimore, 239 U.S. 207 (1915).

[413] Charlotte Harbor Ry. v. Welles, 260 U.S. 8 (1922).

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fer taxes to gifts or bequests of nonresidents; 3) allocation of the income of multi-jurisdictional entities for tax purposes; 4) the scope of state authority to tax income of nonresidents; and 5) collection of state use taxes.

The Court's opinions in these cases have often discussed due process and dormant commerce clause issues as if they were indistinguishable.[414] A later decision, *Quill Corp. v. North Dakota*,[415] however, used a two-tier analysis that found sufficient contact to satisfy due process but not dormant commerce clause requirements. In *Quill*,[416] the Court struck down a state statute requiring an out-of-state mail order company with neither outlets nor sales representatives in the state to collect and transmit use taxes on sales to state residents, but did so based on Commerce Clause rather than due process grounds. Taxation of an interstate business does not offend due process, the Court held, if that business "purposefully avails itself of the benefits of an economic market in the [taxing] State . . . even if it has no physical presence in the State."[417] Thus, *Quill* may be read as implying that the more stringent Commerce Clause standard subsumes due process jurisdictional issues, and that consequently these due process issues need no longer be separately considered.[418] This interpretation has yet to be confirmed, however, and a detailed review of due process precedents may prove useful.

Real Property.—Even prior to the ratification of the Fourteenth Amendment, it was a settled principle that a state could not tax land situated beyond its limits. Subsequently elaborating upon that principle, the Court has said that, "we know of no case where

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[414] For discussion of the relationship between the taxation of interstate commerce and the dormant commerce clause, *see* Taxation, *supra*.

[415] 504 U.S. 298 (1992).

[416] 504 U.S. 298 (1992).

[417] The Court had previously held that the requirement in terms of a benefit is minimal. Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), (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 Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977).

[418] A physical presence within the state is necessary, however, under the Commerce Clause analysis applicable to taxation of mail order sales. *See* Quill Corp. v. North Dakota, 504 U.S. at 309–19 (refusing to overrule the Commerce Clause ruling in National Bellas Hess, Inc. 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).

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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."[419] Insofar as a tax payment may be viewed as an exaction for the maintenance of government in consideration of protection afforded, the logic sustaining this rule is self-evident.

Tangible Personalty.—A state may tax tangible property located within its borders (either directly through an *ad valorem* tax or indirectly through death taxes) irrespective of the residence of the owner.[420] By the same token, if tangible personal property makes only occasional incursions into other states, its permanent situs remains in the state of origin, and, subject to certain exceptions, is taxable only by the latter.[421] The ancient maxim, *mobilia sequuntur personam*, which originated 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."[422]

Thus, when rolling stock is permanently located and used in a business outside the boundaries of a domiciliary state, the latter has no jurisdiction to tax it.[423] Further, vessels that merely touch briefly at numerous ports never acquire a taxable situs at any one of them, and are taxable in the domicile of their owners or not at

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

[420] 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).

[421] New York ex rel. New York Cent. R.R. v. Miller, 202 U.S. 584 (1906).

[422] 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).

[423] Union Transit Co. v. Kentucky, 199 U.S. 194 (1905). Justice Black, in Central R.R. v. Pennsylvania, 370 U.S. 607, 619–20 (1962), had his "doubts about the use of the Due Process Clause to strike down state tax laws. The modern use of due process to invalidate state taxes rests on two doctrines: (1) that a State is without 'jurisdiction to tax' property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited. Nothing in the language or the history of the Fourteenth Amendment, however, indicates any intention to establish either of these two doctrines. . . . And in the first case [Railroad Co. v. Jackson, 74 U.S. (7 Wall.) 262 (1869)] striking down a state tax for lack of jurisdiction to tax after the passage of that Amendment neither the Amendment nor its Due Process Clause . . . was even mentioned." He also maintained that Justice Holmes shared this view in Union Transit Co. v. Kentucky, 199 U.S. at 211.

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all.[424] Thus, where airplanes are continually in and out of a state during the course of a tax year, the entire fleet may be taxed by the domicile state.[425]

Conversely, a nondomiciliary state, although it may not tax property belonging to a foreign corporation that has never come within its borders, may levy a tax on movables that are regularly and habitually used and employed in that state. Thus, although the fact that cars are loaded and reloaded at a refinery in a state outside the owner's domicile does not fix the situs of the entire fleet in that state, the state may nevertheless tax the number of cars that on the average are found to be present within its borders.[426] 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.[427] Or, a state property tax on railroads, which is measured by gross earnings apportioned to mileage, is constitutional unless it exceeds what

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[424] Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911). Ships operating wholly on the waters within one state, however, are taxable there and not at the domicile of the owners. Old Dominion Steamship Co. v. Virginia, 198 U.S. 299 (1905).

[425] Noting that an entire fleet of airplanes of an interstate carrier were "never continuously without the [domiciliary] State during the whole tax year," that such airplanes also had their "home port" in the domiciliary state, and that the company maintained its principal office therein, the Court sustained a personal property tax applied by the domiciliary state to all the airplanes owned by the taxpayer. Northwest Airlines v. Minnesota, 322 U.S. 292, 294–97 (1944). No other state was deemed able to accord the same protection and benefits as the taxing state in which the taxpayer had both its domicile and its business situs. Union Transit Co. v. Kentucky, 199 U.S. 194 (1905), which disallowed the taxing of tangibles located permanently outside the domicile state, was held to be inapplicable. 322 U.S. at 295 (1944). Instead, the case was said to be governed by New York *ex rel.* New York Cent. R.R. v. Miller, 202 U.S. 584, 596 (1906). As to the problem of multiple taxation of such airplanes, which had in fact been taxed proportionately by other states, the Court declared that the "taxability of any part of this fleet by any other state, than Minnesota, in view of the taxability of the entire fleet by that state, is not now before us." Justice Jackson, in a concurring opinion, would treat Minnesota's right to tax as exclusively of any similar right elsewhere.

[426] Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933). Moreover, in assessing that part of a railroad within its limits, a state need not treat it as an independent line valued as if it was operated separately from the balance of the railroad. The state may ascertain the value of the whole line as a single property and then determine the value of the part within on a mileage basis, unless there be special circumstances which distinguish between conditions in the several states. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894).

[427] 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).

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would be legitimate as an ordinary tax on the property valued as part of a going concern or is relatively higher than taxes on other kinds of property.[428]

Intangible Personalty.—To determine whether a state may tax intangible personal property, the Court has applied the fiction *mobilia sequuntur personam* (movable property follows the person) and has also recognized that such property may acquire, for tax purposes, a permanent business or commercial situs. The Court, however, has never clearly disposed of the issue whether multiple personal property taxation of intangibles is consistent with due process. In the case of corporate stock, however, the Court has obliquely acknowledged that the owner thereof may be taxed at his own domicile, at the commercial situs of the issuing corporation, and at the latter's domicile. Constitutional lawyers speculated whether the Court would sustain a tax by all three jurisdictions, or by only two of them. If the latter, the question would be which two—the state of the commercial situs and of the issuing corporation's domicile, or the state of the owner's domicile and that of the commercial situs.[429]

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;[430] (2) a mortgage owned and kept outside the state by a nonresident but on land within the state;[431] (3) investments, in the form of loans to a resident, made by a resident agent of a nonresident creditor;[432] (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 ;[433] (5) membership owned by a nonresident in a domestic exchange, known as a chamber of commerce;[434] (6) membership by a

[428] Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929). If a tax reaches only revenues derived from local operations, the fact that the apportionment formula does not result in mathematical exactitude is not a constitutional defect. Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940).

[429] 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).

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

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

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

[433] These deposits were allowed to be subjected to a personal property tax in the city of his residence, regardless of whether or not they are subject to tax in the state where the business is carried onFidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54 (1917). The tax is imposed for the general advantage of living within the jurisdiction (benefit-protection theory), and may be measured by reference to the riches of the person taxed.

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

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resident in a stock exchange located in another state;[435] (7) stock held by a resident in a foreign corporation that does no business and has no property within the taxing state;[436] (8) stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing state;[437] (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;[438](10) dividends of a corporation distributed ratably among stockholders regardless of their residence outside the state;[439] (11) the transfer within the taxing state by one nonresident to another of stock certificates issued by a foreign corporation;[440] and (12) promissory notes executed by a domestic corporation, although payable to banks in other states.[441]

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;[442] (2) a tax, measured by income, levied on trust certificates held by a resident,

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[435] Citizens Nat'l Bank v. Durr, 257 U.S. 99, 109 (1921). "Double taxation" the Court observed "by one and the same State is not" prohibited "by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interest falling within the jurisdiction of both, forbidden."

[436] Hawley v. Malden, 232 U.S. 1, 12 (1914). The Court attached no importance to the fact that the shares were already taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the stock owner was domiciled, or at any rate did not find it necessary to pass upon the validity of the latter two taxes. The present levy was deemed to be tenable on the basis of the benefit-protection theory, namely, "the economic advantages realized through the protection at the place . . . [of business situs] of the ownership of rights in intangibles. . . ." The Court also added that "undoubtedly the State in which a corporation is organized may . . . [tax] all of its shares whether owned by residents or nonresidents."

[437] First Bank Corp. v. Minnesota, 301 U.S. 234, 241 (1937). The shares represent an aliquot portion of the whole corporate assets, and the property right so represented arises where the corporation has its home, and is therefore within the taxing jurisdiction of the State, notwithstanding that ownership of the stock may also be a taxable subject in another State.

[438] Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938).

[439] The Court found that all stockholders were the ultimate beneficiaries of the corporation's activities within the taxing State, were protected by the latter, and were thus subject to the State's jurisdiction. International Harvester Co. v. Department of Taxation, 322 U.S. 435 (1944). This tax, though collected by the corporation, is on the transfer to a stockholder of his share of corporate dividends within the taxing State and is deducted from said dividend payments. Wisconsin Gas Co. v. United States, 322 U.S. 526 (1944).

[440] New York *ex rel.* Hatch v. Reardon, 204 U.S. 152 (1907).

[441] Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931). These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution in the latter which took place in the taxing State.

[442] Buck v. Beach, 206 U.S. 392 (1907).

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representing interests in various parcels of land (some inside the state and some outside), the holder of the certificates, though without a voice in the management of the property, being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale.[443]

The Court also invalidated a property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another state and as to which the beneficiary had neither control nor possession, apart from the receipt of income therefrom.[444] 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.[445] The first case, *Brooke v. Norfolk*,[446] is distinguishable by virtue of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Also different is *Safe Deposit & Trust Co. v. Virginia*,[447] where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control.

A state in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the corporation's bank deposits and accounts receivable even though the deposits are outside the state and the accounts receivable arise from manufacturing activities in another state. Similarly, a nondomiciliary state in which a foreign corporation did business can tax the "corporate excess" arising from property employed and business done in the taxing state.[448] 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.[449]

Also a domiciliary state that imposes no franchise tax on a stock fire insurance corporation may assess a tax on the full amount of

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

[444] Brooke v. City of Norfolk, 277 U.S. 27 (1928).

[445] Greenough v. Tax Assessors, 331 U.S. 486, 496–97 (1947).

[446] 277 U.S. 27 (1928).

[447] 280 U.S. 83 (1929).

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

[449] Alpha Cement Co. v. Massachusetts, 268 U.S. 203 (1925). A domiciliary State, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this "corporate excess" arose from property located and business

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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.[450]

A property tax on the capital stock of a domestic company, however, the appraisal of which includes the value of coal mined in the taxing state but located in another state awaiting sale, deprives the corporation of its property without due process of law.[451] Also void for the same reason is a state tax on the franchise of a domestic ferry company that includes in the valuation of the tax the worth of a franchise granted to the company by another state.[452]

Transfer (Inheritance, Estate, Gift) Taxes.—As a state has authority to regulate transfer of property by wills or inheritance, it may base its succession taxes upon either the transmission or receipt of property by will or by descent.[453] But whatever may be the justification of their power to levy such taxes, since 1905 the states have consistently found themselves restricted by the rule in *Union Transit Co. v. Kentucky*,[454] which precludes imposition of transfer taxes upon tangible which are permanently located or have an actual *situs* outside the state.

In the case of intangibles, however, the Court has oscillated in upholding, then rejecting, and again sustaining the levy by more than one state of death taxes upon intangibles. Until 1930, transfer taxes upon intangibles by either the domiciliary or the *situs* (but

done in another State and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936). *See also* Memphis Gas Co. v. Beeler, 315 U.S. 649, 652 (1942).

[450] Newark Fire Ins. Co. v. State Board, 307 U.S. 313, 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.

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

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

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

[454] 199 U.S. 194 (1905) (property taxes). The rule was subsequently reiterated in 1925 in Frick v. Pennsylvania, 268 U.S. 473 (1925). *See also* Treichler v. Wisconsin, 338 U.S. 251 (1949); City Bank Farmers' Trust Co. v. Schnader, 293 U.S. 112 (1934). In State Tax Comm'n v. Aldrich, 316 U.S. 174, 185 (1942), however, Justice Jackson, in dissent, asserted that a reconsideration of this principle had become timely.

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nondomiciliary) state, were with rare exceptions approved. Thus, in *Bullen v. Wisconsin*,[455] the domiciliary state of the creator of a trust was held competent to levy an inheritance tax on an out-of-state trust fund consisting of stocks, bonds, and notes, as the settlor reserved the right to control disposition and to direct payment of income for life. The Court reasoned that such reserved powers were the equivalent to a fee in the property. It took cognizance of the fact that the state in which these intangibles had their situs had also taxed the trust.[456]

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.[457] Also against the trend was *Blodgett v. Silberman*,[458] in which 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.[459]

In the course of about two years following the Depression, the Court handed down a group of four decisions that placed the stamp of disapproval upon multiple transfer taxes and—by inference—other multiple taxation of intangibles.[460] The Court found that "practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform rule confining the jurisdiction to impose death transfer taxes as to intangibles to the State of the [owner's] domicile."[461] Thus, the Court proceeded to deny the right of nondomiciliary states to tax intangibles, rejecting jurisdictional claims founded upon such bases as control, benefit, protection or

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[455] 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).

[456] Levy of an inheritance tax by a nondomiciliary State was also sustained on similar grounds in Wheeler v. New York, 233 U.S. 434 (1914) wherein it was held that the presence of a negotiable instrument was sufficient to confer jurisdiction upon the State seeking to tax its transfer.

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

[458] 277 U.S. 1 (1928).

[459] The Court conceded, however, that the domiciliary State could tax the transfer of books and certificates of indebtedness found in that safe deposit box as well as the decedent's interest in a foreign partnership.

[460] 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); Farmers Loan Co. v. Minnesota, 280 U.S. 204 (1930).

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

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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.

The Court has expressly overruled only one of these four decisions condemning multiple succession taxation of intangibles. In 1939, in *Curry v. McCanless*, the Court announced a departure from "[t]he doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state . . . ."[462] Taking cognizance of the fact that this doctrine had never been extended to the field of income taxation or consistently applied in the field of property taxation, the Court declared that a correct interpretation of constitutional requirements would dictate the following conclusions: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. . . . But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property 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 . . . ."[463]

In accordance with this line of reasoning, the domicile of a decedent (Tennessee) and the state where a trust received securities conveyed from the decedent by will (Alabama) were both allowed to impose a tax on the transfer of these securities. "In effecting her purposes, the testatrix 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 necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both."[464]

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[462] 307 U.S. 357, 363 (1939).

[463] 307 U.S. at 366, 367, 368.

[464] 307 U.S. at 372. These statements represented a belated adoption of the views advanced by Chief Justice Stone in dissenting or concurring opinions that 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

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On the authority of *Curry v. McCanless*, the Court, in *Pearson v. McGraw*,[465] sustained the application of an Oregon transfer tax to intangibles handled by an Illinois trust company, although the property was never physically present in Oregon. Jurisdiction to tax was viewed as dependent, not on the location of the property in the state, but on the fact that the owner was a resident of Oregon. In *Graves v. Elliott*,[466] 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. It is a potential source of wealth and its exercise in the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power. The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation."[467]

The costliness of multiple taxation of estates comprising intangibles can be appreciably aggravated if one or more states find that the decedent died domiciled within its borders. In such cases, contesting states may discover that the assets of the estate are insuffi-

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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.

[465] 308 U.S. 313 (1939).

[466] 307 U.S. 383 (1939).

[467] 307 U.S. at 386. Consistent application of the principle enunciated in Curry v. McCanless is also discernible in two later cases in which the Court sustained the right of a domiciliary state to tax the transfer of intangibles kept outside its boundaries, notwithstanding that "in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose legal protection they enjoy." Graves v. Schmidlapp, 315 U.S. 657, 661 (1942). In this case, 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 the statement in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 429 (1819), that the power to tax "is an incident of sovereignty, and is coextensive with that to which it is an incident." 315 U.S. at 660. Again, in Central Hanover Bank Co. v. Kelly, 319 U.S. 94 (1943), the Court approved a New Jersey transfer tax imposed on the occasion of the death of a New Jersey grantor of an irrevocable trust despite the fact that it was executed in New York, the securities were located in New York, and the disposition of the corpus was to two nonresident sons.

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cient to satisfy their claims. Thus, in *Texas v. Florida*,[468] the State of Texas filed an original petition in the Supreme Court against three other states who claimed to be the domicile of the decedent, noting that the portion of the estate within Texas alone would not suffice to discharge its own tax, and that its efforts to collect its tax might be defeated by adjudications of domicile by the other states. The Supreme Court disposed of this controversy by sustaining a finding that the decedent had been domiciled in Massachusetts, but intimated that thereafter it would take jurisdiction in like situations only in the event that an estate was valued less than the total of the demands of the several states, so that the latter were confronted with a prospective inability to collect.

Corporate Privilege Taxes.—A domestic corporation may be subjected to a privilege tax graduated according to paid-up capital stock, even though the stock represents capital not subject to the taxing power of the state, because the tax is levied not on property but on the privilege of doing business in corporate form.[469] However, a state cannot tax property beyond its borders under the guise of taxing the privilege of doing an intrastate business. Therefore, a license tax based on the authorized capital stock of an out-of-state corporation is void,[470] even though there is a maximum fee,[471] unless the tax is apportioned based on property interests in the tax-

[468] 306 U.S. 398 (1939). Resort to the Supreme Court's original jurisdiction was necessary because in Worcester County 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.

[469] Kansas City Ry. v. Kansas, 240 U.S. 227 (1916); Kansas City, M. & B.R.R. v. Stiles, 242 U.S. 111 (1916). Similarly, the validity of a franchise tax, imposed on a domestic corporation engaged in foreign maritime commerce and assessed upon a proportion of the total franchise value equal to the ratio of local business done to total business, is not impaired by the fact that the total value of the franchise was enhanced by property and operations carried on beyond the limits of the state. Schwab v. Richardson, 263 U.S. 88 (1923).

[470] 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).

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

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ing state.[472] On the other hand, a fee collected only once as the price of admission to do intrastate business is distinguishable from a tax and accordingly may be levied on an out-of-state corporation based on the amount of its authorized capital stock.[473]

A municipal license tax imposed on a foreign corporation for goods sold within and without the state, but manufactured in the city, is not a tax on business transactions or property outside the city and therefore does not violate the Due Process Clause.[474] But a state lacks jurisdiction to extend its privilege tax to the gross receipts of a foreign contracting corporation for fabricating equipment outside the taxing state, even if the equipment is later installed in the taxing state. Unless the activities that are the subject of the tax are carried on within its territorial limits, a state is not competent to impose such a privilege tax.[475]

Individual Income Taxes.—A state may tax annually the entire net income of resident individuals from whatever source received,[476] as jurisdiction is founded upon the rights and privileges incident to domicile. A state may also tax the portion of a nonresident's net income that derives from property owned by him within its borders, and from any business, trade, or profession carried on by him within its borders.[477] This state power is based upon the state's dominion over the property he owns, or over activity from which the income derives, and from the obligation to contribute to the support of a government that secures the collection of such income. Accordingly, a state may tax residents on income from rents of land located outside the state; from interest on bonds physically outside the state and secured by mortgage upon lands physically outside the state;[478] and from a trust created and administered in another state and not directly taxable to the trustee.[479] Further, the

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[472] An example of such an apportioned tax is a franchise tax based on such proportion of outstanding capital stock as is represented by property owned and used in business transacted in the taxing state. St. Louis S.W. Ry. v. Arkansas, 235 U.S. 350 (1914).

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

[474] American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919). Nor does a state license tax on the production of electricity violate the due process clause because it may be necessary, to ascertain, as an element in its computation, the amounts delivered in another jurisdiction. Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932). A tax on chain stores, at a rate per store determined by the number of stores both within and without the state is not unconstitutional as a tax in part upon things beyond the jurisdiction of the state.

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

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

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

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

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

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fact that another state has lawfully taxed identical income in the hands of trustees operating in that state does not necessarily destroy a domiciliary state's right to tax the receipt of income by a resident beneficiary.[480]

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,[481] unless the income attributed to the state is out of all appropriate proportion to the business transacted in the state.[482] Thus, a franchise tax on a foreign corporation may be measured by income, not just from business within the state, but also on net income from interstate and foreign business.[483] Because the privilege granted by a state to a foreign corporation of carrying on business supports a tax by that state, it followed that a Wisconsin privilege dividend tax could be applied to a Delaware corporation despite its having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. The tax could be imposed on the "privilege of declaring and receiving dividends" out of income derived from property located and business transacted in Wisconsin, equal to a specified percentage of such dividends, the corporation being required to deduct the tax from dividends payable to resident and nonresident shareholders.[484]

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[480] Guaranty Trust Co. v. Virginia, 305 U.S. 19, 23 (1938). Likewise, even though a nonresident does no business in a state, the state may tax the profits realized by the nonresident upon his sale of a right appurtenant to membership in a stock exchange within its borders. New York ex rel. Whitney v. Graves, 299 U.S. 366 (1937).

[481] 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. Moorman Mfg. Co. v. Bair, 437 U.S. at 276–80, implied that a showing of actual multiple taxation was a necessary predicate to a due process challenge but might not be sufficient.

[482] Evidence may be submitted that tends to show that a state has applied a method that, although fair on its face, operates so as to reach profits that are in no sense attributable to transactions within its jurisdiction. Hans Rees' Sons v. North Carolina, 283 U.S. 123 (1931).

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

[484] 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

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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,[485] but such a tax is invalid if the company has withdrawn all its agents from the state and has ceased to do business there, merely continuing to receive the renewal premiums at its home office.[486] Also violating due process is a state insurance premium tax imposed on a nonresident firm doing business in the taxing jurisdiction, where the firm obtained the coverage of property within the state from an unlicenced out-of-state insurer that consummated the contract, serviced the policy, and collected the premiums outside that taxing jurisdiction.[487] However, a tax may be imposed upon the privilege of entering and engaging in business in a state, even if the tax is a percentage of the "annual premiums to be paid throughout the life of the policies issued." Under this kind of tax, a state may continue to collect even after the company's withdrawal from the state.[488]

A state may lawfully extend a tax to a foreign insurance company that contracts with an automobile sales corporation in a third state to insure customers of the automobile sales corporation against loss of cars purchased through the automobile sales corporation, insofar as the cars go into the possession of a purchaser within the taxing state.[489] 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.[490] Likewise a Connecticut life insurance corporation, licensed to do business in California, which negotiated reinsurance contracts in Connecticut, received payment of premiums on such contracts in Connecticut, and was liable in Connecticut for payment of losses claimed under such contracts, 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 Califor-

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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).

[485] Equitable Life Society v. Pennsylvania, 238 U.S. 143 (1915).

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

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

[488] Continental Co. v. Tennessee, 311 U.S. 5, 6 (1940).

[489] Palmetto Ins. Co. v. Connecticut, 272 U.S. 295 (1926).

[490] St. Louis Compress Co. v. Arkansas, 260 U.S. 346 (1922).

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nia and protected policies effected in California on the lives of California residents. 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.[491]

Procedure in Taxation

Generally.—The Supreme Court has never decided exactly what due process is required in the assessment and collection of general taxes. Although the Court has 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.[492] Due process of law as applied to taxation does not mean judicial process;[493] 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.[494] Due process is satisfied if a taxpayer is given an opportunity to test the validity of a tax at any time before it is final, whether before a board having a quasi-judicial character, or before a tribunal provided by the state for such purpose.[495]

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 oc-

[491] Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938). When policy loans to residents are made by a local agent of a foreign insurance company, in the servicing of which notes are signed, security taken, interest collected, and debts are paid within the State, such credits are taxable to the company, notwithstanding that the promissory notes evidencing such credits are kept at the home office of the insurer. Metropolitan Life Ins. Co. v. City of New Orleans, 205 U.S. 395 (1907). But when a resident policyholder's loan is merely charged against the reserve value of his policy, under an arrangement for extinguishing the debt and interest thereon by deduction from any claim under the policy, such credit is not taxable to the foreign insurance company. Orleans Parish v. New York Life Ins. Co., 216 U.S. 517 (1910). Premiums due from residents on which an extension has been granted by foreign companies also are credits on which the latter may be taxed by the State of the debtor's domicile. Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U.S. 346 (1911). The mere fact that the insurers charge these premiums to local agents and give no credit directly to policyholders does not enable them to escape this tax.

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

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

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

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

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cupations. 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 tax-payer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it."[496]

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."[497]

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.[498] Where a tax board has its time of sitting fixed by law and where its sessions are not secret, no obstacle prevents the appearance of any one before it to assert a right or redress a wrong and in the business of assessing taxes, this is all that can be rea-

[496] Hagar v. Reclamation Dist., 111 U.S. 701, 709–10 (1884).
[497] 111 U.S. at 710.
[498] McMillen v. Anderson, 95 U.S. 37, 42 (1877).

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sonably asked.[499] Nor is there any constitutional command that notice of an assessment as well as an opportunity to contest it be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal during a suit to collect the tax and before the demand of the state for remittance becomes final.[500]

However, when assessments based on the enjoyment of a special benefit are made by a political subdivision, a taxing board or court, the property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into that determination.[501] The hearing need not amount to a judicial inquiry,[502] although a mere opportunity to submit objections in writing, without the right of personal appearance, is not sufficient.[503] Generally, if an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, the property owner is not entitled to be heard in advance on the question of benefits.[504] 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.[505] 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

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

[500] Nickey v. Mississippi, 292 U.S. 393, 396 (1934). *See also* Clement Nat'l Bank v. Vermont, 231 U.S. 120 (1913). A hearing before judgment, with full opportunity to submit evidence and arguments being all that can be adjudged vital, it follows that rehearings and new trials are not essential to due process of law. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894). One hearing is sufficient to constitute due process, Michigan Central R.R. v. Powers, 201 U.S. 245, 302 (1906), and the requirements of due process are also met if a taxpayer, who had no notice of a hearing, does receive notice of the decision reached there and is privileged to appeal it and, on appeal, to present evidence and be heard on the valuation of his property. Pittsburgh C.C. & St. L. Ry. v. Board of Pub. Works, 172 U.S. 32, 45 (1898).

[501] St. Louis & K.C. 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).

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

[503] Londoner v. City of Denver, 210 U.S. 373 (1908).

[504] 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).

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

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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.[506]

More specifically, where the mode of assessment resolves itself into a mere mathematical calculation, there is no necessity for a hearing.[507] 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.[508] 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.[509]

Collection of Taxes.—States may undertake a variety of methods to collect taxes. For instance, collection of an inheritance tax may be expedited by a statute requiring the sealing of safe deposit boxes for at least ten days after the death of the renter and obliging the lessor to retain assets found therein sufficient to pay the tax that may be due the state.[510] A state may compel retailers to collect such gasoline taxes from consumers and, under penalty of a fine for delinquency, to remit monthly the amounts thus collected.[511] In collecting personal income taxes, most states require employers to deduct and withhold the tax from the wages of employees.[512]

States may also use various procedures to collect taxes from prior tax years. To reach property that has escaped taxation, a state may tax estates of decedents for a period prior to death and grant pro-

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[506] Utley v. Petersburg, 292 U.S. 106, 109 (1934); French v. Barber Asphalt Paving Co., 181 U.S. 324, 341 (1901). *See also* Soliah v. Heskin, 222 U.S. 522 (1912). Nor can he rightfully complain because the statute renders conclusive, after a hearing, the determination as to apportionment by the same body which levied the assessment. Hibben v. Smith, 191 U.S. 310, 321 (1903).

[507] 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 percent. Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915).

[508] City of Detroit v. Parker, 181 U.S. 399 (1901).

[509] Paulsen v. Portland, 149 U.S. 30, 38 (1893).

[510] National Safe Deposit Co. v. Stead, 232 U.S. 58 (1914).

[511] Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924). Likewise, a tax on the tangible personal property of a nonresident owner may be collected from the custodian or possessor of such property, and the latter, as an assurance of reimbursement, may be granted a lien on such property. Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910).

[512] The duty thereby imposed on the employer has never been viewed as depriving him of property without due process of law, nor has the adjustment of his system of accounting been viewed as an unreasonable regulation of the conduct of business. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

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portionate deductions for all prior taxes that the personal representative can prove to have been paid.[513] In addition, the Court found no violation of property rights when a state asserts a prior lien against trucks repossessed by a vendor from a carrier (1) accruing from the operation by the carrier of trucks not sold by the vendors, either before or during the time the carrier operated the vendors' trucks, or (2) arising from assessments against the carrier, after the trucks were repossessed, but based upon the carrier's operations preceding such repossession. Such lien need not be limited to trucks owned by the carrier because the wear on the highways occasioned by the carrier's operation is in no way altered by the vendor's retention of title.[514]

As a state may provide in advance that taxes will bear interest from the time they become due, it may with equal validity stipulate that taxes which have become delinquent will bear interest from the time the delinquency commenced. Further, a state may adopt new remedies for the collection of taxes and apply these remedies to taxes already delinquent.[515] 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.[516] Nor is a foreign insurance company denied due process of law when its personal property is distrained to satisfy unpaid taxes.[517]

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.[518] 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.[519] On the other hand, although 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,[520] a judgment imposing personal liability against a nonresident taxpayer over whom the state court acquired

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[513] Bankers Trust Co. v. Blodgett, 260 U.S. 647 (1923).
[514] International Harvester Corp. v. Goodrich, 350 U.S. 537 (1956).
[515] League v. Texas, 184 U.S. 156 (1902).
[516] Palmer v. McMahon, 133 U.S. 660, 669 (1890).
[517] Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905).
[518] King v. Mullins, 171 U.S. 404 (1898); Chapman v. Zobelein, 237 U.S. 135 (1915).
[519] Leigh v. Green, 193 U.S. 79 (1904).
[520] Davidson v. City of New Orleans, 96 U.S. 97, 107 (1878).

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no jurisdiction is void.[521] Apart from such restraints, however, a state is free to adopt new remedies for the collection of taxes and even to apply new remedies to taxes already delinquent.[522]

Sufficiency and Manner of Giving Notice.—Notice of tax assessments or liabilities, insofar as it is required, may be either personal, by publication, by statute fixing the time and place of hearing,[523] or by delivery to a statutorily designated agent.[524] As regards land, "where the State . . . [desires] to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment. . . ." In fact, compliance with statutory notice requirements combined with actual notice to owners of land can be sufficient in an *in rem* case, even if there are technical defects in such notice.[525]

Whether statutorily required notice is sufficient may vary with the circumstances. Thus, where a taxpayer was not legally competent, no guardian had been appointed and town officials were aware of these facts, notice of a foreclosure was defective, even though the tax delinquency was mailed to her, published in local papers, and posted in the town post office.[526] On the other hand, due process was not denied to appellants who were unable to avert foreclosure

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[521] Dewey v. City of Des Moines, 173 U.S. 193 (1899).

[522] League v. Texas, 184 U.S. 156, 158 (1902). *See also* Straus v. Foxworth, 231 U.S. 162 (1913).

[523] Londoner v. City of 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).

[524] A state statute may designate a corporation as the agent of a nonresident stockholder to receive notice and to represent him in proceedings for correcting assessment. Corry v. Baltimore, 196 U.S. 466, 478 (1905).

[525] Leigh v. Green, 193 U.S. 79, 92–93 (1904). Thus, an assessment for taxes and a notice of sale when such taxes are delinquent will be sustained as long as there is a description of the land and the owner knows that the property so described is his, even if that description is not technically correct. Ontario Land Co. v. Yordy, 212 U.S. 152 (1909). Where tax proceedings are *in rem*, owners are bound to take notice thereof, and to pay taxes on their property, even if the land is assessed to unknown or other persons. Thus, if an owner stands by and sees his property sold for delinquent taxes, he is not thereby wrongfully deprived of his property. Id. *See also* Longyear v. Toolan, 209 U.S. 414 (1908).

[526] Covey v. Town of Somers, 351 U.S. 141 (1956).

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on certain trust lands (based on liens for unpaid water charges) because their own bookkeeper failed to inform them of the receipt of mailed notices.[527]

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.[528] Requirements of due process are similarly violated by a statute that limits a taxpayer's right to challenge an assessment to cases of fraud or corruption,[529] and by a state tribunal that prevents the recovery of taxes imposed in violation of the Constitution and laws of the United States by invoking a state law that allows suits to recover taxes alleged to have been assessed illegally only if the taxes had been paid at the time and in the manner provided by such law.[530] 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.[531]

Laches.—Persons failing to avail themselves of an opportunity to object and be heard cannot thereafter complain of assessments as arbitrary and unconstitutional.[532] Likewise a car company that failed to report its gross receipts, as required by statute, has no

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[527] Nelson v. New York City, 352 U.S. 103 (1956). This conclusion was unaffected by the disparity between the value of the land taken and the amount owed the city. Having issued appropriate notices, the city cannot be held responsible for the negligence of the bookkeeper and the managing trustee in overlooking arrearages on tax bills, nor is it obligated to inquire why appellants regularly paid real estate taxes on their property.

[528] Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930).

[529] Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907).

[530] Carpenter v. Shaw, 280 U.S. 363 (1930). *See also* Ward v. Love County, 253 U.S. 17 (1920). In this as in other areas, the state must provide procedural safeguards against imposition of an unconstitutional tax. These procedures need not apply *predeprivation*, but a state that denies predeprivation remedy by requiring that tax payments be made before objections are heard must provide a *postdeprivation* remedy. McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990). *See also* Reich v. Collins, 513 U.S. 106 (1994) (violation of due process to hold out a post-deprivation remedy for unconstitutional taxation and then, after the disputed taxes had been paid, to declare that no such remedy exists); Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442 (1998) *(per curiam)* (violation of due process to limit remedy to one who pursued pre-payment of tax, where litigant reasonably relied on apparent availability of post-payment remedy).

[531] Carpenter v. Shaw, 280 U.S. 363 (1930).

[532] Farncomb v. Denver, 252 U.S. 7 (1920).

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further right to contest the state comptroller's estimate of those receipts and his adding to his estimate the 10 percent penalty permitted by law.[533]

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.[534]

Fundamental Rights (Noneconomic Substantive Due Process)

A counterpart to the now-discredited economic substantive due process, noneconomic substantive due process is still vital today. The concept has come to include disparate lines of cases, and various labels have been applied to the rights protected, including "fundamental rights," "privacy rights," "liberty interests" and "incorporated rights." The binding principle of these cases is that they involve rights so fundamental that the courts must subject any legislation infringing on them to close scrutiny. This analysis, criticized by some for being based on extra-constitutional precepts of natural law,[535] serves as the basis for some of the most significant constitutional holdings of our time. For instance, the application of the Bill of Rights to the states, seemingly uncontroversial today, is based not on constitutional text, but on noneconomic substantive due process and the "incorporation" of fundamental rights.[536] Other noneconomic due process holdings, however, such as the cases establishing the right of a woman to have an abortion,[537] remain controversial.

Development of the Right of Privacy.—More so than other areas of law, noneconomic substantive due process seems to have started with few fixed precepts. Were the rights being protected property rights (and thus really protected by economic due process) or were they individual liberties? What standard of review needed to be applied? What were the parameters of such rights once identified? For instance, did a right of "privacy" relate to protecting physical spaces such as one's home, or was it related to the issue of autonomy to make private, intimate decisions? Once a right was

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[533] Pullman Co. v. Knott, 235 U.S. 23 (1914).

[534] *See* analysis under "National Eminent Domain Power," Fifth Amendment, *supra*.

[535] *See*, *e.g.*, Raoul Berger,Government by Judiciary: The Transformation of the Fourteenth Amendment (Cambridge: 1977).

[536] *See* Bill of Rights, "Fourteenth Amendment," *supra*.

[537] *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

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identified, often using abstract labels, how far could such an abstraction be extended? Did protecting the "privacy" of the decisions whether to have a family also include the right to make decisions regarding sexual intimacy? Although many of these issues have been resolved, others remain.

One of the earliest formulations of noneconomic substantive due process was the right to privacy. This right was first proposed by Samuel Warren and Louis Brandeis in an 1890 Harvard Law Review article[538] as a unifying theme to various common law protections of the "right to be left alone," including the developing laws of nuisance, libel, search and seizure, and copyright. According to the authors, "the right to life has come to mean the right to enjoy life,—the right to be let alone . . . . This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature."

The concepts put forth in this article, which appeared to relate as much to private intrusions on persons as to intrusions by government, reappeared years later in a dissenting opinion by Justice Brandeis regarding the Fourth Amendment.[539] Then, in the 1920s, at the heyday of economic substantive due process, the Court ruled in two cases that, although nominally involving the protection of property, foreshadowed the rise of the protection of noneconomic interests. In *Meyer v. Nebraska*,[540] the Court struck down a state law forbidding schools from teaching any modern foreign language to any child who had not successfully finished the eighth grade. Two years later, in *Pierce v. Society of Sisters*,[541] the Court declared it unconstitutional to require public school education of children aged

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[538] Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).

[539] *See* Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting) (arguing against the admissibility in criminal trials of secretly taped telephone conversations). In *Olmstead*, Justice Brandeis wrote: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." 277 U.S. at 478.

[540] 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).

[541] 268 U.S. 510 (1925).

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eight to sixteen. The statute in *Meyer* was found to interfere with the property interest of the plaintiff, a German teacher, in pursuing his occupation, while the private school plaintiffs in *Pierce* were threatened with destruction of their businesses and the values of their properties.[542] Yet in both cases the Court also permitted the plaintiffs to represent the interests of parents and children in the assertion of other noneconomic forms of "liberty."

"Without doubt," Justice McReynolds said in *Meyer*, liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[543] The right of the parents to have their children instructed in a foreign language was "within the liberty of the [Fourteenth] Amendment."[544] *Meyer* was then relied on in *Pierce* to assert that the statute there "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[545]

Although the Supreme Court continued to define noneconomic liberty broadly in *dicta*,[546] this new concept was to have little impact for decades.[547] Finally, in 1967, in *Loving v. Virginia*,[548] the Court held that a statute prohibiting interracial marriage denied substantive due process. Marriage was termed "one of the 'basic civil

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[542] Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 531, 533, 534 (1928). The Court has subsequently made clear that these cases dealt with "a complete prohibition of the right to engage in a calling," holding that "a brief interruption" did not constitute a constitutional violation. Conn v. Gabbert, 526 U.S. 286, 292 (1999) (search warrant served on attorney prevented attorney from assisting client appearing before a grand jury).

[543] 262 U.S. at 399.

[544] 262 U.S. at 400.

[545] 268 U.S. at 534–35.

[546] 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").

[547] *E.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905); Zucht v. King, 260 U.S. 174 (1922) (allowing compulsory vaccination); Buck v. Bell, 274 U.S. 200 (1927) (allowing sexual sterilization of inmates of state institutions found to be afflicted with hereditary forms of insanity or imbecility); Minnesota v. Probate Court *ex rel.* Pearson, 309 U.S. 270 (1940) (allowing institutionalization of habitual sexual offenders as psychopathic personalities).

[548] 388 U.S. 1, 12 (1967).

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rights of man'" and a "fundamental freedom." "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and the classification of marriage rights on a racial basis was "unsupportable." Further development of this line of cases was slowed by the expanded application of the Bill of Rights to the states, which afforded the Court an alternative ground to void state policies.[549]

Despite the Court's increasing willingness to overturn state legislation, the basis and standard of review that the Court would use to review infringements on "fundamental freedoms" were not always clear. In *Poe v. Ullman*,[550] for instance, the Court dismissed as non-justiciable a suit challenging a Connecticut statute banning the use of contraceptives, even by married couples. In dissent, however, Justice Harlan advocated the application of a due process standard of reasonableness—the same lenient standard he would have applied to test economic legislation.[551] Applying a lengthy analysis, Justice Harlan concluded that the statute in question infringed upon a fundamental liberty without the showing of a justification which would support the intrusion. Yet, when the same issue returned to the Court in *Griswold v. Connecticut*,[552] a majority of the Justices rejected reliance on substantive due process[553] and instead decided it on another basis—that the statute was an invasion of privacy, which was a non-textual "penumbral" right protected by a matrix

[549] Indeed, in Griswold v. Connecticut, 381 U.S. 479, 482 (1965), Justice Douglas reinterpreted *Meyer* and *Pierce* as having been based on the First Amendment. Note also that in Epperson v. Arkansas, 393 U.S. 97, 105 (1968), and Tinker v. Des Moines Indep. Community School Dist., 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.

[550] 367 U.S. 497, 522, 539–45 (1961). Justice Douglas, also dissenting, relied on a due process analysis, which began with the texts of the first eight Amendments as the basis of fundamental due process and continued into the "emanations" from this as also protected. Id. at 509.

[551] According to Justice Harlan, due process is limited neither to procedural guarantees nor to the rights enumerated in the first eight Amendments of the Bill of Rights, but is rather "a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions." The liberty protected by the clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." 367 U.S. at 542, 543.

[552] 381 U.S. 479 (1965).

[553] "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." Griswold v. Connecticut, 381 U.S. at 482 (opinion of Court by Justice Douglas).

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of constitutional provisions.[554] Not only was this right to be protected again governmental intrusion, but there was apparently little or no consideration to be given to what governmental interests might justify such an intrusion upon the marital bedroom.

The apparent lack of deference to state interests in *Griswold* was borne out in the early abortion cases, discussed in detail below, which required the showing of a "compelling state interest" to interfere with a woman's right to terminate a pregnancy.[555] Yet, in other contexts, the Court appears to have continued to use a "reasonableness" standard.[556] More recently, the Court has complicated the issue further (again in the abortion context) by the addition of yet another standard, "undue burden." [557]

A further problem confronting the Court is how such abstract rights, once established, are to be delineated. For instance, the constitutional protections afforded to marriage, family, and procreation in *Griswold* have been extended by the Court to apply to married and unmarried couples alike.[558] However, in *Bowers v. Hardwick*,[559] the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited types of intimate activities engaged in by married as well as unmarried couples.[560] Then,

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[554] The analysis, while reminiscent of the "right to privacy" first suggested by Warren and Brandeis, still approached the matter in reliance on substantive due process cases. It should be noted that the separate concurrences of Justices Harlan and White were specifically based on substantive due process, 381 U.S. at 499, 502, which indicates that the majority's position was intended to be something different. Justice Goldberg, on the other hand, in concurrence, would have based the decision on the Ninth Amendment. 381 U.S. at 486–97. *See* analysis under the Ninth Amendment, "Rights Retained By the People," *supra*.

[555] *See* Roe v. Wade, 410 U.S. 113 (1973).

[556] When the Court began to extend "privacy" rights to unmarried person through the equal protection clause, it seemed to rely upon a view of rationality and reasonableness not too different from Justice Harlan's dissent in Poe v. Ullman. Eisenstadt v. Baird, 405 U.S. 438 (1972), is the principal case. *See also* Stanley v. Illinois, 405 U.S. 645 (1972).

[557] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[558] *See*, *e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972). "If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453.

[559] 478 U.S. 186 (1986).

[560] The Court upheld the statute only as applied to the plaintiffs, who were homosexuals, 478 U.S. at 188 (1986), and thus rejected an argument that there is a "fundamental right of homosexuals to engage in acts of consensual sodomy." Id. at

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in *Lawrence v. Texas*,[561] the Supreme Court reversed itself, holding that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violates the Due Process Clause.

Similar disagreement over the appropriate level of generality for definition of a liberty interest was evident in *Michael H. v. Gerald D.*, involving the rights of a biological father to establish paternity and associate with a child born to the wife of another man.[562] While recognizing the protection traditionally afforded a father, Justice Scalia, joined only by Chief Justice Rehnquist in this part of the plurality decision, rejected the argument that a non-traditional familial connection (*i.e.* the relationship between a father and the offspring of an adulterous relationship) qualified for constitutional protection, arguing that courts should limit consideration to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[563] 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.'"[564]

Abortion.—In *Roe v. Wade*,[565] the Court established a right of personal privacy protected by the Due Process Clause that includes the right of a woman to determine whether or not to bear a child. In doing so, the Court dramatically increased judicial oversight of legislation under the privacy line of cases, striking down aspects of abortion-related laws in practically all the states, the District of Columbia, and the territories. To reach this result, the Court first un-

192–93. In a dissent, Justice Blackmun indicated that he would have evaluated the statute as applied to both homosexual and heterosexual conduct, and thus would have resolved the broader issue not addressed by the Court—whether there is a general right to privacy and autonomy in matters of sexual intimacy. Id. at 199–203 (Justice Blackmun dissenting, joined by Justices Brennan, Marshall and Stevens).

[561] 539 U.S. 558 (2003) (overruling *Bowers*).

[562] 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.

[563] 491 U.S. at 128 n.6.

[564] 491 U.S. at 142.

[565] 410 U.S. 113, 164 (1973). A companion case was Doe v. Bolton, 410 U.S. 179 (1973). The opinion by Justice Blackman was concurred in by Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Chief Justice Burger. Justices White and Rehnquist dissented, id. at 171, 221, arguing that the Court should follow the traditional due process test of determining whether a law has a rational relation to a valid state objective and that so judged the statute was valid. Justice Rehnquist was willing to consider an absolute ban on abortions even when the mother's life is in jeopardy to be a denial of due process, 410 U.S. at 173, while Justice White left the issue open. 410 U.S. at 223.

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dertook a lengthy historical review of medical and legal views regarding abortion, finding that modern prohibitions on abortion were of relatively recent vintage and thus lacked the historical foundation which might have preserved them from constitutional review.[566] Then, the Court established that the word "person" as used in the Due Process Clause and in other provisions of the Constitution did not include the unborn, and therefore the unborn lacked federal constitutional protection.[567] Finally, the Court summarily announced that the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action" includes "a right of personal privacy, or a guarantee of certain areas or zones of privacy"[568] and that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[569]

It was also significant that the Court held this right of privacy to be "fundamental" and, drawing upon the strict standard of review found in equal protection litigation, held that the Due Process Clause required that any limits on this right be justified only by a "compelling state interest" and be narrowly drawn to express only the legitimate state interests at stake.[570] Assessing the possible interests of the states, the Court rejected justifications relating to the promotion of morality and the protection of women from the medical hazards of abortions as unsupported in the record and ill-served by the laws in question. Further, the state interest in protecting the life of the fetus was held to be limited by the lack of a social consensus with regard to the issue of when life begins. Two valid state interests were, however, recognized. "[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"[571]

Because medical data indicated that abortion prior to the end of the first trimester is relatively safe, the mortality rate being lower than the rates for normal childbirth, and because the fetus has no capability of meaningful life outside the mother's womb, the Court found that the state has no "compelling interest" in the first trimester and "the attending physician, in consultation with his patient,

[566] 410 U.S. at 129–47.
[567] 410 U.S. at 156–59.
[568] 410 U.S. at 152–53.
[569] 410 U.S. at 152–53.
[570] 410 U.S. at 152, 155–56. The "compelling state interest" test in equal protection cases is reviewed under "The New Standards: Active Review," *infra*.
[571] 410 U.S. at 147–52, 159–63.

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is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[572] 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.[573] "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."[574]

Thus, the Court concluded that "(a) for the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician; (b) for the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health; (c) for the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Further, in a companion case, the Court struck down three procedural provisions relating to a law that did allow some abortions.[575] These regulations required that an abortion be performed in a hospital accredited by a private accrediting organization, that the operation be approved by the hospital staff abortion committee, and that the performing physician's judgment be confirmed by the independent examination of the patient by two other licensed physicians. These provisions were held not to be justified by the state's interest in maternal health because they were not reasonably re-

[572] 410 U.S. at 163.

[573] 410 U.S. at 163.

[574] 410 U.S. at 163–64. A fetus becomes "viable" when it is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id. at 160 (footnotes omitted).

[575] Doe v. Bolton, 410 U.S. 179 (1973).

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lated to that interest.[576] 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 abortions on the grounds that the doctor could use his best clinical judgment in light of all the attendant circumstances.[577]

After *Roe*, various states attempted to limit access to this newly found right, such as by requiring spousal or parental consent to obtain an abortion.[578] The Court, however, held that (1) requiring spousal consent was an attempt by the state to delegate a veto power over the decision of the woman and her doctor that the state itself could not exercise,[579] (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,[580] and (3) that a criminal pro-

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[576] 410 U.S. at 192–200. In addition, a residency provision was struck down as violating the privileges and immunities clause of Article IV, § 2. Id. at 200. *See* analysis under "State Citizenship: Privileges and Immunities," *supra*.

[577] 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 holding in *Roe* 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 that is unelaborated in the opinion. *See also* United States v. Vuitch, 402 U.S. 62 (1971).

[578] Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See also* Bellotti v. Baird, 443 U.S. 622 (1979) (parental consent to minor's abortion); Colautti v. Franklin, 439 U.S. 379 (1979) (imposition on doctor's determination of viability of fetus and obligation to take life-saving steps); Singleton v. Wulff, 428 U.S. 106 (1976) (standing of doctors to litigate right of patients to Medicaid-financed abortions); Bigelow v. Virginia, 421 U.S. 809 (1975) (ban on newspaper ads for abortions); Connecticut v. Menillo, 423 U.S. 9 (1975) (state ban on performance of abortion by "any person" may constitutionally be applied to prosecute nonphysicians performing abortions).

[579] 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.

[580] 428 U.S. at 72–75. Minors have rights protected by the Constitution, but the states have broader authority to regulate their activities than those of adults. Here, the Court perceived no state interest served by the requirement that overcomes the woman's right to make her own decision; it emphasized that it was not holding that every minor, regardless of age or maturity, could give effective consent for an abortion. Justice Stevens joined the other dissenters on this part of the holding. Id. at 101. In Bellotti v. Baird, 443 U.S. 622 (1979), eight Justices agreed that a parental consent law, applied to a mature minor found to be capable of making, and having made, an informed and reasonable decision to have an abortion, was void but split on the reasoning. Four Justices would hold that neither parents nor a court could be given an absolute veto over a mature minor's decision, while four others would

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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*.[581] The Court sustained provisions that required the woman's written consent to an abortion with assurances that it is informed and freely given, and the Court also upheld mandatory reporting and recordkeeping for public health purposes with adequate assurances of confidentiality. Another provision that barred the use of the most commonly used method of abortion after the first 12 weeks of pregnancy was declared unconstitutional because, in the absence of another comparably safe technique, it did not qualify as a reasonable protection of maternal health and it instead operated to deny the vast majority of abortions after the first 12 weeks.[582]

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."[583] The Court held, however, that a state may require that abortions be performed in hospitals *or* licensed outpatient clinics, as long as licensing standards do not "depart from accepted medical practice."[584] Various "informed consent" requirements were struck

hold that if parental consent is required the state must afford an expeditious access to court to review the parental determination and set it aside in appropriate cases. In H. L. v. Matheson, 450 U.S. 398 (1981), the Court upheld, as applied to an unemancipated minor living at home and dependent on her parents, a statute requiring a physician, "if possible," to notify the parents or guardians of a minor seeking an abortion. The decisions leave open a variety of questions, addressed by some concurring and dissenting Justices, dealing with when it would not be in the minor's best interest to avoid notifying her parents and with the alternatives to parental 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).

[581] 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).

[582] Planned Parenthood v. Danforth, 428 U.S. 52, 75–79 (1976).

[583] 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.

[584] Simopoulos v. Virginia, 462 U.S. 506, 516 (1983).

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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.[585] The Court also invalidated a 24-hour waiting period following a woman's written, informed consent.[586]

On the other hand, the Court upheld a requirement that tissue removed in clinic abortions be submitted to a pathologist for examination, because the same requirements were imposed for in-hospital abortions and for almost all other in-hospital surgery.[587] The Court also 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.[588] Further, the Court refused to extend *Roe* to require states to pay for abortions for the indigent, holding that neither due process nor equal protection requires government to use public funds for this purpose.[589]

The equal protection discussion in the public funding case bears closer examination because of its significance for later cases. The equal protection question arose because public funds were being made available for medical care to indigents, including costs attendant to childbirth, but not for expenses associated with abortions. Admittedly, discrimination based on a non-suspect class such as indigents does not generally compel strict scrutiny. However, the question arose as to whether such a distinction impinged upon the right to abortion, and thus should be subjected to heightened scrutiny. The Court rejected this argument and used a rational basis test, noting that the condition that was a barrier to getting an abortion—indigency—was not created or exacerbated by the government.

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[585] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444–45 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). In *City of Akron*, the Court explained that while the state has a legitimate interest in ensuring that the woman's consent is informed, it may not 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. *City of Akron*, 462 U.S. 416, 448–49 (1983).

[586] 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).

[587] Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 486–90 (1983).

[588] 462 U.S. at 482–86, 505.

[589] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980). *See also* Beal v. Doe, 432 U.S. 438 (1977) (states are not required by federal law to fund abortions); Harris v. McRae, 448 U.S. at 306–11 (same). The state restriction in *Maher*, 432 U.S. at 466, applied to nontherapeutic abortions, whereas the federal law barred funding for most medically necessary abortions as well, a distinction the Court deemed irrelevant, *Harris*, 448 U.S. at 323, although it provided Justice Stevens with the basis for reaching different results. Id. at 349 (dissenting).

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In reaching this finding the Court held that, while a state-created obstacle need not be absolute to be impermissible, it must at a minimum "unduly burden" the right to terminate a pregnancy. And, the Court held, to allocate public funds so as to further a state interest in normal childbirth does not create an absolute obstacle to obtaining and does not unduly burden the right.[590] What is interesting about this holding is that the "undue burden" standard was to take on new significance when the Court began raising questions about the scope and even the legitimacy of *Roe*.

Although the Court expressly reaffirmed *Roe v. Wade* in 1983,[591] its 1989 decision in *Webster v. Reproductive Health Services*[592] signaled the beginning of a retrenchment. *Webster* upheld two aspects of a Missouri statute regulating abortions: a prohibition on the use of public facilities and employees to perform abortions not necessary to save the life of the mother; and a requirement that a physician, before performing an abortion on a fetus she has reason to believe has reached a gestational age of 20 weeks, make an actual viability determination.[593] This retrenchment was also apparent in two 1990 cases in which the Court upheld both one-parent and two-parent notification requirements.[594]

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[590] "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there." *Maher*, 432 U.S. at 469–74 (the quoted sentence is at 474); *Harris*, 448 U.S. at 321–26. Justices Brennan, Marshall, and Blackmun dissented in both cases and Justice Stevens joined them in *Harris*. Applying the same principles, the Court held that a municipal hospital could constitutionally provide hospital services for indigent women for childbirth but deny services for abortion. Poelker v. Doe, 432 U.S. 519 (1977).

[591] 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.

[592] 492 U.S. 490 (1989).

[593] 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.

[594] Ohio's requirement that one parent be notified of a minor's intent to obtain an abortion, or that the minor use a judicial bypass procedure to obtain the approval of a juvenile court, was approved. Ohio v. Akron Center for Reproductive Health,

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Webster, however, exposed a split in the Court's approach to *Roe v. Wade*. The plurality opinion by Chief Justice Rehnquist, joined in that part by Justices White and Kennedy, was highly critical of *Roe*, but found no occasion to overrule it. Instead, the plurality's approach sought to water down *Roe* by applying a less stringent standard of review. For instance, the plurality found the viability testing requirement valid because it "permissibly furthers the State's interest in protecting potential human life."[595] Justice O'Connor, however, concurred in the result based on her view that the requirement did not impose "an undue burden" on a woman's right to an abortion, while Justice Scalia's concurrence urged that *Roe* be overruled outright. Thus, when a Court majority later invalidated a Minnesota procedure requiring notification of both parents without judicial bypass, it did so because it did "not reasonably further any legitimate state interest."[596]

Roe was not confronted more directly in *Webster* because the viability testing requirement, as characterized by the plurality, merely asserted a state interest in protecting potential human life after viability, and hence did not challenge *Roe's* 'trimester framework.[597] Nonetheless, a majority of Justices appeared ready to reject a strict trimester approach. The plurality asserted a compelling state interest in protecting human life throughout pregnancy, rejecting the notion that the state interest "should come into existence only at the point of viability;"[598] Justice O'Connor repeated her view that the trimester approach is "problematic;"[599] and, as mentioned, Justice Scalia would have done away with *Roe* altogether.

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497 U.S. 502 (1990). And, while the Court ruled that Minnesota's requirement that both parents be notified was invalid standing alone, the statute was saved by a judicial bypass alternative. Hodgson v. Minnesota, 497 U.S. 417 (1990).

[595] 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.

[596] Hodgson v. Minnesota, 497 U.S. 417, 450 (1990).

[597] 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.

[598] 492 U.S. at 519.

[599] 492 U.S. at 529. Previously, dissenting in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983), Justice O'Connor had suggested that the *Roe* trimester framework "is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."

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Three years later, however, the Court invoked principles of *stare decisis* to reaffirm *Roe's* "essential holding," although it had by now abandoned the trimester approach and adopted Justice O'Connor's "undue burden" test and *Roe's* "essential holding."[600] According to the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[601] the right to abortion has three parts. "First is a recognition of the right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."

This restatement of *Roe's* essentials, recognizing a legitimate state interest in protecting fetal life throughout pregnancy, necessarily eliminated the rigid trimester analysis permitting almost no regulation in the first trimester. Viability, however, still marked "the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions,"[602] but less burdensome regulations could be applied before viability. "What is at stake," the three-Justice plurality asserted, "is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." Thus, unless an undue burden is im-

[600] 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*," id. at 923, and would have invalidated all of the challenged provisions. Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, would have overruled *Roe* and upheld all challenged aspects of the Pennsylvania law.

[601] 505 U.S. 833, 846 (1992).

[602] 505 U.S. 833, 860 (1992).

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posed, states may adopt measures "designed to persuade [a woman] to choose childbirth over abortion."[603]

Casey did, however, overturn earlier decisions striking down informed consent and 24-hour waiting periods.[604] 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.[605]After 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[606] 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).[607] 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 to decide whether to bear a child.

The passage of various state laws restricting so-called "partial birth abortions" gave observers an opportunity to see if the "undue

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[603] 505 U.S. at 877–78. Application of these principles in *Casey* led the Court to uphold overrule some precedent, but to invalidate arguably the most restrictive provision. The four provisions challenged which were upheld included a narrowed definition of "medical emergency" (which controlled exemptions from the Act's limitations), record keeping and reporting requirements, an informed consent and 24-hour waiting period requirement; and a parental consent requirement, with possibility for judicial bypass, applicable to minors. The provisions which was invalidated as an undue burden on a woman's right to an abortion was a spousal notification requirement.

[604] 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).

[605] Requiring informed consent for medical procedures was found to be both commonplace and reasonable, and, in the absence of any evidence of burden, the state could require that information relevant to informed consent be provided by a physician rather than an assistant. The 24-hour waiting period was approved both in theory (it being reasonable to assume "that important decisions will be more informed and deliberate if they follow some period of reflection") and in practice (in spite of "troubling" findings of increased burdens on poorer women who must travel significant distances to obtain abortions, and on all women who must twice rather than once brave harassment by anti-abortion protesters). 505 U.S. at 885–87.

[606] The plurality Justices were joined in this part of their opinion by Justices Blackmun and Stevens.

[607] 505 U.S. at 898.

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burden" standard was in fact likely to lead to a major curtailment of the right to obtain an abortion. In *Stenberg v. Carhart*,[608] the Court reviewed a Nebraska statute that forbade "partially delivering vaginally a living unborn child before killing the unborn child and completing the delivery." Although the state argued that the statute was directed only at an infrequently used procedure referred to as an "intact dilation and excavation," the Court found that the statute could be interpreted to include the far more common procedure of "dilation and excavation."[609] The Court also noted that the prohibition appeared to apply to abortions performed by these procedures throughout a pregnancy, including before viability of the fetus, and that the sole exception in the statute was to allow an abortion that was necessary to preserve the life of the mother.[610] Thus, the statute brought into question both the distinction maintained in *Casey* between pre-viability and post-viability abortions, and the oft-repeated language from *Roe* that provides that abortion restrictions must contain exceptions for situations where there is a threat to either the life or the health of a pregnant woman.[611] The Court, however, reaffirmed the central tenets of its previous abortion decisions, striking down the Nebraska law because its possible application to pre-viability abortions was too broad, and the exception for threats to the life of the mother was too narrow.[612]

Only seven years later, however, the Supreme Court decided *Gonzales v. Carhart*,[613] which, although not formally overruling *Stenberg*, appeared to signal a change in how the Court would analyze limitations on abortion procedures. Of perhaps greatest significance is that *Gonzales* was the first case in which the Court upheld a statutory prohibition on a particular method of abortion. In *Gonzales*, the Court, by a 5–4 vote,[614] upheld a federal criminal statute that prohibited an overt act to "kill" a fetus where it had been intention-

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[608] 530 U.S. 914 (2000).

[609] 530 U.S. at 938–39.

[610] The Nebraska law provided that such procedures could be performed where "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb. Rev. Stat. Ann. § 28–328(1).

[611] Roe v. Wade, 410 U.S. 113, 164 (1973).

[612] As to the question of whether an abortion statute that is unconstitutional in some instances should be struck down in application only or in its entirety, *see* Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) (challenge to parental notification restrictions based on lack of emergency health exception remanded to determine legislative intent regarding severability of those applications).

[613] 550 U.S. 124 (2007).

[614] Justice Kennedy wrote the majority opinion, joined by Justices Roberts, Scalia, Thomas, and Alito, while Justice Ginsberg authored a dissenting opinion, which was joined by Justices Steven, Souter and Breyer. Justice Thomas also filed a concurring opinion, joined by Justice Scalia, calling for overruling *Casey* and *Roe*.

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ally "deliver[ed] . . . [so that] in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother."[615] The Court distinguished this federal statute from the Nebraska statute that it had struck down in *Stenberg*, holding that the federal statute applied only to the intentional performance of the less-common "intact dilation and excavation." The Court found that the federal statute was not unconstitutionally vague because it provided "anatomical landmarks" that provided doctors with a reasonable opportunity to know what conduct it prohibited.[616] Further, the scienter requirement (that delivery of the fetus to these landmarks before fetal demise be intentional) was found to alleviate vagueness concerns.[617]

In a departure from the reasoning of *Stenberg*, the Court held that the failure of the federal statute to provide a health exception[618] was justified by congressional findings that such a procedure was not necessary to protect the health of a mother. Noting that the Court has given "state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty," the Court held that, at least in the context of a facial challenge, such an exception was not needed where "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women."[619] The Court did, however, leave open the possibility that as-applied challenges could still be made in individual cases.[620]

As in *Stenberg*, the prohibition considered in *Gonzales* extended to the performance of an abortion before the fetus was viable, thus directly raising the question of whether the statute imposed an "undue burden" on the right to obtain an abortion. Unlike the statute in *Stenberg*, however, the ban in *Gonzales* was limited to the far less common "intact dilation and excavation" procedure, and consequently did not impose the same burden as the Nebraska

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[615] 18 U.S.C. § 1531(b)(1)(A). The penalty imposed on a physician for a violation of the statute was fines and/or imprisonment for not more than 2 years. In addition, the physician could be subject to a civil suit by the father (or maternal grandparents, where the mother is a minor) for money damages for all injuries, psychological and physical, occasioned by the violation of this section, and statutory damages equal to three times the cost of the partial-birth abortion.

[616] 550 U.S. at 150.

[617] 550 U.S. at 148–150.

[618] As in *Stenberg*, the statute provided an exception for threats to the life of a woman.

[619] 550 U.S. at 162. Arguably, this holding overruled *Stenberg* insofar as *Stenberg* had allowed a facial challenge to the failure of Nebraska to provide a health exception to its prohibition on intact dilation and excavation abortions. 530 U.S. at 929–38.

[620] 550 U.S. at 168.

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statute. The Court also found that there was a "rational basis" for the limitation, including governmental interests in the expression of "respect for the dignity of human life," "protecting the integrity and ethics of the medical profession," and the creation of a "dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."[621]

Privacy after Roe: Informational Privacy, Privacy of the Home or Personal Autonomy?.—The use of strict scrutiny to review intrusions on personal liberties in *Roe v. Wade* seemed to portend the Court's striking down many other governmental restraints upon personal activities. These developments have not occurred, however, as the Court has been relatively cautious in extending the right to privacy. Part of the reason that the Court may have been slow to extend the rationale of *Roe* to other contexts was that "privacy" or the right "to be let alone" appears to encompass a number of different concepts arising from different parts of the Constitution, and the same combination of privacy rights and competing governmental interests are not necessarily implicated in other types of "private" conduct.

For instance, the term "privacy" itself seems to encompass at least two different but related issues. First, it relates to protecting against disclosure of personal information to the outside world, *i.e.,* the right of individuals to determine how much and what information about themselves is to be revealed to others.[622] Second, it relates inward toward notions of personal autonomy, *i.e.,* the freedom of individuals to perform or not perform certain acts or subject themselves to certain experiences.[623] These dual concepts, here referred to as "informational privacy" and "personal autonomy," can easily arise in the same case, as government regulation of personal behavior can limit personal autonomy, while investigating and prosecuting such behavior can expose it to public scrutiny. Unfortunately, some of the Court's cases identified violations of a right of privacy without necessarily making this distinction clear. While the main thrust of the Court's fundamental-rights analysis appears to emphasize the personal autonomy aspect of privacy, now often phrased as "liberty" interests, a clear analytical framework for parsing of these two concepts in different contexts has not yet been established.

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[621] 550 U.S. at 160.

[622] For instance, Justice Douglas's asked rhetorically in *Griswold*: "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." 381 U.S. at 486.

[623] Whalen v. Roe, 429 U.S. 589, 598–600 (1977).

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Another reason that "privacy" is difficult to define is that the right appears to arise from multiple sources. For instance, the Court first identified issues regarding informational privacy as specifically tied to various provisions of Bill of Rights, including the First and Fourth Amendments. In *Griswold v. Connecticut*,[624] however, Justice Douglas found an independent right of privacy in the "penumbras" of these and other constitutional provisions. Although the parameters and limits of the right to privacy were not well delineated by that decision, which struck down a statute banning married couples from using contraceptives, the right appeared to be based on the notion that the government should not be allowed to gather information about private, personal activities.[625] However, years later, when the closely related abortion cases were decided, the right to privacy being discussed was now characterized as a "liberty interest" protected under the Due Process Clause of the Fourteenth Amendment,[626] and the basis for the right identified was more consistent with a concern for personal autonomy.

After *Griswold*, the Court had several opportunities to address and expand on the concept of Fourteenth Amendment informational privacy, but instead it returned to Fourth and Fifth Amendment principles to address official regulation of personal information.[627] For example, in *United States v. Miller*,[628] the Court, in evaluating the right of privacy of depositors to restrict government access to cancelled checks maintained by the bank, relied on whether there was an expectation of privacy under the Fourth Amend-

[624] 381 U.S. 479 (1965).

[625] The predominant concern flowing through the several opinions in Griswold v. Connecticut is the threat of forced disclosure about the private and intimate lives of persons through the pervasive surveillance and investigative efforts that would be needed to enforce such a law; moreover, the concern was not limited to the pressures such investigative techniques would impose on the confines of the Fourth Amendment's search and seizure clause, but also included techniques that would have been within the range of permissible investigation.

[626] 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).

[627] *E.g.*, California Bankers Ass'n v. Shultz, 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).

[628] 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).

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ment.[629] Also, the Court has held that First Amendment itself affords some limitation upon governmental acquisition of information, although only where the exposure of such information would violate freedom of association or the like.[630]

Similarly, in *Fisher v. United States*,[631] the Court held that the Fifth Amendment's Self-incrimination Clause did not prevent the IRS from obtaining income tax records prepared by accountants and in the hands of either the taxpayer or his attorney, no matter how incriminating, because the Amendment only protects against compelled testimonial self-incrimination. The Court noted that it "has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence that, in the Court's view, did not involve compelled testimonial self-incrimination of some sort."[632] Furthermore, it wrote, "[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."[633]

So what remains of informational privacy? A cryptic opinion in *Whalen v. Roe*[634] may indicate the Court's continuing willingness to recognize privacy interests as independent constitutional rights. At issue was a state's pervasive regulation of prescription drugs with abuse potential, and a centralized computer record-keeping system through which prescriptions, including patient identification, could be stored. The scheme was attacked on the basis that it invaded privacy interests against disclosure and privacy interests involving autonomy of persons in choosing whether to have the medication. The Court appeared to agree that both interests are protected, but

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[629] The Bank Secrecy Act required the banks to retain cancelled checks. The Court held that the checks were business records of the bank in which the depositors had no expectation of privacy and therefore there was no Fourth Amendment standing to challenge government legal process directed to the bank, and this status was unchanged by the fact that the banks kept the records under government mandate in the first place.

[630] *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).

[631] 425 U.S. 391 (1976).

[632] 425 U.S. at 399.

[633] 425 U.S. at 401.

[634] 429 U.S. 589 (1977).

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because the scheme was surrounded with extensive security protection against disclosure beyond that necessary to achieve the purposes of the program it was not thought to "pose a sufficiently grievous threat to either interest to establish a constitutional violation."[635] Lower court cases have raised substantial questions as to whether this case established a "fundamental right" to informational privacy, and instead found that some as yet unspecified balancing test or intermediate level of scrutiny was at play.[636]

More than two decades after *Whalen*, the Court remains ambivalent about whether such a privacy right exists, but seems to have settled on a context-specific standard of reasonableness to evaluate such claims. In *Nasa v. Nelson*[637] the Court considered whether government contractors working at NASA's Jet Propulsion Laboratory could be required as part of a background investigation to fill out questionnaires regarding, among other topics, illegal drug use or treatment thereof, and to have personal references queried as to any adverse information going to honesty or trustworthiness. Over a vigorous dissent, the Court presumed without deciding that the government actions implicated a privacy interest of constitutional significance,[638] but then, considering that the employees in question were working in a federal facility and that the background check was the same as was used for federal employees, the Court upheld the questions as "reasonable, employment related" inquiries.[639]

The Court has also briefly considered yet another aspect of privacy—the idea that certain personal activities that were otherwise unprotected could obtain some level of constitutional protection by being performed in particular private locations, such as the home. In *Stanley v. Georgia*,[640] the Court held that the government may not make private possession of obscene materials for private use a crime. Normally, investigation and apprehension of an individual

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[635] 429 U.S. at 598–604. The Court cautioned that it had decided nothing about the privacy implications of the accumulation and disclosure of vast amounts of information in data banks. Safeguarding such information from disclosure "arguably has its roots in the Constitution," at least "in some circumstances," the Court seemed to indicate. Id. at 605. *Compare* id. at 606 (Justice Brennan concurring). What the Court's careful circumscription of the privacy issue through balancing does to the concept is unclear after Nixon v. Administrator of General Services, 433 U.S. 425, 455–65 (1977) (stating that an invasion of privacy claim "cannot be considered in abstract [and] . . . must be weighed against the public interest"). But see id. at 504, 525–36 (Chief Justice Burger dissenting), and 545 n.1 (Justice Rehnquist dissenting).

[636] *See, e.g.,* Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (". . . we believe that the balancing test, more common to due process claims, is appropriate here.").

[637] 562 U.S. ___, No. 09–530, slip op. (2011).

[638] 562 U.S. ___, No. 09–530, slip op. at 11.

[639] 562 U.S. ___, No. 09–530, slip op. at 12–16.

[640] 394 U.S. 557 (1969).

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for possessing pornography in the privacy of the home would raise obvious First Amendment free speech and the Fourth Amendment search and seizure issues. In this case, however, the material was obscenity, unprotected by the First Amendment, and the police had a valid search warrant, obviating Fourth Amendment concerns.[641] Nonetheless, the Court based its decision upon a person's protected right to receive what information and ideas he wishes, which derives from the "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy,"[642] and from the failure of the state to either justify protecting an individual from himself or to show empirical proof of such activity harming society.[643]

The potential significance of *Stanley* was enormous, as any number of illegal personal activities, such as drug use or illegal sex acts, could arguably be practiced in the privacy of one's home with little apparent effect on others. *Stanley*, however, was quickly restricted to the particular facts of the case, namely possession of obscenity in the home.[644] In *Paris Adult Theatre I v. Slaton*,[645] which upheld the government's power to prevent the showing of obscene material in an adult theater, the Court recognized that governmental interests in regulating private conduct could include the promotion of individual character and public morality, and improvement of the quality of life and "tone" of society. "It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those

[641] In fact, the Court passed over a subsidiary Fourth Amendment issue that was available for decision in favor of a broader resolution. 394 U.S. at 569–72. (Stewart, J., concurring).

[642] 394 U.S. at 564–65.

[643] The rights noted by the Court were held superior to the interests Georgia asserted to override them. That is, first, the state was held to have no authority to protect an individual's mind from the effects of obscenity, to promote the moral content of one's thoughts. Second, the state's assertion that exposure to obscenity may lead to deviant sexual behavior was rejected on the basis of a lack of empirical support and, more important, on the basis that less intrusive deterrents were available. Thus, a right to be free of governmental regulation in this area was clearly recognized.

[644] United States v. Reidel, 402 U.S. 351, 354–56 (1971) (no right to distribute obscene material for private use); United States v. Thirty-seven Photographs, 402 U.S. 363, 375–76 (1971) (no right to import obscene material for private use); United States v. 12 200–Ft. Reels of Film, 413 U.S. 123 (1973) (no right to acquire obscene material for private use); Osborne v. Ohio, 495 U.S. 103, 109–111 (1990) (no right to possess child pornography in the home).

[645] 413 U.S. 49 (1973).

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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."[646]

Furthermore, continued the Court in *Paris Adult Theatre I*, "[o]ur Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always beyond state regulation is a step we are unable to take. . . . The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society.'"[647]

Ultimately, the idea that acts should be protected not because of what they are, but because of where they are performed, may have begun and ended with *Stanley*. The limited impact of *Stanley* was reemphasized in *Bowers v. Hardwick*.[648] The Court in *Bowers*, finding that there is no protected right to engage in homosexual sodomy in the privacy of the home, held that *Stanley* did not implicitly create protection for "voluntary sexual conduct [in the home]

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[646] 413 U.S. at 64. Similar themes can be found in Roe v. Wade, 410 U.S. 113, 148 (1972), decided the year before. Because the Court had determined that the right to obtain an abortion constituted a protected "liberty," the State was required to justify its proscription by a compelling interest. Departing from a *laissez faire*, "free will" approach to individual autonomy, the Court recognized protecting the health of the mother as a valid interest. The Court also mentioned but did not rule upon a state interest in protecting morality. The Court was referring not to the morality of abortion, but instead to the promotion of sexual morality through making abortion unavailable. Roe v. Wade, 410 U.S. 113, 148 (1972).

[647] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57–63, 63–64, 68–69 (1973); *see also* id. at 68 n.15. Although it denied a privacy right to view obscenity in a theater, the Court recognized that, in order to protect otherwise recognized autonomy rights, the privacy right might need to be expanded to a variety of different locations: "[T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 n.13 (1973). Thus, arguably, the constitutional protection of places (as opposed to activities) arises not because of any inherent privacy of the location, but because the protected activities normally take place in those locales.

[648] 478 U.S. 186 (1986).

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between consenting adults."[649] Instead, the Court found *Stanley* "firmly grounded in the First Amendment,"[650] and noted that extending the reasoning of that case to homosexual conduct would result in protecting all voluntary sexual conduct between consenting adults, including adultery, incest, and other sexual crimes. Although *Bowers* has since been overruled by *Lawrence v. Texas*[651] based on precepts of personal autonomy, the latter case did not appear to signal the resurrection of the doctrine of protecting activities occurring in private places.

So, what of the expansion of the right to privacy under the rubric of personal autonomy? The Court speaking in *Roe* in 1973 made it clear that, despite the importance of its decision, the protection of personal autonomy was limited to a relatively narrow range of behavior. "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. at 453–54; id. at 460, 463–65 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska*, supra."[652]

Despite the limiting language of *Roe*, the concept of privacy still retained sufficient strength to occasion major constitutional decisions. For instance, in the 1977 case of *Carey v. Population Services Int'l*,[653] recognition of the "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

[649] 478 U.S. at 195–96. Dissenting, Justice Blackmun challenged the Court's characterization of *Stanley*, suggesting that it had rested as much on the Fourth as on the First Amendment, and that "the right of an individual to conduct intimate relationships in . . . his or her own home [is] at the heart of the Constitution's protection of privacy." Id. at 207–08.

[650] 478 U.S. 186, 195 (1986).

[651] 539 U.S. 558 (2003).

[652] Roe v. Wade, 410 U.S. 113, 152 (1973).

[653] 431 U.S. 678 (1977).

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or distribute contraceptives to a minor under 16.[654] The Court significantly extended the *Griswold-Baird* line of cases so as to make the "decision whether or not to beget or bear a child" a "constitutionally protected right of privacy" interest that government may not burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to express only that interest or interests.

For a time, the limits of the privacy doctrine were contained by the 1986 case of *Bowers v. Hardwick*,[655] where the Court by a 5–4 vote roundly rejected the suggestion that the privacy cases protecting "family, marriage, or procreation" extend protection to private consensual homosexual sodomy,[656] and also rejected the more comprehensive claim that the privacy cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[657] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibited

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[654] 431 U.S. at 684–91. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackmun, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court's general principles. Id. at 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id. at 703. Chief Justice Burger, id. at 702, and Justice Rehnquist, id. at 717, dissented.

The limitation of the number of outlets to adults "imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and was unjustified by any interest put forward by the state. The prohibition on sale to minors was judged not by the compelling state interest test, but instead by inquiring whether the restrictions serve "any significant state interest . . . that is not present in the case of an adult." This test is "apparently less rigorous" than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The attempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors' sexual activity, the Court even more doubted, because the State presented no evidence, that limiting access would deter minors from engaging in sexual activity. Id. at 691–99. This portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id. at 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id. at 702, 717.

[655] 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.

[656] "[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.

[657] 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. 478 U.S. at 191. The Court concluded

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the practice.[658] The privacy of the home does not protect all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults."[659] Interestingly, Justice Blackmun, in dissent, was most critical of the Court's framing of the issue as one of homosexual sodomy, as the sodomy statute at issue was not so limited.[660]

Yet, *Lawrence v. Texas*,[661] by overruling *Bowers*, brought the outer limits of noneconomic substantive due process into question by once again using the language of "privacy" rights. Citing the line of personal autonomy cases starting with *Griswold*, the Court found that sodomy laws directed at homosexuals "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[662]

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that there was no "fundamental right [of] homosexuals to engage in acts of consensual sodomy," as homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." 478 U.S. at 191–92.

[658] 478 U.S. at 191–92. Chief Justice Burger's brief concurring opinion amplified this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." Id. at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). Id.

[659] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." 478 U.S. at 195–96. Dissenting Justices Blackmun (id. at 209 n.4) and Stevens (id. at 217–18) suggested that these crimes are readily distinguishable.

[660] 478 U.S. at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. *See* id. at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomy by married couples, and that Georgia had not justified selective application to homosexuals. Id. at 219. Justice Blackmun would instead have addressed the issue more broadly as to whether the law violated an individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he asserted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy. 478 U.S. at 204–06. This position was rejected by the majority, however, which held that the thrust of the fundamental right of privacy in this area is one functionally related to "family, marriage, or procreation." 478 U.S. at 191. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

[661] 539 U.S. 558 (2003).

[662] 539 U.S. at 567.

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Although it quarreled with the Court's finding in *Bowers v. Hardwick* that the proscription against homosexual behavior had "ancient roots," *Lawrence* did not attempt to establish that such behavior was in fact historically condoned. This raises the question as to what limiting principles are available in evaluating future arguments based on personal autonomy. Although the Court seems to recognize that a state may have an interest in regulating personal relationships where there is a threat of "injury to a person or abuse of an institution the law protects,"[663] it also seems to reject reliance on historical notions of morality as guides to what personal relationships are to be protected.[664] Thus, the parameters for regulation of sexual conduct remain unclear.

For instance, the extent to which the government may regulate the sexual activities of minors has not been established.[665] Analysis of this questions is hampered, however, because the Court has still not explained what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty, and how indeed these factors vary significantly enough from other human relationships. The Court's observation in *Roe v. Wade* "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[666] provides little elucidation.[667]

Despite the Court's decision in *Lawrence*, there is a question as to whether the development of noneconomic substantive due process will proceed under an expansive right of "privacy" or under the more limited "liberty" set out in *Roe*. There still appears to be a tendency to designate a right or interest as a right of privacy when

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[663] 539 U.S. at 567.

[664] The Court noted with approval Justice Stevens' dissenting opinion in Bowers v. Hardwick, stating "that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 539 U.S. at 577–78, *citing* Bowers v. Hardwick, 478 U.S. at 216.

[665] The Court reserved this question in *Carey*, 431 U.S. at 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

[666] Roe v. Wade, 410 U.S. 113, 152 (1973). The language is quoted in full in *Carey*, 431 U.S. at 684–85.

[667] 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 not its social significance but is whether it is "explicitly or implicitly guaranteed by the Constitution." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973). That this limitation has not been honored with respect to equal protection analysis or due process analysis can be easily discerned. *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).

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the Court has already concluded that it is valid to extend an existing precedent of the privacy line of cases. Because much of this protection is also now settled to be a "liberty" protected under the due process clauses, however, the analytical significance of denominating the particular right or interest as an element of privacy seems open to question.

Family Relationships.—Unlike the shifting definitions of the "privacy" line of case, the Court's treatment of the "liberty" of familial relationships has a relatively principled doctrinal basis. Starting with *Meyer* and *Pierce,*[668] the Court has held that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[669] For instance, the right to marry is a fundamental right protected by the Due Process Clause,[670] and only "reasonable regulations" of marriage may be imposed.[671] Thus, the Court has held that a state may not deny the right to marry to someone who has failed to meet a child support obligation, as the state already has numerous other means for exacting compliance with support obligations.[672] In fact, any regulation that affects the ability to form, maintain, dissolve, or resolve conflicts within a family is subject to rigorous judicial scrutiny.

There is also a constitutional right to live together as a family,[673] and this right is not limited to the nuclear family. Thus, a neighborhood that is zoned for single-family occupancy, and that defines "family" so as to prevent a grandmother from caring for two grandchildren of different children, was found to violate the Due

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[668] Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1928).

[669] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality). Unlike the liberty interest in property, which derives from early statutory law, these liberties spring instead from natural law traditions, as they are "intrinsic human rights." Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977). These rights, however, do not extend to all close relationships. Bowers v. Hardwick, 478 U.S. 186 (1986) (same sex relationships).

[670] Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974); Zablocki v. Redhail, 434 U.S. 374, 383–87 (1978).

[671] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[672] 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 a violation of due process. Id. at 391, 396. *Compare* Califano v. Jobst, 434 U.S. 47 (1977).

[673] "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).

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Process Clause.[674] And the concept of "family" may extend beyond the biological relationship to the situation of foster families, although the Court has acknowledged that such a claim raises complex and novel questions, and that the liberty interests may be limited.[675] On the other hand, the Court has held that 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.[676]

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.[677] The Court has, however, imposed limits on the ability of a court to require that children be made available for visitation with grandparents and other third parties. In *Troxel v. Granville*,[678] the Court evaluated a Washington State law that allowed "any person" to petition a court "at any time" to obtain visitation rights whenever visitation "may serve the best interests" of a child. Under this law, a child's grandparents were awarded more visitation with a child than was desired by the sole surviving parent. A plurality of the Court, noting the "fundamental rights of parents to make decisions concerning the care, custody and control of their children,"[679] reversed this decision, not-

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[674] 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.

[675] Smith v. Organization of Foster Families, 431 U.S. 816 (1977). As the Court noted, the rights of a natural family arise independently of statutory law, whereas the ties that develop between a foster parent and a foster child arise as a result of state-ordered arrangement. As these latter liberty interests arise from positive law, they are subject to the limited expectations and entitlements provided under those laws. Further, in some cases, such liberty interests may not be recognized without derogation of the substantive liberty interests of the natural parents. Although *Smith* does not define the nature of the interest of foster parents, it would appear to be quite limited and attenuated. Id. at 842–47. In a conflict between natural and foster families, a court is likely to defer to a typical state process which makes such decisions based on the best interests of the child. *See* Quilloin v. Walcott, 434 U.S. 246 (1978).

[676] 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.

[677] The clearest conflict to date was presented by state law giving a veto to parents over their minor children's right to have an abortion. Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Planned Parenthood v. Casey, 503 U.S. 833 (1992). *See also* Parham v. J. R., 442 U.S. 584 (1979) (parental role in commitment of child for treatment of mental illness).

[678] 530 U.S. 57 (2000).

[679] 530 U.S. at 66.

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ing the lack of deference to the parent's wishes and the contravention of the traditional presumption that a fit parent will act in the best interests of a child.

Liberty Interests of People with Mental Disabilities: Civil Commitment and Treatment.—The recognition of liberty rights for people with mental disabilities who are involuntarily committed or who voluntarily seek commitment to public institutions is potentially a major development in substantive due process. The states, pursuant to their *parens patriae* power, have a substantial interest in institutionalizing persons in need of care, both for the protection of such people themselves and for the protection of others.[680] A state, however, "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."[681] Moreover, a person who is constitutionally confined "enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests."[682] Influential lower court decisions have also found a significant right to treatment[683] or "habilitation,"[684] although the Supreme Court's approach in this area has been tentative.

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[680] 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).

[681] O'Connor v. Donaldson, 422 U.S. 563, 576 (1975). *See* Jackson v. Indiana, 406 U.S. 715 (1972); Vitek v. Jones, 445 U.S. 480, 491–94 (1980).

[682] Youngberg v. Romeo, 457 U.S. 307, 324 (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").

[683] 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*, 422 U.S. 563 (1975).

[684] "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; ellipses and brackets supplied by the Court).

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For instance, in *Youngberg v. Romeo*, the Court recognized a liberty right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[685] Although the lower court had agreed that residents at a state mental hospital are entitled to "such treatment as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit,"[686] the Supreme Court found that the plaintiff had reduced his claim to "training related to safety and freedom from restraints."[687] But the Court's concern for federalism, its reluctance to approve judicial activism in supervising institutions, and its recognition of the budgetary constraints associated with state provision of services caused it to hold that lower federal courts must defer to professional decision-making to determine what level of care was adequate. Professional decisions are presumptively valid and liability can be imposed "only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[688] 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.[689]

The Court's resolution of a case involving persistent sexual offenders suggests that state civil commitment systems, besides confining the dangerously mentally ill, may also act to incapacitate per-

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[685] Youngberg v. Romeo, 457 U.S. 307, 319 (1982).

[686] 457 U.S. at 318 n.23.

[687] 457 U.S. at 317–18. Concurring, Justices Blackmun, Brennan, and O'Connor, argued that due process guaranteed patients at least that training necessary to prevent them from losing the skills they entered the institution with. Id. at 325. Chief Justice Burger rejected any protected interest in training. Id. at 329. The Court had also avoided a decision on a right to treatment in O'Connor v. Donaldson, 422 U.S. 563, 573 (1975), vacating and remanding a decision recognizing the right and thereby 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 that had relied on the circuit's *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").

[688] 457 U.S. at 323.

[689] *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). The Supreme Court has limited the injunctive powers of the federal courts in similar situations.

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sons predisposed to engage in specific criminal behaviors. In *Kansas v. Hendricks*,[690] the Court upheld a Kansas law that allowed civil commitment without a showing of "mental illness," so that a defendant diagnosed as a pedophile could be committed based on his having a "mental abnormality" that made him "likely to engage in acts of sexual violence." Although the Court minimized the use of this expanded nomenclature,[691] the concept of "mental abnormality" appears both more encompassing and less defined than the concept of "mental illness." It is unclear how, or whether, the Court would distinguish this case from the indefinite civil commitment of other recidivists such as drug offenders. A subsequent opinion does seem to narrow the *Hendricks* holding so as to require an additional finding that the defendant would have difficulty controlling his or her behavior.[692]

Still other issues await exploration.[693] Additionally, federal legislation is becoming extensive,[694] 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 that the Due Process Clause protects.[695]

"Right to Die".—Although the popular term "right to die" has been used to describe the debate over end-of-life decisions, the underlying issues include a variety of legal concepts, some distinct and some overlapping. For instance, "right to die" could include issues of suicide, passive euthanasia (allowing a person to die by refusal or withdrawal of medical intervention), assisted suicide (providing a person the means of committing suicide), active euthanasia (killing another), and palliative care (providing comfort care which accelerates the death process). Recently, a new category has been

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[690] 521 U.S. 346 (1997).

[691] 521 U.S. at 359. *But see* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (holding that a state can not hold a person suffering from a personality disorder without clear and convincing proof of a mental illness).

[692] Kansas v. Crane, 534 U.S. 407 (2002).

[693] *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).

[694] Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. 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.*

[695] *See*, *e.g.*, Mills v. Rogers, 457 U.S. 291, 299–300 (1982). On the question of procedural due process rights that apply to civil commitments, see "The Problem of Civil Commitment," *infra*.

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suggested—physician-assisted suicide—that appears to be an uncertain blend of assisted suicide or active euthanasia undertaken by a licensed physician.

There has been little litigation of constitutional issues surrounding suicide generally, although Supreme Court *dicta* seems to favor the notion that the state has a constitutionally defensible interest in preserving the lives of healthy citizens.[696] On the other hand, the right of a seriously ill person to terminate life-sustaining medical treatment has been addressed, but not squarely faced. In *Cruzan v. Director, Missouri Department of Health*,[697] the Court, rather than directly addressing the issue, "assume[d]" that "a competent person [has] a constitutionally protected right to refuse lifesaving hydration and nutrition."[698] More importantly, however, a majority of the Justices separately declared that such a liberty interest exists.[699] Yet, it is not clear how actively the Court would seek to protect this right from state regulation.

In *Cruzan,* which involved a patient in a persistent vegetative state, the Court upheld a state requirement that there must be "clear and convincing evidence" of a patient's previously manifested wishes before nutrition and hydration could be withdrawn. Despite the existence of a presumed due process right, the Court held that a state is not required to follow the judgment of the family, the guardian, or "anyone but the patient herself" in making this decision.[700] Thus, in the absence of clear and convincing evidence that the patient had expressed an interest not to be sustained in a persistent vegetative state, or that she had expressed a desire to have a surrogate make such a decision for her, the state may refuse to allow withdrawal of nutrition and hydration.[701]

Despite the Court's acceptance of such state requirements, the implications of the case are significant. First, the Court appears, without extensive analysis, to have adopted the position that refusing nutrition and hydration is the same as refusing other forms of

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[696] Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 280 (1990) ("We do not think that a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death").

[697] 497 U.S. 261 (1990).

[698] 497 U.S. at 279.

[699] *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).

[700] 497 U.S. at 286.

[701] "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 constitutionally protected interests of the individual." 497 U.S. at 281–82.

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medical treatment. Also, the Court seems ready to extend such right not only to terminally ill patients, but also to severely incapacitated patients whose condition has stabilized.[702] However, the Court made clear in a subsequent case, *Washington v. Glucksberg,*[703] that it intends to draw a line between withdrawal of medical treatment and more active forms of intervention.

In *Glucksberg*, the Supreme Court rejected an argument that the Due Process Clause provides a terminally ill individual the right to seek and obtain a physician's aid in committing suicide. Reviewing a challenge to a state statutory prohibition against assisted suicide, the Court noted that it moves with "utmost care" before breaking new ground in the area of liberty interests.[704] The Court pointed out that suicide and assisted suicide have long been disfavored by the American judicial system, and courts have consistently distinguished between passively allowing death to occur and actively causing such death. The Court rejected the applicability of *Cruzan* and other liberty interest cases,[705] noting that while many of the interests protected by the Due Process Clause involve personal autonomy, not all important, intimate, and personal decisions are so protected. By rejecting the notion that assisted suicide is constitutionally protected, the Court also appears to preclude constitutional protection for other forms of intervention in the death process, such as suicide or euthanasia.[706]

PROCEDURAL DUE PROCESS: CIVIL

Generally

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to

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[702] There was testimony that the patient in *Cruzan* could be kept "alive" for about 30 years if nutrition and hydration were continued.

[703] 521 U.S. 702 (1997). In the companion case of Vacco v. Quill, 521 U.S. 793 (1997), the Court also rejected an argument that a state which prohibited assisted suicide but which allowed termination of medical treatment resulting in death unreasonably discriminated against the terminally ill in violation of the Equal Protection Clause of the Fourteenth Amendment.

[704] 521 U.S. at 720.

[705] *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding a liberty interest in terminating pregnancy).

[706] A passing reference by Justice O'Connor in a concurring opinion in *Glucksberg* and its companion case Vacco v. Quill may, however, portend a liberty interest in seeking pain relief, or "palliative" care. *Glucksberg* and *Vacco*, 521 U.S. at 736–37 (Justice O'Connor, concurring).

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the arbitrary exercise of government power.[707] Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved.[708] One of the basic criteria used to establish whether due process is satisfied is whether such procedure was historically required in like circumstances.

Relevance of Historical Use.—The requirements of due process are determined in part by an examination of the settled usages and modes of proceedings of the common and statutory law of England during pre-colonial times and in the early years of this country.[709] In other words, the antiquity of a legal procedure is a factor weighing in its favor. However, it does not follow that a procedure settled in English law and adopted in this country is, or remains, an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be "fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment."[710] Fortunately, the states are not tied down by any provision of the Constitution to the practice and procedure that existed at the common law, but may avail themselves of the wisdom gathered by the experience of the country to make changes deemed to be necessary.[711]

Non-Judicial Proceedings.—A court proceeding is not a requisite of due process.[712] Administrative and executive proceedings

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[707] Thus, where a litigant had the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result. Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).

[708] Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884). "Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law." Id. at 708; *Accord*, Hurtado v. California, 110 U.S. 516, 537 (1884).

[709] Twining v. New Jersey, 211 U.S. 78, 101 (1908); Brown v. New Jersey, 175 U.S. 172, 175 (1899). "A process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country." Hurtado v. California, 110 U.S. at 529.

[710] *Twining*, 211 U.S. at 101.

[711] Hurtado v. California, 110 U.S. 516, 529 (1884); Brown v. New Jersey, 175 U.S. 172, 175 (1899); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 244 (1944).

[712] Ballard v. Hunter, 204 U.S. 241, 255 (1907); Palmer v. McMahon, 133 U.S. 660, 668 (1890).

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are not judicial, yet they may satisfy the Due Process Clause.[713] Moreover, the Due Process Clause does not require *de novo* judicial review of the factual conclusions of state regulatory agencies,[714] and may not require judicial review at all.[715] Nor does the Fourteenth Amendment prohibit a state from conferring judicial functions upon non-judicial bodies, or from delegating powers to a court that are legislative in nature.[716] Further, it is up to a state to determine to what extent its legislative, executive, and judicial powers should be kept distinct and separate.[717]

The Requirements of Due Process.—Although due process tolerates variances in procedure "appropriate to the nature of the case,"[718] it is nonetheless possible to identify its core goals and requirements. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."[719] Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests.[720] The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discov-

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[713] For instance, proceedings to raise revenue by levying and collecting taxes are not necessarily judicial proceedings, yet their validity is not thereby impaired. McMillen v. Anderson, 95 U.S. 37, 41 (1877).

[714] 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).

[715] *See*, *e.g.*, Moore v. Johnson, 582 F.2d 1228, 1232 (9th Cir. 1978) (upholding the preclusion of judicial review of decisions of the Veterans Administration regarding veterans' benefits).

[716] State statutes vesting in a parole board certain judicial functions, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), or conferring discretionary power upon administrative boards to grant or withhold permission to carry on a trade, New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552, 562 (1905), or vesting in a probate court authority to appoint park commissioners and establish park districts, Ohio v. Akron Park Dist., 281 U.S. 74, 79 (1930), are not in conflict with the Due Process Clause and present no federal question.

[717] Carfer v. Caldwell, 200 U.S. 293, 297 (1906).

[718] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[719] Carey v. Piphus, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

[720] Fuentes v. Shevin, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. Carey v. Piphus, 435 U.S. 247, 266–67 (1978); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Nelson v. Adams, 529 U.S. 460 (2000) (amendment of judgement to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute).

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ery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

(1) Notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [721] This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable followup measures" that may be available.[722] In addition, 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.[723] Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it.[724] Such notice, however, need not describe the legal procedures necessary to protect one's interest if such procedures are otherwise set out in published, generally available public sources.[725]

(2) Hearing. "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest." [726] This right is a "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment . . . ." [727] Thus, the notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." [728]

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[721] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See also* Richards v. Jefferson County, 517 U.S. 793 (1996) (res judicata may not apply where taxpayer who challenged a county's occupation tax was not informed of prior case and where taxpayer interests were not adequately protected).

[722] Jones v. Flowers, 547 U.S. 220, 235 (2006) (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed"; the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so).

[723] Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

[724] 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).

[725] City of West Covina v. Perkins, 525 U.S. 234 (1999).

[726] Mathews v. Eldridge, 424 U.S. 319, 333 (1976). "Parties whose rights are to be affected are entitled to be heard." Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

[727] 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).

[728] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

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(3) Impartial Tribunal. Just as in criminal and quasi-criminal cases,[729] an impartial decisionmaker is an essential right in civil proceedings as well.[730] "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."[731] Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board's effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.[732]

There is, however, a "presumption of honesty and integrity in those serving as adjudicators,"[733] so that the burden is on the objecting party to show a conflict of interest or some other specific reason for disqualification of a specific officer or for disapproval of the system. Thus, combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician's suspension, may raise substantial concerns, but does not by itself establish a violation of due process.[734] The Court has also held that the official or personal stake that school board members had in a decision to fire teachers who had engaged in a strike against the school system in violation of

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[729] Tumey v. Ohio, 273 U.S. 510 (1927)); *In re* Murchison, 349 U.S. 133 (1955).

[730] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[731] Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Schweiker v. McClure, 456 U.S. 188, 195 (1982).

[732] Gibson v. Berryhill, 411 U.S. 564 (1973). Or, the conduct of deportation hearings by a person who, while he had not investigated the case heard, was also an investigator who must judge the results of others' investigations just as one of them would some day judge his, raised a substantial problem which was resolved through statutory construction). Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[733] 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).

[734] Withrow v. Larkin, 421 U.S. 35 (1975). Where an administrative officer is acting in a prosecutorial, rather than judicial or quasi-judicial role, an even lesser standard of impartiality applies. Marshall v. Jerrico, 446 U.S. 238, 248–50 (1980) (regional administrator assessing fines for child labor violations, with penalties going into fund to reimburse cost of system of enforcing child labor laws). But "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." Id. at 249.

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state law was not such so as to disqualify them.[735] Sometimes, to ensure an impartial tribunal, the Due Process Clause requires a judge to recuse himself from a case. In *Caperton v. A. T. Massey Coal Co., Inc.*, the Court noted that "most matters relating to judicial disqualification [do] not rise to a constitutional level," and that "matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion."[736] The Court added, however, that "[t]he early and leading case on the subject" had "concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case."[737] In addition, although "[p]ersonal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause,'" there "are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[738] These circumstances include "where a judge had a financial interest in the outcome of a case" or "a conflict arising from his participation in an earlier proceeding."[739] In such cases, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[740] In *Caperton*, a company appealed a jury verdict of $50 million, and its chairman spent $3 million to elect a justice to the Supreme Court of Appeals of West Virginia at a time when "[i]t was reasonably foreseeable . . . that the pending case would be before the newly elected justice."[741] This $3 million was more than the total amount spent by all other supporters of the justice and three times the amount spent by the justice's own committee. The justice was elected, declined to recuse himself, and joined a 3-to-2 decision overturning the jury verdict. The Supreme Court, in a 5-to-4 opinion written by Justice Kennedy, "conclude[d] that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportion-

[735] 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).

[736] 556 U.S. ___, No. 08–22, slip op. at 6 (2009) (citations omitted).

[737] 556 U.S. ___, No. 08–22, slip op. at 6, quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927).

[738] 556 U.S. ___, No. 08–22, slip op. at 6 (citations omitted).

[739] 556 U.S. ___, No. 08–22, slip op. at 7, 9.

[740] 556 U.S. ___, No. 08–22, slip op. at 11 (citations omitted).

[741] 556 U.S. ___, No. 08–22, slip op. at 15.

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ate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." [742]

(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." [743] Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny." [744]

(5) Discovery. The Court has never directly confronted this issue, but in one case it did observe in *dictum* that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." [745] 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.[746] There appear to be no cases, however, holding they must, and there is some authority that they cannot absent congressional authorization.[747]

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[742] 556 U.S. ___, No. 08–22, slip op. at 14. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented, asserting that "a 'probability of bias' cannot be defined in any limited way," "provides no guidance to judges and litigants about when recusal will be constitutionally required," and "will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be." Slip. op. at 1 (Roberts, C.J., dissenting). The majority countered that "[t]he facts now before us are extreme in any measure." Slip op. at 17.

[743] Goldberg v. Kelly, 397 U.S. 254, 269 (1970). *See also* ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93–94 (1913). *Cf.* § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d).

[744] 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).

[745] Greene v. McElroy, 360 U.S. 474, 496 (1959), *quoted with approval in* Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

[746] Recommendations and Reports of the Administrative Conference of the United States 571 (1968–1970).

[747] FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964).

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(6) Decision on the Record. Although this issue arises principally in the administrative law area,[748] it applies generally. "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." [749]

(7) Counsel. In *Goldberg v. Kelly*, the Court held that a government agency must permit a welfare recipient who has been denied benefits to be represented by and assisted by counsel.[750] In the years since, the Court has struggled with whether civil litigants in court and persons before agencies who could not afford retained counsel should have counsel appointed and paid for, and the matter seems far from settled. The Court has established a presumption that an indigent does not have the right to appointed counsel unless his "physical liberty" is threatened.[751] Moreover, that an indigent may have a right to appointed counsel in some civil proceedings where incarceration is threatened does not mean that counsel must be made available in all such cases. Rather, the Court focuses on the circumstances in individual cases, and may hold that provision of counsel is not required if the state provides appropriate alternative safeguards.[752]

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[748] 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 R.R. v. Railroad Comm'n, 324 U.S. 548 (1945) (agency decision supported by evidence in record, its decision sustained, disregarding *ex parte* evidence).

[749] Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (citations omitted).

[750] 397 U.S. 254, 270–71 (1970).

[751] Lassiter v. Department of Social Services, 452 U.S. 18 (1981). The Court purported to draw this rule from Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no *per se* right to counsel in probation revocation proceedings). To introduce this presumption into the balancing, however, appears to disregard the fact that the first factor of Mathews v. Eldridge, 424 U.S. 319 (1976), upon which the Court (and dissent) relied, relates to the importance of the interest to the person claiming the right. Thus, at least in this context, the value of the first *Eldridge* factor is diminished. The Court noted, however, that the Mathews v. Eldridge standards were drafted in the context of the generality of cases and were not intended for case-by-case application. *Cf.* 424 U.S. at 344 (1976).

[752] Turner v. Rogers, 564 U.S. ___, No. 10–10, slip op. (2011). The *Turner* Court denied an indigent defendant appointed counsel in a civil contempt proceeding to enforce a child support order, even though the defendant faced incarceration unless he showed an inability to pay the arrearages. The party opposing the defendant in the case was not the state, but rather the unrepresented custodial parent, nor was the case unusually complex. A five-Justice majority, though denying a right to counsel, nevertheless reversed the contempt order because it found that the procedures followed remained inadequate.

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Though the calculus may vary, cases not involving detention also are determined on a case-by-case basis using a balancing standard.[753]

For instance, in a case involving a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized the parent's interest as "an extremely important one." The Court, however, also noted the state's strong interest in protecting the welfare of children. Thus, as the interest in correct fact-finding was strong on both sides, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no "specially troublesome" substantive or procedural issues had been raised, the litigant did not have a right to appointed counsel.[754] In other due process cases involving parental rights, the Court has held that due process requires special state attention to parental rights.[755] Thus, it would appear likely that in other parental right cases, a right to appointed counsel could be established.

The Procedure That Is Due Process

The Interests Protected: "Life, Liberty and Property".—The language of the Fourteenth Amendment requires the provision of due process when an interest in one's "life, liberty or property" is threatened.[756] Traditionally, the Court made this determination by reference to the common understanding of these terms, as embodied in the development of the common law.[757] In the 1960s, how-

[753] 452 U.S. at 31–32. The balancing decision is to be made initially by the trial judge, subject to appellate review. Id. at 32

[754] 452 U.S. at 27–31. The decision was a five-to-four, with Justices Stewart, White, Powell, and Rehnquist and Chief Justice Burger in the majority, and Justices Blackmun, Brennan, Marshall, and Stevens in dissent. Id. at 35, 59.

[755] *See*, *e.g.*, Little v. Streater, 452 U.S. 1 (1981) (indigent entitled to state-funded blood testing in a paternity action the state required to be instituted); Santosky v. Kramer, 455 U.S. 745 (1982) (imposition of higher standard of proof in case involving state termination of parental rights).

[756] Morrissey v. Brewer, 408 U.S. 471, 481 (1982). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972). Developments under the Fifth Amendment's Due Process Clause have been interchangeable. *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974).

[757] For instance, at common law, one's right of life existed independently of any formal guarantee of it and could be taken away only by the state pursuant to the formal processes of law, and only for offenses deemed by a legislative body to be particularly heinous. One's liberty, generally expressed as one's freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures. One's ownership of lands, chattels, and other properties, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally understood in Anglo-American countries.

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ever, the Court began a rapid expansion of the "liberty" and "property" aspects of the clause to include such non-traditional concepts as conditional property rights and statutory entitlements. Since then, the Court has followed an inconsistent path of expanding and contracting the breadth of these protected interests. The "life" interest, on the other hand, although often important in criminal cases, has found little application in the civil context.

The Property Interest.—The expansion of the concept of "property rights" beyond its common law roots reflected a recognition by the Court that certain interests that fall short of traditional property rights are nonetheless important parts of people's economic well-being. For instance, where household goods were sold under an installment contract and title was retained by the seller, the possessory interest of the buyer was deemed sufficiently important to require procedural due process before repossession could occur.[758] In addition, the loss of the use of garnished wages between the time of garnishment and final resolution of the underlying suit was deemed a sufficient property interest to require some form of determination that the garnisher was likely to prevail.[759] Furthermore, the continued possession of a driver's license, which may be essential to one's livelihood, is protected; thus, a license should not be suspended after an accident for failure to post a security for the amount of damages claimed by an injured party without affording the driver an opportunity to raise the issue of liability.[760]

A more fundamental shift in the concept of property occurred with recognition of society's growing economic reliance on government benefits, employment, and contracts,[761] and with the decline of the "right-privilege" principle. This principle, discussed previously in the First Amendment context,[762] was pithily summarized by Justice Holmes in dismissing a suit by a policeman protesting being fired from his job: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a po-

[758] Fuentes v. Shevin, 407 U.S. 67 (1972) (invalidating replevin statutes which authorized the authorities to seize goods simply upon the filing of an ex parte application and the posting of bond).

[759] Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

[760] Bell v. Burson, 402 U.S. 535 (1971). *Compare* Dixon v. Love, 431 U.S. 105 (1977), *with* Mackey v. Montrym, 443 U.S. 1 (1979). *But see* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (no liberty interest in worker's compensation claim where reasonableness and necessity of particular treatment had not yet been resolved).

[761] *See* Laurence Tribe, American Constitutional Law 685 (2d. ed) (1988).

[762] Tribe, *supra*, at 1084–90.

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liceman."[763] Under this theory, a finding that a litigant had no "vested property interest" in government employment,[764] or that some form of public assistance was "only" a privilege,[765] meant that no procedural due process was required before depriving a person of that interest.[766] The reasoning was that, if a government was under no obligation to provide something, it could choose to provide it subject to whatever conditions or procedures it found appropriate.

The conceptual underpinnings of this position, however, were always in conflict with a line of cases holding that the government could not require the diminution of constitutional rights as a condition for receiving benefits. This line of thought, referred to as the "unconstitutional conditions" doctrine, held that, "even though a 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."[767] Nonetheless, the two doctrines coexisted in an unstable relationship until the 1960s, when the right-privilege distinction started to be largely disregarded.[768]

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[769] against erroneous governmental deprivation of something it had within its discretion bestowed. Previously, the Court had limited due process protections to constitutional rights, traditional rights, common law rights and "natural rights." Now, under a new "positivist" approach, a protected property or liberty interest might be found based on any positive governmental statute or governmental prac-

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[763] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E.2d 517, 522 (1892).

[764] 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).

[765] Flemming v. Nestor, 363 U.S. 603 (1960).

[766] Barsky v. Board of Regents, 347 U.S. 442 (1954).

[767] Perry v. Sindermann, 408 U.S. 593, 597 (1972). *See* Speiser v. Randall, 357 U.S. 513 (1958).

[768] *See* William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968). Much of the old fight had to do with imposition of conditions on admitting corporations into a state. *Cf.* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656–68 (1981) (reviewing the cases). The right-privilege distinction is not, however, totally moribund. *See* Buckley v. Valeo, 424 U.S. 1, 108–09 (1976) (sustaining as qualification for public financing of campaign agreement to abide by expenditure limitations otherwise unconstitutional); Wyman v. James, 400 U.S. 309 (1971).

[769] This means that Congress or a state legislature could still simply take away part or all of the benefit. Richardson v. Belcher, 404 U.S. 78 (1971); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982).

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tice that gave rise to a legitimate expectation. Indeed, for a time it appeared that this positivist conception of protected rights was going to displace the traditional sources.

As noted previously, the advent of this new doctrine can be seen in *Goldberg v. Kelly*,[770] in which the Court held that, because termination of welfare assistance may deprive an eligible recipient of the means of livelihood, the government must provide a pretermination evidentiary hearing at which an initial determination of the validity of the dispensing agency's grounds for termination may be made. In order to reach this conclusion, the Court found that such benefits "are a matter of statutory entitlement for persons qualified to receive them."[771] Thus, where the loss or reduction of a benefit or privilege was conditioned upon specified grounds, it was found that the recipient had a property interest entitling him to proper procedure before termination or revocation.

At first, the Court's emphasis on the importance of the statutory rights to the claimant led some lower courts to apply the Due Process Clause by assessing the weights of the interests involved and the harm done to one who lost what he was claiming. This approach, the Court held, was inappropriate. "[W]e must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[772] To have a property interest in the constitutional sense, the Court held, it was not enough that one has an abstract need or desire for a benefit or a unilateral expectation. He must rather "have a legitimate claim of entitlement" to the benefit. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[773]

Consequently, in *Board of Regents v. Roth*, the Court held that the refusal to renew a teacher's contract upon expiration of his one-year term implicated no due process values because there was noth-

[770] 397 U.S. 254 (1970).

[771] 397 U.S. at 261–62. *See also* Mathews v. Eldridge, 424 U.S. 319 (1976) (Social Security benefits).

[772] Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972).

[773] 408 U.S. at 577. Although property interests often arise by statute, the Court has also recognized interests established by state case law. Thus, where state court holdings required that private utilities terminate service only for cause (such as nonpayment of charges), then a utility is required to follow procedures to resolve disputes about payment or the accuracy of charges prior to terminating service. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

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ing in the public university's contract, regulations, or policies that "created any legitimate claim" to reemployment.[774] By contrast, in *Perry v. Sindermann*,[775] a professor employed for several years at a public college was found to have a protected interest, even though his employment contract had no tenure provision and there was no statutory assurance of it.[776] The "existing rules or understandings" were deemed to have the characteristics of tenure, and thus provided a legitimate expectation independent of any contract provision.[777]

The Court has also found "legitimate entitlements" in a variety of other situations besides employment. In *Goss v. Lopez*,[778] an Ohio statute provided for both free education to all residents between five and 21 years of age and compulsory school attendance; thus, the state was deemed to have obligated itself to accord students some due process hearing rights prior to suspending them, even for such a short period as ten days. "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has oc-

[774] 436 U.S. at 576–78. The Court also held that no liberty interest was implicated, because in declining to rehire Roth the state had not made any charges against him or taken any actions that would damage his reputation or stigmatize him. 436 at 572–75. For an instance of protection accorded a claimant on the basis of such an action, see Codd v. Vegler. *See also* Bishop v. Wood, 426 U.S. 341, 347–50 (1976); Vitek v. Jones, 445 U.S. 480, 491–94 (1980); Board of Curators v. Horowitz, 435 U.S. 78, 82–84 (1978).

[775] 408 U.S. 593 (1972). *See* Leis v. Flynt, 439 U.S. 438 (1979) (finding no practice or mutually explicit understanding creating interest).

[776] 408 U.S. at 601–03 (1972). In contrast, a statutory assurance was found in Arnett v. Kennedy, 416 U.S. 134 (1974), where the civil service laws and regulations allowed suspension or termination "only for such cause as would promote the efficiency of the service." 416 U.S. at 140. On the other hand, a policeman who was a "permanent employee" under an ordinance which appeared to afford him a continuing position subject to conditions subsequent was held not to be protected by the Due Process Clause because the federal district court interpreted the ordinance as providing only employment at the will and pleasure of the city, an interpretation that the Supreme Court chose not to disturb. Bishop v. Wood, 426 U.S. 341 (1976). "On its face," the Court noted, "the ordinance on which [claimant relied] may fairly be read as conferring" both "a property interest in employment . . . [and] an enforceable expectation of continued public employment." 426 U.S. at 344–45 (1976). The district court's decision had been affirmed by an equally divided appeals court and the Supreme Court deferred to the presumed greater expertise of the lower court judges in reading the ordinance. 426 U.S. at 345 (1976).

[777] 408 U.S. at 601.

[778] 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). *See also* 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).

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curred."[779] The Court is highly deferential, however, to school dismissal decisions based on academic grounds.[780]

The further one gets from traditional precepts of property, the more difficult it is to establish a due process claim based on entitlements. In *Town of Castle Rock v. Gonzales*,[781] the Court considered whether police officers violated a constitutionally protected property interest by failing to enforce a restraining order obtained by an estranged wife against her husband, despite having probable cause to believe the order had been violated. While noting statutory language that required that officers either use "every reasonable means to enforce [the] restraining order" or "seek a warrant for the arrest of the restrained person," the Court resisted equating this language with the creation of an enforceable right, noting a longstanding tradition of police discretion coexisting with apparently mandatory arrest statutes.[782] Finally, the Court even questioned whether finding that the statute contained mandatory language would have created a property right, as the wife, with no criminal enforcement authority herself, was merely an indirect recipient of the benefits of the governmental enforcement scheme.[783]

In *Arnett v. Kennedy*,[784] an incipient counter-revolution to the expansion of due process was rebuffed, at least with respect to entitlements. Three Justices sought to qualify the principle laid down in the entitlement cases and to restore in effect much of the right-privilege distinction, albeit in a new formulation. The case involved a federal law that provided that employees could not be discharged except for cause, and the Justices acknowledged that due process rights could be created through statutory grants of entitlements. The Justices, however, observed that the same law specifically withheld the procedural protections now being sought by the employees. Because "the property interest which appellee had in his

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[779] Goss v. Lopez, 419 U.S. at 574. *See also* Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license); O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) (statutory entitlement of nursing home residents protecting them in the enjoyment of assistance and care).

[780] 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.

[781] 545 U.S. 748 (2005).

[782] 545 U.S. at 759. The Court also noted that the law did not specify the precise means of enforcement required; nor did it guarantee that, if a warrant were sought, it would be issued. Such indeterminancy is not the "hallmark of a duty that is mandatory." Id. at 763.

[783] 545 U.S. at 764–65.

[784] 416 U.S. 134 (1974).

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employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest,"[785] the employee would have to "take the bitter with the sweet."[786] Thus, Congress (and by analogy state legislatures) could qualify the conferral of an interest by limiting the process that might otherwise be required.

But the other six Justices, although disagreeing among themselves in other respects, rejected this attempt 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 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."[787] Yet, in *Bishop v. Wood*,[788] the Court accepted a district court's finding that a policeman held his position "at will" despite language setting forth conditions for discharge. Although the majority opinion was couched in terms of statutory construction, the majority appeared to come close to adopting the three-Justice *Arnett* position, so much so that the dissenters accused the majority of having repudiated the majority position of the six Justices in *Arnett*. And, in *Goss v. Lopez*,[789] Justice Powell, writing in dissent but using language quite similar to that of Justice Rehnquist in *Arnett*, seemed to indicate that the right to public education could be qualified by a statute authorizing a school principal to impose a ten-day suspension.[790]

Subsequently, however, the Court held squarely 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 virtually any state-created prop-

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[785] 416 U.S. at 155 (Justices Rehnquist and Stewart and Chief Justice Burger).

[786] 416 U.S. at 154.

[787] 416 U.S. 167 (Justices Powell and Blackmun concurring). *See* 416 U.S. at 177 (Justice White concurring and dissenting), 203 (Justice Douglas dissenting), 206 (Justices Marshall, Douglas, and Brennan dissenting).

[788] 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.

[789] 419 U.S. 565, 573–74 (1975). *See* id. at 584, 586–87 (Justice Powell dissenting).

[790] 419 U.S. at 584, 586–87 (Justice Powell dissenting).

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erty interest at will.[791] A striking application of this analysis is found in *Logan v. Zimmerman Brush Co.*,[792] 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 noted that various older cases had clearly established that causes of action were property, and, in any event, Logan's claim was an entitlement grounded in state law and thus could only be removed "for cause." This property interest existed independently of the 120-day time period and could not simply be taken away by agency action or inaction.[793]

The Liberty Interest.—With respect to liberty interests, the Court has followed a similarly meandering path. Although the traditional concept of liberty was freedom from physical restraint, the Court has expanded the concept to include various other protected interests, some statutorily created and some not.[794] Thus, in *Ingraham v. Wright*,[795] the Court unanimously agreed that school children had a liberty interest in freedom from wrongfully or excessively administered corporal punishment, whether or not such interest was protected by statute. "The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."[796]

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[791] Vitek v. Jones, 445 U.S. 480, 491 (1980). *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

[792] 455 U.S. 422 (1982).

[793] 455 U.S. at 428–33 A different majority of the Court also found an equal protection denial. 455 U.S. at 438.

[794] These procedural liberty interests should not, however, be confused with substantive liberty interests, which, if not outweighed by a sufficient governmental interest, may not be intruded upon regardless of the process followed. *See* "Fundamental Rights (Noneconomic Due Process)," *supra*.

[795] 430 U.S. 651 (1977).

[796] 430 U.S. at 673. The family-related liberties discussed under substantive due process, as well as the associational and privacy ones, no doubt provide a fertile source of liberty interests for procedural protection. *See* Armstrong v. Manzo, 380 U.S. 545 (1965) (natural father, with visitation rights, must be given notice and opportunity to be heard with respect to impending adoption proceedings); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father could not simply be presumed unfit to have custody of his children because his interest in his children warrants deference and protection). See also Smith v. Organization of Foster Families, 431 U.S. 816 (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).

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The Court also appeared to have expanded the notion of "liberty" to include the right to be free of official stigmatization, and found that such threatened stigmatization could in and of itself require due process.[797] Thus, in *Wisconsin v. Constantineau*,[798] the Court invalidated a statutory scheme in which persons could be labeled "excessive drinkers," without any opportunity for a hearing and rebuttal, and could then be barred from places where alcohol was served. The Court, without discussing the source of the entitlement, noted that the governmental action impugned the individual's reputation, honor, and integrity.[799]

But, in *Paul v. Davis*,[800] the Court appeared to retreat from recognizing damage to reputation alone, holding instead that the liberty interest extended only to those situations where loss of one's reputation also resulted in loss of a statutory entitlement. In *Davis*, the police had included plaintiff's photograph and name on a list of "active shoplifters" circulated to merchants without an opportunity for notice or hearing. But the Court held that "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interest by means of damage actions."[801] Thus, unless the government's official defamation has a specific negative effect on an entitlement, such as the denial to "excessive drinkers" of the right to obtain alcohol that occurred in *Constantineau*, there is no protected liberty interest that would require due process.

A number of liberty interest cases that involve statutorily created entitlements involve prisoner rights, and are dealt with more

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[797] Board of Regents v. Roth, 408 U.S. 564, 569–70 (1972); Goss v. Lopez, 419 U.S. 565 (1975).

[798] 400 U.S. 433 (1971).

[799] *But see* Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003) (posting of accurate information regarding sex offenders on state Internet website does not violate due process as the site does not purport to label the offenders as presently dangerous).

[800] 424 U.S. 693 (1976).

[801] Here the Court, 424 U.S. at 701–10, distinguished *Constantineau* as being a "reputation-plus" case. That is, it involved not only the stigmatizing of one posted but it also "deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry." 424 U.S. at 708. How the state law positively did this the Court did not explain. But, of course, the reputation-plus concept is now well-settled. *See* discussion below. *See also* Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Siegert v. Gilley, 500 U.S. 226 (1991); Paul v. Davis, 424 U.S. 693, 711–12 (1976). In a later 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).

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extensively in the section on criminal due process. However, they are worth noting here. In *Meachum v. Fano*,[802] the Court held that a state prisoner was not entitled to a fact-finding hearing when he was 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 was satisfied by the initial valid conviction, which had deprived him of liberty, and (2) no state law guaranteed him the right to remain in the prison to which he was initially assigned, subject to transfer for cause of some sort. As a prisoner could be transferred for any reason or for no reason under state law, the decision of prison officials was not dependent upon any state of facts, and no hearing was required.

In *Vitek v. Jones*,[803] by contrast, a state statute permitted transfer of a prisoner to a state mental hospital for treatment, but the transfer could be effectuated only upon a finding, by a designated physician or psychologist, that the prisoner "suffers from a mental disease or defect" and "cannot be given treatment in that facility." Because the transfer was conditioned upon a "cause," the establishment of the facts necessary to show the cause had to be done through fair procedures. Interestingly, however, the *Vitek* Court also held that the prisoner had a "residuum of liberty" in being free from the different confinement and from the stigma of involuntary commitment for mental disease that the Due Process Clause protected. Thus, the Court has recognized, in this case and in the cases involving revocation of parole or probation,[804] a liberty interest that is separate from a statutory entitlement and that can be taken away only through proper procedures.

But, with respect to the possibility of parole or commutation or otherwise more rapid release, no matter how much the expectancy matters to a prisoner, in the absence of some form of positive entitlement, the prisoner may be turned down without observance of procedures.[805] Summarizing its prior holdings, the Court recently concluded that two requirements must be present before a liberty interest is created in the prison context: the statute or regulation must contain "substantive predicates" limiting the exercise of discretion, and there must be explicit "mandatory language" requiring

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[802] 427 U.S. 215 (1976). *See also* Montanye v. Haymes, 427 U.S. 236 (1976).

[803] 445 U.S. 480 (1980).

[804] Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[805] Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998); Jago v. Van Curen, 454 U.S. 14 (1981). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (due process applies to forfeiture of good-time credits and other positivist granted privileges of prisoners).

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a particular outcome if substantive predicates are found.[806] In an even more recent case, the Court limited the application of this test to those circumstances where the restraint on freedom imposed by the state creates an "atypical and significant hardship."[807]

Proceedings in Which Procedural Due Process Need Not Be Observed.—Although due notice and a reasonable opportunity to be heard are two fundamental protections found in almost all systems of law established by civilized countries,[808] there are certain proceedings in which the enjoyment of these two conditions has not been deemed to be constitutionally necessary. For instance, persons adversely affected by a law cannot challenge its validity on the ground that the legislative body that enacted it gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no consideration to particular points of view. "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."[809]

Similarly, when an administrative agency engages in a legislative function, as, for example, when it drafts regulations of general application affecting an unknown number of persons, it need not afford a hearing prior to promulgation.[810] On the other hand, if a regulation, sometimes denominated an "order," is of limited application, that is, it affects an identifiable class of persons, the question whether notice and hearing is required and, if so, whether it must

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[806] 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).

[807] Sandin v. Conner, 515 U.S. 472, 484 (1995) (30-day solitary confinement not atypical "in relation to the ordinary incidents of prison life"); Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship").

[808] Twining v. New Jersey, 211 U.S. 78, 110 (1908); Jacob v. Roberts, 223 U.S. 261, 265 (1912).

[809] 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). *Cf.* Logan v. Zimmerman Brush Co., 445 U.S. 422, 432–33 (1982).

[810] United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

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precede such action, becomes a matter of greater urgency and must be determined by evaluating the various factors discussed below.[811]

One such factor is whether agency action is subject to later judicial scrutiny.[812] In one of the initial decisions construing the Due Process Clause of the Fifth Amendment, the Court upheld the authority of the Secretary of the Treasury, acting pursuant to statute, to obtain money from a collector of customs alleged to be in arrears. The Treasury simply issued a distress warrant and seized the collector's property, affording him no opportunity for a hearing, and requiring him to sue for recovery of his property. While acknowledging that history and settled practice required proceedings in which pleas, answers, and trials were requisite before property could be taken, the Court observed that the distress collection of debts due the crown had been the exception to the rule in England and was of long usage in the United States, and was thus sustainable.[813]

In more modern times, the Court upheld a procedure under which a state banking superintendent, after having taken over a closed bank and issuing notices to stockholders of their assessment, could issue execution for the amounts due, subject to the right of each stockholder to contest his liability for such an assessment by an affidavit of illegality. The fact that the execution was issued in the first instance by a governmental officer and not from a court, followed by personal notice and a right to take the case into court, was seen as unobjectionable.[814]

It is a violation of due process for a state to enforce a judgment against a party to a proceeding without having given him an opportunity to be heard sometime before final judgment is entered.[815] 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

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[811] 410 U.S. at 245 (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at issue, requiring a hearing in latter proceedings but not in the former). *See* Londoner v. City of Denver, 210 U.S. 373 (1908).

[812] "It is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights which, by later resort to the courts, secures to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process." Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246–47 (1944).

[813] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[814] Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928).

[815] 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).

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remitted to other actions initiated by him[816] 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.[817] On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was held to have been deprived of his rights without due process of law.[818]

When Process Is Due.—The requirements of due process, as has been noted, depend upon the nature of the interest at stake, while the form of due process required is determined by the weight of that interest balanced against the opposing interests.[819] The currently prevailing standard is that formulated in *Mathews v. Eldridge*,[820] which concerned termination of Social Security benefits. "Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

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[816] 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).

[817] 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).

[818] Saunders v. Shaw, 244 U.S. 317 (1917).

[819] "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970), (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Justice Frankfurter concurring)). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 894–95 (1961).

[820] 424 U.S. 319, 335 (1976).

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The termination of welfare benefits in *Goldberg v. Kelly*,[821] which could have resulted in a "devastating" loss of food and shelter, had required a pre-deprivation hearing. The termination of Social Security benefits at issue in *Mathews* would require less protection, however, because those benefits are not based on financial need and a terminated recipient would be able to apply for welfare if need be. Moreover, the determination of ineligibility for Social Security benefits more often turns upon routine and uncomplicated evaluations of data, reducing the likelihood of error, a likelihood found significant in *Goldberg*. Finally, the administrative burden and other societal costs involved in giving Social Security recipients a pre-termination hearing would be high. Therefore, a post-termination hearing, with full retroactive restoration of benefits, if the claimant prevails, was found satisfactory.[822]

Application of the *Mathews* standard and other considerations brought some noteworthy changes to the process accorded debtors and installment buyers. Earlier cases, which had focused upon the interests of the holders of the property in not being unjustly deprived of the goods and funds in their possession, leaned toward requiring pre-deprivation hearings. Newer cases, however, look to the interests of creditors as well. "The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."[823]

Thus, *Sniadach v. Family Finance Corp.*,[824] which mandated pre-deprivation hearings before wages may be garnished, has apparently been limited to instances when wages, and perhaps certain other basic necessities, are in issue and the consequences of deprivation would be severe.[825] *Fuentes v. Shevin*,[826] which struck down

[821] 397 U.S. 254, 264 (1970).

[822] Mathews v. Eldridge, 424 U.S. 319, 339–49 (1976).

[823] 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*.

[824] 395 U.S. 337 (1969).

[825] North Georgia Finishing v. Di-Chem, 419 U.S. 601, 611 n.2 (1975) (Justice Powell concurring). The majority opinion draws no such express distinction, *see* id. at 605–06, rather emphasizing that *Sniadach-Fuentes* do require observance of *some* due process procedural guarantees. *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 614 (1974) (opinion of Court by Justice White emphasizing the wages aspect of the earlier case).

[826] 407 U.S. (1972).

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a replevin statute that authorized the seizure of property (here household goods purchased on an installment contract) simply upon the filing of an *ex parte* application and the posting of bond, has been limited,[827] so that an appropriately structured *ex parte* judicial determination before seizure is sufficient to satisfy due process.[828] Thus, laws authorizing sequestration, garnishment, or other seizure of property of an alleged defaulting debtor need only require that (1) the creditor furnish adequate security to protect the debtor's interest, (2) the creditor make a specific factual showing before a neutral officer or magistrate, not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) an opportunity be assured for an adversary hearing promptly after seizure to determine the merits of the controversy, with the burden of proof on the creditor.[829]

Similarly, applying the *Mathews v. Eldridge* standard in the context of government employment, the Court has held, albeit by a combination of divergent opinions, that the interest of the employee in retaining his job, the governmental interest in the expeditious removal of unsatisfactory employees, the avoidance of administrative

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[827] *Fuentes* was an extension of the *Sniadach* principle to all "significant property interests" and thus mandated pre-deprivation hearings. *Fuentes* was a decision of uncertain viability from the beginning, inasmuch as it was four-to-three; argument had been heard prior to the date Justices Powell and Rehnquist joined the Court, hence neither participated in the decision. *See Di-Chem*, 419 U.S. at 616–19 (Justice Blackmun dissenting); *Mitchell*, 416 U.S. at 635–36 (1974) (Justice Stewart dissenting).

[828] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975). More recently, the Court has applied a variant of the Mathews v. Eldridge formula in holding that Connecticut's prejudgment attachment statute, which "fail[ed] to provide a preattachment hearing without at least requiring a showing of some exigent circumstance," operated to deny equal protection. Connecticut v. Doehr, 501 U.S. 1, 18 (1991). "[T]he relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." 501 U.S. at 11.

[829] Mitchell v. W.T. Grant Co., 416 U.S. at 615–18 (1974) and at 623 (Justice Powell concurring). *See also* Arnett v. Kennedy, 416 U.S. 134, 188 (1974) (Justice White concurring in part and dissenting in part). Efforts to litigate challenges to seizures in actions involving two private parties may be thwarted by findings of "no state action," but there often is sufficient participation by state officials in transferring possession of property to constitute state action and implicate due process. *Compare* Flagg Bros. 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).

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burdens, and the risk of an erroneous termination combine to require the provision of some minimum pre-termination notice and opportunity to respond, followed by a full post-termination hearing, complete with all the procedures normally accorded and back pay if the employee is successful.[830] Where the adverse action is less than termination of employment, the governmental interest is significant, and where reasonable grounds for such action have been established separately, then a prompt hearing held after the adverse action may be sufficient.[831] In other cases, hearings with even minimum procedures may be dispensed with when what is to be established is so pro forma or routine that the likelihood of error is very small.[832] In a case dealing with negligent state failure to observe a procedural deadline, the Court held that the claimant was entitled to a hearing with the agency to pass upon the merits of his claim prior to dismissal of his action.[833]

In *Brock v. Roadway Express, Inc.*,[834] a Court plurality applied a similar analysis to governmental regulation of private employment, determining that an employer may be ordered by an agency to reinstate a "whistle-blower" employee without an opportunity for a full evidentiary hearing, but that the employer is entitled to be informed of the substance of the employee's charges, and to have an opportunity for informal rebuttal. The principal difference with the *Mathews v. Eldridge* test was that here the Court acknowledged two conflicting private interests to weigh in the equation: that of the employer "in controlling the makeup of its workforce" and that of the employee in not being discharged for whistleblowing.

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[830] Arnett v. Kennedy, 416 U.S. 134, 170–71 (1974) (Justice Powell concurring), and 416 U.S. at 195–96 (Justice White concurring in part and dissenting in part); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (discharge of state government employee). In Barry v. Barchi, 443 U.S. 55 (1979), the Court held that the state interest in assuring the integrity of horse racing carried on under its auspices justified an interim suspension without a hearing once it established the existence of certain facts, provided that a prompt judicial or administrative hearing would follow suspension at which the issues could be determined was assured. *See also* FDIC v. Mallen, 486 U.S. 230 (1988) (strong public interest in the integrity of the banking industry justifies suspension of indicted bank official with no pre-suspension hearing, and with 90-day delay before decision resulting from post-suspension hearing).

[831] Gilbert v. Homar, 520 U.S. 924 (1997) (no hearing required prior to suspension without pay of tenured police officer arrested and charged with a felony).

[832] *E.g.*, Dixon v. Love, 431 U.S. 105 (1977) (when suspension of driver's license is automatic upon conviction of a certain number of offenses, no hearing is required because there can be no dispute about facts).

[833] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

[834] 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.

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Whether the case signals a shift away from evidentiary hearing requirements in the context of regulatory adjudication will depend on future developments.[835]

A delay in retrieving money paid to the government is unlikely to rise to the level of a violation of due process. In *City of Los Angeles v. David*,[836] a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the city. When he subsequently sought to challenge the imposition of this impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as the private interest affected—the temporary loss of the use of the money—could be compensated by the addition of an interest payment to any refund of the fee. Further factors considered were that a 30-day delay was unlikely to create a risk of significant factual errors, and that shortening the delay significantly would be administratively burdensome for the city.

In another respect, the balancing standard of *Mathews* has resulted in states' having wider flexibility in determining what process is required. For instance, in an alteration of previously existing law, no hearing is required if a state affords the claimant an adequate alternative remedy, such as a judicial action for damages or breach of contract.[837] Thus, the Court, in passing on the infliction of corporal punishment in the public schools, held that the existence of common-law tort remedies for wrongful or excessive administration of punishment, plus the context in which the punishment was administered (*i.e.*, the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonableness in punishment), made reasonably assured the probability that a child would not be punished without cause or excessively.[838] The Court did not, however, inquire about the availability of judicial remedies for such violations in the state in which the case arose.[839]

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[835] 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.

[836] 538 U.S. 715 (2003).

[837] *See*, *e.g.*, Lujan v. G & G Fire Sprinklers, Inc., 523 U.S. 189 (2001) (breach of contract suit against state contractor who withheld payment to subcontractor based on state agency determination of noncompliance with Labor Code sufficient for due process purposes).

[838] Ingraham v. Wright, 430 U.S. 651, 680–82 (1977).

[839] 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.

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The Court has required greater protection from property deprivations resulting from operation of established state procedures than from those resulting from random and unauthorized acts of state employees,[840] and presumably this distinction still holds. Thus, the Court has held that post-deprivation procedures would not satisfy due process if it is "the state system itself that destroys a complainant's property interest."[841] Although the Court briefly entertained the theory that a negligent (*i.e.*, non-willful) action by a state official was sufficient to invoke due process, and that a post-deprivation hearing regarding such loss was required,[842] the Court subsequently overruled this holding, stating that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."[843]

In "rare and extraordinary situations," where summary action is necessary to prevent imminent harm to the public, and the private interest infringed is reasonably deemed to be of less importance, government can take action with no notice and no opportunity to defend, subject to a later full hearing.[844] Examples are seizure

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[840] Logan v. Zimmerman Brush Co., 455 U.S. at 435–36 (1982). The Court emphasized that a post-deprivation hearing regarding harm inflicted by a state procedure would be inadequate. "That is particularly true where, as here, the State's only post-termination process comes in the form of an independent tort action. Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole." 455 U.S. 422, 436–37.

[841] 455 U.S. at 436.

[842] More expressly adopting the tort remedy theory, the Court in Parratt v. Taylor, 451 U.S. 527 (1981), held that the loss of a prisoner's mail-ordered goods through the negligence of prison officials constituted a deprivation of property, but that the state's post-deprivation tort-claims procedure afforded adequate due process. When a state officer or employee acts negligently, the Court recognized, there is no way that the state can provide a pre-termination hearing; the real question, therefore, is what kind of post-deprivation hearing is sufficient. When the action complained of is the result of the unauthorized failure of agents to follow established procedures and there is no contention that the procedures themselves are inadequate, the Due Process Clause is satisfied by the provision of a judicial remedy which the claimant must initiate. 451 U.S. at 541, 543–44. It should be noted that *Parratt* was a property loss case, and thus may be distinguished from liberty cases, where a tort remedy, by itself, may not be adequate process. *See* Ingraham v. Wright, 430 U.S. at 680–82.

[843] Daniels v. Williams, 474 U.S. 327, 328 (1986) (involving negligent acts by prison officials). Hence, there is no requirement for procedural due process stemming from such negligent acts and no resulting basis for suit under 42 U.S.C. § 1983 for deprivation of rights deriving from the Constitution. Prisoners may resort to state tort law in such circumstances, but neither the Constitution nor § 1983 provides a federal remedy.

[844] Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971). *See* Parratt v. Taylor, 451 U.S. 527, 538–40 (1981). Of course, one may waive his due process rights, though as with other constitutional rights, the waiver must be knowing and voluntary. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). *See also* Fuentes v. Shevin, 407 U.S. 67, 94–96 (1972).

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of contaminated foods or drugs or other such commodities to protect the consumer,[845] collection of governmental revenues,[846] and the seizure of enemy property in wartime.[847] Thus, citing national security interests, the Court upheld an order, issued without notice and an opportunity to be heard, excluding a short-order cook employed by a concessionaire from a Naval Gun Factory, but the basis of the five-to-four decision is unclear.[848] On the one hand, the Court was ambivalent about a right-privilege distinction;[849] 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.[850]

Jurisdiction

Generally.—Jurisdiction may be defined as the power of a government to create legal interests, and the Court has long held that the Due Process Clause limits the abilities of states to exercise this power.[851] In the famous case of *Pennoyer v. Neff*,[852] the Court enunciated two principles of jurisdiction respecting the states in a federal system[853]: 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."[854] Over a long period of

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[845] 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).

[846] Phillips v. Commissioner, 283 U.S. 589, 597 (1931).

[847] Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921).

[848] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

[849] 367 U.S. at 894, 895, 896 (1961).

[850] 367 U.S. at 896–98. *See* Goldberg v. Kelly, 397 U.S. 254, 263 n.10 (1970); Board of Regents v. Roth, 408 U.S. 564, 575 (1972); Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (plurality opinion), and 416 U.S. at 181–183 (Justice White concurring in part and dissenting in part).

[851] Scott v. McNeal, 154 U.S. 34, 64 (1894).

[852] 95 U.S. 714 (1878).

[853] Although these two principles were drawn from the writings of Joseph Story refining the theories of continental jurists, Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 252–62, the constitutional basis for them was deemed to be in the Due Process Clause of the Fourteenth Amendment. Pennoyer v. Neff, 95 U.S. 714, 733–35 (1878). The Due Process Clause and the remainder of the Fourteenth Amendment had not been ratified at the time of the entry of the state-court judgment giving rise to the case. This inconvenient fact does not detract from the subsequent settled use of this constitutional foundation. *Pennoyer* denied full faith and credit to the judgment because the state lacked jurisdiction.

[854] 95 U.S. at 722. The basis for the territorial concept of jurisdiction promulgated in *Pennoyer* and modified over the years is two-fold: a concern for "fair play and substantial justice" involved in requiring defendants to litigate cases against them far from their "home" or place of business. International Shoe Co. v. Washington, 326 U.S. 310, 316, 317 (1945); Travelers Health Ass'n v. Virginia ex rel. State

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time, however, the mobility of American society and the increasing complexity of commerce led to attenuation of the second principle of *Pennoyer*, and consequently the Court established the modern standard of obtaining jurisdiction based upon the nature and the quality of contacts that individuals and corporations have with a state.[855] This "minimum contacts" test, consequently, permits state courts to obtain power over out-of-state defendants.

In Personam Proceedings Against Individuals.—How jurisdiction is determined depends on the nature of the suit being brought. If a dispute is directed against a person, not property, the proceedings are considered *in personam*, and jurisdiction must be established over the defendant's person in order to render an effective decree.[856] Generally, presence within the state is sufficient to create personal jurisdiction over an individual, if process is served.[857] In the case of a resident who is absent from the state, domicile alone is deemed to be sufficient to keep him within reach of the state courts

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Corp. Comm., 339 U.S. 643, 649 (1950); Shaffer v. Heitner, 433 U.S. 186, 204 (1977), and, more important, a concern for the preservation of federalism. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); Hanson v. Denckla, 357 U.S. 235, 251 (1958). The Framers, the Court has asserted, while intending to tie the States together into a Nation, "also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980). Thus, the federalism principle is preeminent. "[T]he Due Process Clause 'does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." 444 U.S. at 294 (internal quotation from International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

[855] International Shoe Co. v. Washington, 326 U.S. 310 (1945)). As the Court explained in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), "[w]ith this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980)). The first principle, that a State may assert jurisdiction over anyone or anything physically within its borders, no matter how briefly there—the so-called "transient" rule of jurisdiction—McDonald v. Mabee, 243 U.S. 90, 91 (1917), remains valid, although in Shaffer v. Heitner, 433 U.S. 186, 204 (1977), the Court's *dicta* appeared to assume it is not.

[856] National Exchange Bank v. Wiley, 195 U.S. 257, 270 (1904); Iron Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463, 471 (1905).

[857] 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*,

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for purposes of a personal judgment, and process can be obtained by means of appropriate, substituted service or by actual personal service on the resident outside the state.[858] However, if the defendant, although technically domiciled there, 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, because it is not reasonably calculated to give actual notice of the proceedings and opportunity to be heard.[859]

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.[860] The early cases held that the process of a court of one state could not run into another and summon a resident of that state to respond to proceedings against him, when neither his person nor his property was within the jurisdiction of the court rendering the judgment.[861] This rule, however, has been attenuated in a series of steps.

Consent has always been sufficient to create jurisdiction, even in the absence of any other connection between the litigation and the forum. For example, the appearance of the defendant for any purpose other than to challenge the jurisdiction of the court was deemed a voluntary submission to the court's power,[862] and even a special appearance to deny jurisdiction might be treated as consensual submission to the court.[863] The concept of "constructive consent" was then seized upon as a basis for obtaining jurisdiction. For

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.

[858] Milliken v. Meyer, 311 U.S. 457 (1940).

[859] McDonald v. Mabee, 243 U.S. 90 (1917).

[860] Rees v. City of 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).

[861] 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).

[862] 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).

[863] State legislation which provides that a defendant who comes into court to challenge the validity of service upon him in a personal action surrenders himself to the jurisdiction of the court, but which allows him to dispute where process was served, is constitutional and does not deprive him of property without due process of law. In such a situation, the defendant may ignore the proceedings as wholly ineffective, and attack the validity of the judgment if and when an attempt is made to take his property thereunder. If he desires, however, to contest the validity of the

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instance, with the advent of the automobile, States were permitted to engage in the fiction that the use of their highways was conditioned upon the consent of drivers to be sued in state courts for accidents or other transactions arising out of such use. Thus, a state could designate a state official as a proper person to receive service of process in such litigation, and establishing jurisdiction required only that the official receiving notice communicate it to the person sued.[864]

Although the Court approved of the legal fiction that such jurisdiction arose out of consent, the basis for jurisdiction was really the state's power to regulate acts done in the state that were dangerous to life or property.[865] Because the state did not really have the ability to prevent nonresidents from doing business in their state,[866] this extension was necessary in order to permit states to assume jurisdiction over individuals "doing business" within the state. Thus, the Court soon recognized that "doing business" within a state was itself a sufficient basis for jurisdiction over a nonresident individual, at least where the business done was exceptional enough to create a strong state interest in regulation, and service could be effectuated within the state on an agent appointed to carry out the business.[867]

The culmination of this trend, established in *International Shoe Co. v. Washington*,[868] was the requirement that there be "minimum contacts" with the state in question in order to establish jurisdiction. The outer limit of this test is illustrated by *Kulko v. Superior Court*,[869] 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.[870] The argument was made that the father had "caused an effect" in the state by availing himself of the benefits and protections of California's laws and by deriving an economic benefit in the lessened expense of maintaining the daughter

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court proceedings and he loses, it is within the power of a state to require that he submit to the jurisdiction of the court to determine the merits. York v. Texas, 137 U.S. 15 (1890); Kauffman v. Wootters, 138 U.S. 285 (1891); Western Life Indemnity Co. v. Rupp, 235 U.S. 261 (1914).

[864] Hess v. Pawloski, 274 U.S. 352 (1927); Wuchter v. Pizzutti, 276 U.S. 13 (1928); Olberding v. Illinois Cent. R.R., 346 U.S. 338, 341 (1953).

[865] Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).

[866] 274 U.S. at 355. *See* Flexner v. Farson, 248 U.S. 289, 293 (1919).

[867] Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[868] 326 U.S. 310, 316 (1945).

[869] 436 U.S. 84 (1978).

[870] Kulko had visited the state twice, seven and six years respectively before initiation of the present action, his marriage occurring in California on the second visit, but neither the visits nor the marriage was sufficient or relevant to jurisdiction. 436 U.S. at 92–93.

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in New York. The Court explained that, "[l]ike any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."[871] Although the Court noted that the "effects" test had been accepted as a test of contacts when wrongful activity outside a state causes injury within the state or when commercial activity affects state residents, the Court found that these factors were not present in this case, and any economic benefit to Kulko was derived in New York and not in California.[872] 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.

An additional case on the limits of "minimum contacts" jurisdiction over an individual, *Walden v. Fiore*, further articulates the principles involved.[873] Plaintiffs in the case transited through Atlanta while returning to Las Vegas from a gambling trip to Puerto Rico. According to the plaintifs, an officer at the Atlanta airport wrongfully seized and temporarily retained $97,000 of their gambling winnings, with plaintiffs continuing to Las Vegas before the money's return. They subsequently filed a tort action against the officer in Nevada. The Supreme Court, however, held that the court in Nevada lacked jurisdiction, because of insufficient contacts between the officer and the state relative to the alleged harm. The contacts that count, the Court said, are those initiated by the defendant himself. And, it is the nature of the defendant's activities that matter, and not the mere fact that the defendant has a connection with someone in a state.[874]

Suing Out-of-State (Foreign) Corporations.—A curious aspect of American law is that a corporation has no legal existence outside the boundaries of the state chartering it.[875] Thus, the basis for state court jurisdiction over an out-of-state ("foreign") corporation has been even more uncertain than that with respect to individuals. Before *International Shoe Co. v. Washington*,[876] it was asserted that, because 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 with regard to in-state transactions, either by appointment of someone to receive process or in the ab-

[871] 436 U.S. at 92.
[872] 436 U.S. at 96–98.
[873] 571 U.S. ___, No. 12–574, slip op. (2014).
[874] 571 U.S. ___, No. 12–574, slip op. at 6–8.
[875] *Cf.* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).
[876] 326 U.S. 310 (1945).

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sence of such designation, by accepting service upon corporate agents authorized to operate within the state.[877] Further, by doing business in a state, the corporation was deemed to be present there and thus subject to service of process and suit for transactions conducted there.[878] This theoretical corporate presence conflicted with the idea of corporations having no existence outside their state of incorporation, but it was nonetheless accepted that a corporation "doing business" in a state to a sufficient degree was "present" for service of process upon its agents in the state who carried out that business.[879]

Presence alone, however, does not expose a corporation to all manner of suits through the exercise of general jurisdiction. Only corporations whose continuous and systematic affiliations with a forum make them "essentially at home" there are broadly amenable to suit.[880] Without the protection of such a rule, 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.[881] And if the corporation stopped doing business in the forum state before suit against it was commenced, it

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[877] Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); St. Clair v. Cox, 106 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 Co., 243 U.S. 93 (1917).

[878] 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).

[879] *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).

[880] Daimler AG v. Bauman, 571 U.S. ___, No. 11–965, slip op. (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. ___, No. 10–76, slip op. at 2 (2011)) (U.S. subsidiary of Daimler doing substantial business in California not subject to suit there with respect to acts taken in Argentina by Argentinian susdiary of Daimler).

[881] *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). *See also* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. ___, No. 10–76, slip op. (2011) (distinguishing application of stream-of-commerce analysis in specific cases of in-state injury from the degree of presence a corporation must maintain in a state to be amenable to general jurisdiction there).

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might well escape jurisdiction altogether.[882] 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.[883] 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.[884]

The touchstone in jurisdiction cases was recast by *International Shoe Co. v. Washington* and its "minimum contacts" analysis.[885] International Shoe, an out-of-state corporation, had not been issued a license to do business in Washington State, but it systematically and continuously employed a sales force of Washington residents to solicit therein, and thus was held amenable to suit in Washington for unpaid unemployment compensation contributions for such salesmen. A notice of assessment was served personally upon one of the local sales solicitors, and a copy of the assessment was sent by registered mail to the corporation's principal office in Missouri, and this was deemed sufficient to apprise the corporation of the proceeding.

To reach this conclusion, the Court not only overturned prior holdings that mere solicitation of business does not constitute a sufficient contact to subject a foreign corporation to a state's jurisdiction,[886] 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 such contacts of the corporation with the

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[882] 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). Jurisdiction would continue, however, if a state had conditioned doing business on a firm's agreeing to accept service through state officers should it and its agent withdraw. Washington ex rel. Bond & Goodwin & Tucker v. Superior Court, 289 U.S. 361, 364 (1933).

[883] 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).

[884] *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 Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

[885] 326 U.S. 310 (1945).

[886] This departure was recognized by Justice Rutledge subsequently in Nippert v. City of Richmond, 327 U.S. 416, 422 (1946). Because 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 used International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), to find it was "present" in the state.

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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."[887] As to the scope of application to be accorded this "fair play and substantial justice" doctrine, the Court concluded that "so far as . . . [corporate] obligations arise out of or are connected with activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."[888]

Extending this logic, a majority of the Court ruled that an out-of-state association selling mail order insurance had developed sufficient contacts and ties with Virginia residents so that the state could institute enforcement proceedings under its Blue Sky Law by forwarding notice to the company by registered mail, notwithstanding that the Association solicited business in Virginia solely through recommendations of existing members and was represented therein by no agents whatsoever.[889] 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, especially in view of the fact that the suits could be more conveniently tried in Virginia where claims of loss could be investigated.[890]

Likewise, the Court reviewed a California statute which subjected foreign mail order insurance companies engaged in contracts with California residents to suit in California courts, and which had authorized the petitioner to serve a Texas insurer by registered mail

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[887] International Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

[888] 326 U.S. at 319.

[889] 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).

[890] 339 U.S. at 647–49. The holding in Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140 (1923), that a similar mail order insurance company could not be viewed as doing business in the forum state and that the circumstances under which its contracts with forum state citizens, executed and to be performed in its state of incorporation, were consummated could not support an implication that the foreign company had consented to be sued in the forum state, was distinguished rather than formally overruled. 339 U.S. at 647. In any event, *Benn* could not have survived McGee v. International Life Ins. Co., 355 U.S. 220 (1957), below.

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only.[891] The contract between the company and the insured specified that Austin, Texas, was the place of "making" and the place where liability should be deemed to arise. The company mailed premium notices to the insured in California, and he mailed his premium payments to the company in Texas. Acknowledging that the connection of the company with California was tenuous—it had no office or agents in the state and no evidence had been presented that it had solicited anyone other than the insured for business—the Court sustained jurisdiction on the basis that the suit was on a contract which had a substantial connection with California. "The contract was delivered in California, the premiums were mailed there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[892]

In making this decision, the Court noted that "[l]ooking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."[893] However, in *Hanson v. Denckla*, decided during the same Term, the Court found *in personam* jurisdiction lacking for the first time since *International Shoe Co. v. Washington*, pronouncing firm due process limitations. In *Hanson*,[894] the issue was whether a Florida court considering a contested will obtained jurisdiction over corporate trustees of disputed property through use of ordinary mail and publication. The

[891] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[892] 355 U.S. at 223. The Court also noticed the proposition that the insured could not bear the cost of litigation away from home as well as the insurer could. *See also* Perkins v. Benguet Consolidating Mining Co., 342 U.S. 437 (1952), a case too atypical on its facts to permit much generalization but which does appear to verify the implication of *International Shoe* that *in personam* jurisdiction may attach to a corporation even where the cause of action does not arise out of the business done by defendant in the forum state, as well as to state, in *dictum*, that the mere presence of a corporate official within the state on business of the corporation would suffice to create jurisdiction if the claim arose out of that business and service were made on him within the state. 342 U.S. at 444–45. The Court held that the state could, but was not required to, assert jurisdiction over a corporation owning gold and silver mines in the Philippines but temporarily (because of the Japanese occupation) carrying on a part of its general business in the forum state, including directors' meetings, business correspondence, banking, and the like, although it owned no mining properties in the state.

[893] 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).

[894] 357 U.S. 235 (1958). The decision was 5-to-4. *See* 357 U.S. at 256 (Justice Black dissenting), 262 (Justice Douglas dissenting).

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will had been entered into and probated in Florida, the claimants were resident in Florida and had been personally served, but the trustees, who were indispensable parties, were resident in Delaware. Noting the trend in enlarging the ability of the states to obtain in personam jurisdiction over absent defendants, the Court denied the exercise of nationwide in personam jurisdiction by states, saying that "it would be a mistake to assume that th[e] trend [to expand the reach of state courts] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[895]

The Court recognized in *Hanson* that Florida law was the most appropriate law to be applied in determining the validity of the will and that the corporate defendants might be little inconvenienced by having to appear in Florida courts, but it denied that either circumstance satisfied the Due Process Clause. The Court noted that due process restrictions do more than guarantee immunity from inconvenient or distant litigation, in that "[these restrictions] are consequences of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimum contacts' with that State that are a prerequisite to its exercise of power over him." The only contacts the corporate defendants had in Florida consisted of a relationship with the individual defendants. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . . The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case."[896]

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[895] 357 U.S. at 251. In dissent, Justice Black observed that "of course we have not reached the point where state boundaries are without significance and I do not mean to suggest such a view here." 357 U.S. at 260.

[896] 357 U.S. at 251, 253–54. Upon an analogy of choice of law and *forum non conveniens*, Justice Black argued that the relationship of the nonresident defendants and the subject of the litigation to the Florida made Florida the natural and constitutional basis for asserting jurisdiction. 357 U.S. at 251, 258–59. The Court has numerous times asserted that contacts sufficient for the purpose of designating a particular state's law as appropriate may be insufficient for the purpose of asserting jurisdiction. *See* Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Kulko v. Superior Court, 436 U.S. 84, 98 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294–95 (1980). On the due process limits on choice of law decisions, *see* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

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The Court continued to apply *International Shoe* principles in diverse situations. Thus, circulation of a magazine in a state was an adequate basis for that state to exercise jurisdiction over an out-of-state corporate magazine publisher in a libel action. The fact that the plaintiff did not have "minimum contacts" with the forum state was not dispositive since the relevant inquiry is the relations among the defendant, the forum, and the litigation.[897] Or, damage done to the plaintiff's reputation in his home state caused by circulation of a defamatory magazine article there may justify assertion of jurisdiction over the out-of-state authors of such article, despite the lack of minimum contact between the authors (as opposed to the publishers) and the state.[898] Further, though 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.[899]

The Court has continued to wrestle over when a state may adjudicate a products liability claim for an injury occurring within it, at times finding the defendant's contacts with the place of injury to be too attenuated to support its having to mount a defense there. In *World-Wide Volkswagen Corp. v. Woodson*,[900] the Court applied its "minimum contacts" test to preclude the assertion of jurisdiction over two foreign corporations that did no business in the forum state. Plaintiffs had sustained personal injuries in Oklahoma in an accident involving an alleged defect in their automobile. The car had been purchased the previous year in New York, the plaintiffs were New York residents at time of purchase, and the accident had occurred while they were driving through Oklahoma on their way to a new residence in Arizona. Defendants were the automobile retailer and its wholesaler, both New York corporations that did no business in Oklahoma. The Court found no circumstances justifying assertion by Oklahoma courts of jurisdiction over defen-

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[897] 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).

[898] 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).

[899] 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).

[900] 444 U.S. 286 (1980).

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dants. The defendants (1) carried on no activity in Oklahoma, (2) closed no sales and performed no services there, (3) availed themselves of none of the benefits of the state's laws, (4) solicited no business there either through salespersons or through advertising reasonably calculated to reach the state, and (5) sold no cars to Oklahoma residents or indirectly served or sought to serve the Oklahoma market. Although it might have been foreseeable that the automobile would travel to Oklahoma, foreseeability was held to be relevant only insofar as "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[901] The Court in *World-Wide Volkswagen Corp.* contrasted the facts of the case with the instance of a corporation "deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[902]

In *Asahi Metal Industry Co. v. Superior Court*,[903] the Court addressed more closely how jurisdiction flows with products downstream. The Court identified two standards for limiting jurisdiction even as products proceed to foreseeable destinations. The more general standard harked back to the fair play and substantial justice doctrine of *International Shoe* and requires balancing the respective interests of the parties, the prospective forum state, and alternative fora. All the Justices agreed with the legitimacy of this test in assessing due process limits on jurisdiction.[904] However, four Justices would also apply a more exacting test: A defendant who placed a product in the stream of commerce knowing that the product might eventually be sold in a state will be subject to jurisdiction there only if the defendant also had purposefully acted to avail itself of the state's market. According to Justice O'Connor, who wrote the opinion espousing this test, a defendant subjected itself to jurisdic-

[901] 444 U.S. at 297.

[902] 444 U.S. at 298.

[903] 480 U.S. 102 (1987). In *Asahi*, a California resident sued, *inter alia*, a Taiwanese tire tube manufacturer for injuries caused by a blown-out motorcycle tire. After plaintiff and the tube manufacturer settled the case, which had been filed in California, the tube manufacturer sought indemnity in the California courts against Asahi Metal, the Japanese supplier of the tube's valve assembly.

[904] All the Justices also agreed that due process considerations foreclosed jurisdiction in *Asahi*, even though Asahi Metal could have foreseen that some of its valve assemblies would end up incorporated into tire tubes sold in the United States. Three of the *Asahi* Justices had been dissenters in World-Wide Volkswagen Corp. v. Woodson. Of the three dissenters, Justice Brennan had argued that the "minimum contacts" test was obsolete and that jurisdiction should be predicated upon the balancing of the interests of the forum state and plaintiffs against the actual burden imposed on defendant, 444 U.S. at 299, while Justices Marshall and Blackmun had applied the test and found jurisdiction because of the foreseeability of defendants that a defective product of theirs might cause injury in a distant state and because the defendants had entered into an interstate economic network. 444 U.S. at 313.

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tion by targeting or serving customers in a state through, for example, direct advertising, marketing through a local sales agent, or establishing channels for providing regular advice to local customers. Action, not expectation, is key.[905] In *Asahi*, the state was found to lack jurisdiction under both tests cited.

Doctrine in stream-of-commerce cases was refined further in *J. McIntyre Machinery, Ltd. v. Nicastro*.[906] Justice Kennedy, writing for a four-Justice plurality, asserted that it is a defendant's purposeful availment of the forum state that makes jurisdiction consistent with traditional notions of fair play and substantial justice. The question is not so much the fairness of a state reaching out to bring a foreign defendant before its courts as it is a matter of a foreign defendant having acted within a state so as to bring itself within the state's limited authority. Thus, a British machinery manufacturer who targeted the U.S. market generally through engaging a nationwide distributor and attending trade shows, among other means, could not be sued in New Jersey for an industrial accident that occurred in the state. Even though at least one of its machines (and perhaps as many as four) were sold to New Jersey concerns, the defendant had not purposefully targeted the New Jersey market through, for example, establishing an office, advertising, or sending employees.[907] Writing in dissent for herself and two other Justices, Justice Ginsburg concluded that it was reasonable and fair, and therefore consistent with due process requirements, for New Jersey to claim jurisdiction to adjudicate the case locally because the defendant manufacturer had promoted its products in the United States and established a national distribution system. "On what sensible view of the allocation of adjudicatory authority," the dissent rhetorically asked, "could the place of [the plaintiff's] injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?"[908] Concurring with the plurality, Justice Breyer emphasized the outcome lay in stream-of-commerce precedents that held isolated or infrequent sales could not support jurisdiction. At the same time, Justice Breyer cautioned against adoption of the plurality's strict active availment of the forum rule, especially because

[905] 480 U.S. at 109–113 (1987). Agreeing with Justice O'Connor on this test were Chief Justice Rehnquist and Justices Powell and Scalia.

[906] 564 U.S. ___, No. 09–1343, slip op. (2011).

[907] 564 U.S. ___, No. 09–1343, slip op. (2011) (Kennedy, Roberts, Scalia and Thomas).

[908] 564 U.S. ___, No. 09–1343, slip op. at 6–7 (2011) (Ginsburg, Sotomayor and Kagan dissenting).

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the Court had yet to consider due process requirements in the context of evolving business models, modern e-commerce in particular.[909]

Actions In Rem: Proceeding Against Property.—In an *in rem* action, which is an action brought directly against a property interest, a state can validly proceed to settle controversies with regard to rights or claims against tangible or intangible property within its borders, notwithstanding that jurisdiction over the defendant was never established.[910] Unlike jurisdiction *in personam*, a judgment entered by a court with *in rem* jurisdiction does not bind the defendant personally but determines the title to or status of the only property in question.[911] Proceedings brought to register title to land,[912] to condemn[913] or confiscate[914] real or personal property, or to administer a decedent's estate[915] are typical in rem actions. Due process is satisfied by seizure of the property (the "*res*") and notice to all who have or may have interests therein.[916] Under prior case law, a court could acquire *in rem* jurisdiction over nonresidents by mere constructive service of process,[917] under the theory that property was always in possession of its owners and that seizure would afford them notice, because they would keep themselves apprized of the state of their property. It was held, however, that this fiction did not satisfy the requirements of due process, and, whatever the nature of the proceeding, that notice must be given in a manner

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[909] 564 U.S. ___, No. 09–1343, slip op. (2011) (Breyer and Alito concurring).

[910] Accordingly, by reason of its inherent authority over titles to land within its territorial confines, a state court could proceed to judgment respecting the ownership of such property, even though it lacked a constitutional competence to reach claimants of title who resided beyond its borders. Arndt v. Griggs, 134 U.S. 316, 321 (1890); Grannis v. Ordean, 234 U.S. 385 (1914); Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917).

[911] Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 348 (1850).

[912] 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).

[913] Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559 (1889).

[914] *The Confiscation Cases*, 87 U.S. (20 Wall.) 92 (1874).

[915] Clarke v. Clarke, 178 U.S. 186 (1900); Riley v. New York Trust Co., 315 U.S. 343 (1942).

[916] Pennoyer v. Neff, 95 U.S. 714 (1878). Predeprivation notice and hearing may be required if the property is not the sort that, given advance warning, could be removed to another jurisdiction, destroyed, or concealed. United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (notice to owner required before seizure of house by government).

[917] 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).

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that actually notifies the person being sought or that has a reasonable certainty of resulting in such notice.[918]

Although the Court has now held "that all assertions of state-court jurisdiction must be evaluated according to the ['minimum contacts'] standards set forth in *International Shoe Co. v. Washington*,"[919] it does not appear that this will appreciably change the result for *in rem* jurisdiction over property. "[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State."[920] Thus, for "true" *in rem* actions, the old results are likely to still prevail.

Quasi in Rem: Attachment Proceedings.—If a defendant is neither domiciled nor present in a state, he cannot be served personally, and any judgment in money obtained against him would be unenforceable. This does not, however, prevent attachment of a defendant's property within the state. The practice of allowing a state to attach a non-resident's real and personal property situated within its borders to satisfy a debt or other claim by one of its citizens goes back to colonial times. Attachment is considered a form of *in rem* proceeding sometimes called "*quasi in rem,*" and under *Pennoyer v. Neff*[921] an attachment could be implemented by obtaining a writ against the local property of the defendant and giving notice

[918] 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).

[919] 433 U.S. 186 (1977).

[920] 433 U.S. at 207–08 (footnotes 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.

[921] 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).

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by publication.[922] The judgement was then satisfied from the property attached, and if the attached property was insufficient to satisfy the claim, the plaintiff could go no further.[923]

This form of proceeding raised many questions. Of course, there were always instances in which it was fair to subject a person to suit on his property located in the forum state, such as where the property was related to the matter sued over.[924] In others, the question was more disputed, as in the famous New York Court of Appeals case of *Seider v. Roth*,[925] in which the property subject to attachment was the contractual obligation of the defendant's insurance company to defend and pay the judgment. But, in *Harris v. Balk*,[926] the facts of the case and the establishment of jurisdiction through *quasi in rem* proceedings raised the issue of fairness and territoriality. The claimant was a Maryland resident who was owed a debt by Balk, a North Carolina resident. The Marylander ascertained, apparently adventitiously, that Harris, a North Carolina resident who owed Balk an amount of money, was passing through Maryland, and the Marylander attached this debt. Balk had no notice of the action and a default judgment was entered, after which Harris paid over the judgment to the Marylander. When Balk later sued Harris in North Carolina to recover on his debt, Harris argued that he had been relieved of any further obligation by satisfying the judgment in Maryland, and the Supreme Court sustained his defense, ruling that jurisdiction had been properly obtained and the Maryland judgment was thus valid.[927]

Subsequently, *Harris v. Balk* was overruled by *Shaffer v. Heitner*,[928] in which the Court rejected the Delaware state court's

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[922] The theory was that property is always in possession of an owner, and that seizure of the property will inform him. This theory of notice was disavowed sooner than the theory of jurisdiction. See "Actions in Rem: Proceedings Against Property", *supra*.

[923] Other, *quasi in rem* actions, which are directed against persons, but ultimately have property as the subject matter, such as probate, Goodrich v. Ferris, 214 U.S. 71, 80 (1909), and garnishment of foreign attachment proceedings, Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917); Harris v. Balk, 198 U.S. 215 (1905), might also be prosecuted to conclusion without requiring the presence of all parties in interest. The jurisdictional requirements for rendering a valid divorce decree are considered under the Full Faith and Credit Clause, Art. I, § 1.

[924] 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).

[925] 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312 (1966).

[926] 198 U.S. 215 (1905).

[927] *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).

[928] 433 U.S. 186 (1977).

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jurisdiction, holding that the "minimum contacts" test of *International Shoe* applied to all *in rem* and *quasi in rem* actions. The case involved a Delaware sequestration statute under which plaintiffs were authorized to bring actions against nonresident defendants by attaching their "property" within Delaware, the property here consisting of shares of corporate stock and options to stock in the defendant corporation. The stock was considered to be in Delaware because that was the state of incorporation, but none of the certificates representing the seized stocks were physically present in Delaware. The reason for applying the same test as is applied in *in personam* cases, the Court said, "is simple and straightforward. It is premised on recognition that '[t]he phrase 'judicial jurisdiction' over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing."[929] 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.'"[930]

A further tightening of jurisdictional standards occurred in *Rush v. Savchuk*.[931] The plaintiff was injured in a one-car accident in Indiana while a passenger in a car driven by defendant. Plaintiff later moved to Minnesota and sued defendant, still resident in Indiana, in state court in Minnesota. There were no contacts between the defendant and Minnesota, but defendant's insurance company did business there and plaintiff garnished the insurance contract, signed in Indiana, under which the company was obligated to defend defendant in litigation and indemnify him to the extent of the policy limits. The Court refused to permit jurisdiction to be grounded on the contract; the contacts justifying jurisdiction must be those of the defendant engaging in purposeful activity related to the forum.[932] *Rush* thus resulted in

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[929] 433 U.S. at 207 (internal quotation from RESTATEMENT (SECOND) OF CONFLICT OF LAWS 56, Introductory Note (1971)).

[930] 433 U.S. at 207. The characterization of actions *in rem* as being not actions against a *res* but against persons with interests merely reflects Justice Holmes' insight in Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76–77, 55 N.E., 812, 814, *appeal dismissed*, 179 U.S. 405 (1900).

[931] 444 U.S. 320 (1980).

[932] 444 U.S. at 328–30. In dissent, Justices Brennan and Stevens argued that what the state courts had done was the functional equivalent of direct-action statutes. Id. at 333 (Justice Stevens); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Justice Brennan). The Court, however, refused so to view the Minnesota garnishment action, saying that "[t]he State's ability to exert its power over the 'nominal defendant' is analytically prerequisite to the insurer's entry into

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the demise of the controversial *Seider v. Roth* doctrine, which lower courts had struggled to save after *Shaffer v. Heitner*.[933]

Actions in Rem: Estates, Trusts, Corporations.—Generally, probate will occur where the decedent was domiciled, and, as a probate judgment is considered *in rem*, a determination as to assets in that state will be determinative as to all interested persons.[934] Insofar as the probate affects real or personal property beyond the state's boundaries, however, the judgment is *in personam* and can bind only parties thereto or their privies.[935] Thus, the Full Faith and Credit Clause would not prevent an out-of-state court in the state where the property is located from reconsidering the first court's finding of domicile, which could affect the ultimate disposition of the property.[936]

The difficulty of characterizing the existence of the *res* in a particular jurisdiction is illustrated by the *in rem* aspects of *Hanson v. Denckla*.[937] As discussed earlier,[938] the decedent created a trust with a Delaware corporation as trustee,[939] and the Florida courts had attempted to assert both *in personam* and *in rem* jurisdiction over the Delaware corporation. Asserting the old theory that a court's *in rem* jurisdiction "is limited by the extent of its power and by the coordinate authority of sister States,"[940] *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

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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.

[933] *See* O'Conner v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1034 (1978).

[934] Goodrich v. Ferris, 214 U.S. 71, 80 (1909); McCaughey v. Lyall, 224 U.S. 558 (1912).

[935] Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917); Riley v. New York Trust Co., 315 U.S. 343 (1942).

[936] 315 U.S. at 353.

[937] 357 U.S. 235 (1957).

[938] The *in personam* aspect of this decision is considered *supra*.

[939] 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.

[940] 357 U.S. at 246.

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from its authority to probate and construe the domiciliary's will, under which the foreign assets might pass, were a sufficient basis of *in rem* jurisdiction and decided they were not.[941] The effect of *International Shoe* in this area is still to be discerned.

The reasoning of the *Pennoyer*[942] rule, that seizure of property and publication was sufficient to give notice to nonresidents or absent defendants, has also been applied in proceedings for the forfeiture of abandoned property. If all known claimants were personally served and all claimants who were unknown or nonresident were given constructive notice by publication, judgments in these proceedings were held binding on all.[943] But, in *Mullane v. Central Hanover Bank & Trust Co.*,[944] the Court, while declining to characterize the proceeding as *in rem* or *in personam*, held that a bank managing a common trust fund in favor of nonresident as well as resident beneficiaries could not obtain a judicial settlement of accounts if the only notice was publication in a local paper. Although such notice by publication was sufficient as to beneficiaries whose interests or addresses were unknown to the bank, the Court held that it was feasible to make serious efforts to notify residents and nonresidents whose whereabouts were known, such as by mailing notice to the addresses on record with the bank.[945]

Notice: Service of Process.—Before a state may legitimately exercise control over persons and property, the state's jurisdiction must be perfected by an appropriate service of process that is effective to notify all parties of proceedings that may affect their rights.[946] Personal service guarantees actual notice of the pendency of a le-

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[941] 357 U.S. at 247–50. The four dissenters, Justices Black, Burton, Brennan, and Douglas, believed that the transfer in Florida of $400,000 made by a domiciliary and affecting beneficiaries, almost all of whom lived in that state, gave rise to a sufficient connection with Florida to support an adjudication by its courts of the effectiveness of the transfer. 357 U.S. at 256, 262.

[942] *See* discussion of *Pennoyer*, *supra*.

[943] 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).

[944] 339 U.S. 306 (1950).

[945] A related question is which state has the authority to escheat a corporate debt. *See* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961); Texas v. New Jersey, 379 U.S. 674 (1965). Where a state seeks to escheat intangible corporate property such as uncollected debt, the Court found that the multiplicity of states with a possible interest made a "contacts" test unworkable. Citing ease of administration rather than logic or jurisdiction, the Court held that the authority to take the uncollected claims against a corporation by escheat would be based on whether the last known address on the company's books for the each creditor was in a particular state.

[946] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank

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gal action, and has traditionally been deemed necessary in actions styled *in personam*.[947] But "certain less rigorous notice procedures have enjoyed substantial acceptance throughout our legal history; in light of this history and the practical obstacles to providing personal service in every instance," the Court in some situations has allowed the use of procedures that "do not carry with them the same certainty of actual notice that inheres in personal service."[948] But, whether the action be *in rem* or *in personam*, there is a constitutional minimum; due process requires "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."[949]

The use of mail to convey notice, for instance, has become quite established,[950] especially for assertion of *in personam* jurisdiction extraterritorially upon individuals and corporations having "minimum contacts" with a forum state, where various "long-arm" statutes authorize notice by mail.[951] Or, in a class action, due process is satisfied by mail notification of out-of-state class members, giving such mem-

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& Trust Co., 339 U.S. 306, 314 (1950). "There . . . must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant." Omni Capital Int'l v. Rudolph Wolff & Co., 484 U.S. 97 (1987).

[947] McDonald v. Mabee, 243 U.S. 90, 92 (1971).

[948] Greene v. Lindsey, 456 U.S. 444, 449 (1982). *See* Dusenbery v. United States, 534 U.S. 161 (2001) (upholding a notice of forfeiture that was delivered by certified mail to the mailroom of a prison where the individual to be served was incarcerated, even though the individual himself did not sign for the letter).

[949] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Thus, in Jones v. Flowers, 547 U.S. 220 (2006), the Court held that, after a state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed," the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so. And, 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 satisfy due process. Without requiring service by mail, the Court observed that the mails "provide an 'efficient and inexpensive means of communication' upon which prudent men will ordinarily rely in the conduct of important affairs." Id. at 455 (citations omitted). *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).

[950] *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).

[951] *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, "service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the sum-

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bers the opportunity to "opt out" but with no requirement that inclusion in the class be contingent upon affirmative response.[952] 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.[953]

Power of the States to Regulate Procedure

Generally.—As long as a party has been given sufficient notice and an opportunity to defend his interest, the Due Process Clause of the Fourteenth Amendment does not generally mandate the particular forms of procedure to be used in state courts.[954] The states may regulate the manner in which rights may be enforced and wrongs remedied,[955] and may create courts and endow them with such jurisdiction as, in the judgment of their legislatures, seems appropriate.[956] 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 that ordinarily do not implicate the Fourteenth Amendment. The function of the Fourteenth Amendment is

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mons 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).

[952] Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

[953] *E.g.*, Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) (authorizing direct action against insurance carrier rather than against the insured).

[954] Holmes v. Conway, 241 U.S. 624, 631 (1916); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900). A state "is free to regulate procedure of its courts in accordance with it own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897); Jordan v. Massachusetts, 225 U.S. 167, 176, (1912). 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).

[955] 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).

[956] Cincinnati Street Ry. v. Snell, 193 U.S. 30, 36 (1904).

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negative rather than affirmative[957] and in no way obligates the states to adopt specific measures of reform.[958]

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.[959] But, foreclosure of all access to the courts, through financial barriers and perhaps through other means as well, is subject to federal constitutional scrutiny and must be justified by reference to a state interest of suitable importance. Thus, where a state has monopolized the avenues of settlement of disputes between persons by prescribing judicial resolution, and where the dispute involves a fundamental interest, such as marriage and its dissolution, the state may not deny access to those persons unable to pay its fees.[960]

Older cases, which have not been questioned by more recent ones, 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 re-

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[957] Some recent decisions, however, have imposed some restrictions on state procedures that require substantial reorientation of process. While this is more generally true in the context of criminal cases, in which the appellate process and post-conviction remedial process have been subject to considerable revision in the treatment of indigents, some requirements have also been imposed in civil cases. Boddie v. Connecticut, 401 U.S. 371 (1971); Lindsey v. Normet, 405 U.S. 56, 74–79 (1972); Santosky v. Kramer, 455 U.S. 745 (1982). Review has, however, been restrained with regard to details. *See, e.g.*, Lindsey v. Normet, 405 U.S. at 64–69.

[958] 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 untrammeled 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 that 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).

[959] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Nor did the retroactive application of this statutory requirement to actions pending at the time of its adoption violate 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.

[960] 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).

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cord.[961] For similar reasons, a requirement of the performance of a chemical analysis as a condition precedent to a suit to recover for damages resulting to crops from allegedly deficient fertilizers, while allowing other evidence, was not deemed arbitrary or unreasonable.[962]

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.[963]

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.[964] 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.[965] 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.[966] 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.[967]

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

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[961] Young Co. v. McNeal-Edwards Co., 283 U.S. 398 (1931); Adam v. Saenger, 303 U.S. 59 (1938).

[962] Jones v. Union Guano Co., 264 U.S. 171 (1924).

[963] Sawyer v. Piper, 189 U.S. 154 (1903).

[964] Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915).

[965] 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)..

[966] 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).

[967] Ownbey v. Morgan, 256 U.S. 94 (1921).

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process of law.[968] 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.[969] Congress may, however, severely restrict attorney's fees in an effort to keep an administrative claims proceeding informal.[970]

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.[971] 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.[972]

By virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a state may provide that a public officer embezzling public money shall, notwithstanding that he has made restitution, suffer 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.[973] 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 pen-

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[968] Ballard v. Hunter, 204 U.S. 241, 259 (1907).

[969] Missouri, Kansas & Texas Ry. v. Cade, 233 U.S. 642, 650 (1914).

[970] 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).

[971] 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).

[972] 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).

[973] Coffey v. Harlan County, 204 U.S. 659, 663, 665 (1907).

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alty imposed for the contempt, but merely a reasonable method for sustaining the effectiveness of the state's judicial process.[974]

To deter careless destruction of human life, a state may allow punitive damages to be assessed in actions against employers for deaths caused by the negligence of their employees,[975] and may also allow punitive damages for fraud perpetrated by employees.[976] 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.[977] The Court has indicated, however, that, although the Excessive Fines Clause of the Eighth Amendment "does not apply to awards of punitive damages in cases between private parties,"[978] a "grossly excessive" award of punitive damages violates substantive due process, as the Due Process Clause limits the amount of punitive damages to what is "reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence."[979] These limits may be discerned by a court by examining the degree of reprehensibility of the act, the ratio between the punitive award and plaintiff's actual or potential harm, and the legislative sanctions provided for comparable misconduct.[980] In addi-

[974] 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).

[975] Pizitz Co. v. Yeldell, 274 U.S. 112, 114 (1927).

[976] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

[977] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (finding sufficient constraints on jury discretion in jury instructions and in post-verdict review). *See also* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (striking down a provision of the Oregon Constitution limiting judicial review of the amount of punitive damages awarded by a jury).

[978] Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989).

[979] BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996) (holding that a $2 million judgment for failing to disclose to a purchaser that a "new" car had been repainted was grossly excessive in relation to the state's interest, as only a few of the 983 similarly repainted cars had been sold in that same state); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (holding that a $145 million judgment for refusing to settle an insurance claim was excessive as it included consideration of conduct occurring in other states). *But see* TXO Corp. v. Alliance Resources, 509 U.S. 443 (1993) (punitive damages of $10 million for slander of title does not violate the Due Process Clause even though the jury awarded actual damages of only $19,000).

[980] BMW v. Gore, 517 U.S. at 574–75 (1996). The Court has suggested that awards exceeding a single-digit ratio between punitive and compensatory damages would be unlikely to pass scrutiny under due process, and that the greater the compensatory damages, the less this ratio should be. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 424 (2003).

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tion, the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . ."[981]

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.[982]

Thus, where a receiver for property is appointed 13 years after the disappearance of the owner and notice is made by publication, it is not a violation of due process to bar actions relative to that property after an interval of only one year after such appointment.[983] When a state, by law, suddenly prohibits all actions to contest tax deeds which have been of record for two years unless they are brought within six months after its passage, no unconstitutional deprivation is effected.[984] No less valid is a statute which provides that when a person has been in possession of wild lands under a recorded deed continuously for 20 years and had paid taxes thereon during the same, and the former owner in that interval pays nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provision.[985] 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.[986]

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[981] Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (punitive damages award overturned because trial court had allowed jury to consider the effect of defendant's conduct on smokers who were not parties to the lawsuit).

[982] 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).

[983] Blinn v. Nelson, 222 U.S. 1 (1911).

[984] Turner v. New York, 168 U.S. 90, 94 (1897).

[985] 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 property without due process.

[986] Mattson v. Department of Labor, 293 U.S. 151, 154 (1934).

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Moreover, a state may extend as well as shorten the time in which suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. Thus, a repeal or extension of a statute of limitations affects no unconstitutional deprivation of property of a debtor-defendant in whose favor such statute had already become a defense. "A right to defeat a just debt by the statute of limitation . . . [is not] a vested right," such as is protected by the Constitution. Accordingly no offense against the Fourteenth Amendment is committed by revival, through an extension or repeal, of an action on an implied obligation to pay a child for the use of her property,[987] or a suit to recover the purchase price of securities sold in violation of a Blue Sky Law,[988] 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.[989]

However, for suits to recover real and personal property, when the right of action has been barred by a statute of limitations and title as well as real ownership have become vested in the defendant, any later act removing or repealing the bar would be void as attempting an arbitrary transfer of title.[990] 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.[991]

Burden of Proof and Presumptions.—It is clearly within the domain of the legislative branch of government to establish presumptions and rules respecting burden of proof in litigation.[992] Nonetheless, the Due Process Clause does prevent the deprivation of liberty or property upon application of a standard of proof too lax to make reasonable assurance of accurate factfinding. Thus, "[t]he function of a standard of proof, as that concept is embodied in the Due

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[987] Campbell v. Holt, 115 U.S. 620, 623, 628 (1885).

[988] Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

[989] Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945).

[990] Campbell v. Holt, 115 U.S. 620, 623 (1885). *See also* Stewart v. Keyes, 295 U.S. 403, 417 (1935).

[991] Home Ins. Co. v. Dick, 281 U.S. 397, 398 (1930).

[992] Hawkins v. Bleakly, 243 U.S. 210, 214 (1917); James-Dickinson Co. v. Harry, 273 U.S. 119, 124 (1927). Congress's 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).

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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.'"[993]

Applying the formula it has worked out for determining what process is due in a particular situation,[994] the Court has held that a standard at least as stringent as clear and convincing evidence is required in a civil proceeding to commit an individual involuntarily to a state mental hospital for an indefinite period.[995] Similarly, because the interest of parents in retaining custody of their children is fundamental, the state may not terminate parental rights through reliance on a standard of preponderance of the evidence—the proof necessary to award money damages in an ordinary civil action—but must prove that the parents are unfit by clear and convincing evidence.[996] Further, unfitness of a parent may not simply be presumed because of some purported assumption about general characteristics, but must be established.[997]

As long as a presumption is not unreasonable and is not conclusive, it does not violate the Due Process Clause. Legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property, however, and a statute creating a presumption which is entirely arbitrary and which operates to deny a fair opportunity to repel it or to present facts pertinent to one's defense is void.[998] On the other hand, if there is a rational connection between what is proved and what is inferred, legislation declaring that

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[993] Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Justice Harlan concurring)).

[994] Mathews v. Eldridge, 424 U.S. 319 (1976).

[995] Addington v. Texas, 441 U.S. 418 (1979).

[996] 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).

[997] 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.

[998] 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).

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the proof of one fact or group of facts shall constitute *prima facie* evidence of a main or ultimate fact will be sustained.[999]

For a brief period, the Court used what it called the "irrebuttable presumption doctrine" to curb the legislative tendency to confer a benefit or to impose a detriment based on presumed characteristics based on the existence of another characteristic.[1000] Thus, in *Stanley v. Illinois*,[1001] the Court found invalid a construction of the state statute that presumed illegitimate fathers to be unfit parents and that prevented them from objecting to state wardship. Mandatory maternity leave rules requiring pregnant teachers to take unpaid maternity leave at a set time prior to the date of the expected births of their babies were voided as creating a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of teaching.[1002]

Major controversy developed over the application of "irrebuttable presumption doctrine" in benefits cases. Thus, although a state may require that nonresidents must pay higher tuition charges at state colleges than residents, and while the Court assumed that a durational residency requirement would be permissible as a prerequisite to qualify for the lower tuition, it was held impermissible for the state to presume conclusively that because the legal address of a student was outside the state at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student. The Due Process Clause required that the student be afforded the opportunity to show that he is or has become a bona fide resident entitled to the lower tuition.[1003]

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

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[999] 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).

[1000] 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).

[1001] 405 U.S. 645 (1972).

[1002] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

[1003] Vlandis v. Kline, 412 U.S. 441 (1973).

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shown to be false if evidence could be presented.[1004] 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,[1005] and it precluded Congress and legislatures from making general classifications that avoided the administrative costs of individualization in many areas.

Use of the doctrine was curbed if not halted, however, in *Weinberger v. Salfi*,[1006] in which the Court upheld the validity of a Social Security provision requiring that the spouse of a covered wage earner must have been married to the wage earner for at least nine months prior to his death in order to receive benefits as a spouse. Purporting to approve but to distinguish the prior cases in the line,[1007] the Court imported traditional equal protection analysis into considerations of due process challenges to statutory classifications.[1008] Extensions of the prior cases to government entitlement classifications, such as the Social Security Act qualification standard before it, would, said the Court, "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." [1009] 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 pro-

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[1004] Department of Agriculture v. Murry, 413 U.S. 508 (1973).

[1005] 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).

[1006] 422 U.S. 749 (1975).

[1007] *Stanley* and *LaFleur* were distinguished as involving fundamental rights of family and childbearing, 422 U.S. at 771, and *Murry* was distinguished as involving an irrational classification. Id. at 772. *Vlandis*, said Justice Rehnquist for the Court, meant no more than that when a state fixes residency as the qualification it may not deny to one meeting the test of residency the opportunity so to establish it. Id. at 771. *But see* id. at 802–03 (Justice Brennan dissenting).

[1008] 422 U.S. at 768–70, 775–77, 785 (using Dandridge v. Williams, 397 U.S. 471 (1970); Richardson v. Belcher, 404 U.S. 78 (1971); and similar cases).

[1009] Weinberger v. Salfi, 422 U.S. 749, 772 (1975).

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tection sense of those expressions)[1010] 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.[1011]

Trials and Appeals.—Trial by jury in civil trials, unlike the case in criminal trials, has not been deemed essential to due process, and the Fourteenth Amendment has not been held to restrain the states in retaining or abolishing civil juries.[1012] Thus, abolition of juries in proceedings to enforce liens,[1013] mandamus[1014] and quo warranto[1015] actions, and in eminent domain[1016] and equity[1017] proceedings has been approved. states are also free to adopt innovations respecting selection and number of jurors. Verdicts rendered by ten out of twelve jurors may be substituted for the requirement of unanimity,[1018] and petit juries containing eight rather than the conventional number of twelve members may be established.[1019]

If a full and fair trial on the merits is provided, due process does not require a state to provide appellate review.[1020] But if an appeal is afforded, the state must not so structure it as to arbitrarily deny to some persons the right or privilege available to others.[1021]

[1010] *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).

[1011] 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).

[1012] Walker v. Sauvinet, 92 U.S. 90 (1876); New York Central R.R. v. White, 243 U.S. 188, 208 (1917).

[1013] Marvin v. Trout, 199 U.S. 212, 226 (1905).

[1014] *In re* Delgado, 140 U.S. 586, 588 (1891).

[1015] Wilson v. North Carolina, 169 U.S. 586 (1898); Foster v. Kansas, 112 U.S. 201, 206 (1884).

[1016] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 694 (1897).

[1017] Montana Co. v. St. Louis M. & M. Co., 152 U.S. 160, 171 (1894).

[1018] *See* Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

[1019] *See* Maxwell v. Dow, 176 U.S. 581, 602 (1900).

[1020] Lindsey v. Normet, 405 U.S. 56, 77 (1972) (citing cases).

[1021] 405 U.S. at 74–79 (conditioning appeal in eviction action upon tenant posting bond, with two sureties, in twice the amount of rent expected to accrue pending appeal, is invalid when no similar provision is applied to other cases). *Cf.* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) (assessment of 15% penalty on

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PROCEDURAL DUE PROCESS—CRIMINAL

Generally: The Principle of Fundamental Fairness

The Court has held that practically all the criminal procedural guarantees of the Bill of Rights—the Fourth, Fifth, Sixth, and Eighth Amendments—are fundamental to state criminal justice systems and that the absence of one or the other particular guarantees denies a suspect or a defendant due process of law under the Fourteenth Amendment.[1022] In addition, the Court has held that the Due Process Clause protects against practices and policies that violate precepts of fundamental fairness,[1023] even if they do not violate specific guarantees of the Bill of Rights.[1024] The standard query in such cases is whether the challenged practice or policy violates "a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such government." [1025]

This inquiry contains a historical component, as "recent cases . . . have proceeded upon the valid assumption that state criminal

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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).

[1022] *See* analysis under the Bill of Rights, "Fourteenth Amendment," *supra*.

[1023] For instance, *In re* Winship, 397 U.S. 358 (1970), held that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is required by due process. For other recurrences to general due process reasoning, as distinct from reliance on more specific Bill of Rights provisions, *see*, *e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973) (defendant may not be denied opportunity to explore confession of third party to crime for which defendant is charged); Wardius v. Oregon, 412 U.S. 470 (1973) (defendant may not be held to rule requiring disclosure to prosecution of an alibi defense unless defendant is given reciprocal discovery rights against the state); Mullaney v. Wilbur, 421 U.S. 684 (1975) (defendant may not be required to carry the burden of disproving an element of a crime for which he is charged); Estelle v. Williams, 425 U.S. 501 (1976) (a state cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes); Henderson v. Kibbe, 431 U.S. 145 (1977) (sufficiency of jury instructions); Patterson v. New York, 432 U.S. 197 (1977) (defendant may be required to bear burden of affirmative defense); Taylor v. Kentucky, 436 U.S. 478 (1978) (requiring, upon defense request, jury instruction on presumption of innocence); Kentucky v. Whorton, 441 U.S. 786 (1979) (fairness of failure to give jury instruction on presumption of innocence evaluated under totality of circumstances); Sandstrom v. Montana, 442 U.S. 510 (1979) (conclusive presumptions in jury instruction may not be used to shift burden of proof of an element of crime to defendant); Hicks v. Oklahoma, 447 U.S. 343 (1980) (where sentencing enhancement scheme for habitual offenders found unconstitutional, defendant's sentence cannot be sustained, even if sentence falls within range of unenhanced sentences).

[1024] Justice Black thought the Fourteenth Amendment should be limited to the specific guarantees found in the Bill of Rights. *See*, *e.g.*, *In re* Winship, 397 U.S. 358, 377 (1970) (dissenting). For Justice Harlan's response, *see* id. at 372 n.5 (concurring).

[1025] Twining v. New Jersey, 211 U.S. 78, 106 (1908). The question is phrased as whether a claimed right is "implicit in the concept of ordered liberty," whether it partakes "of the very essence of a scheme of ordered liberty," Palko v. Connecticut,

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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."[1026]

The Elements of Due Process

Initiation of the Prosecution.—Indictment by a grand jury is not a requirement of due process; a state may proceed instead by information.[1027] 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,[1028] even aside from the notice requirements of the Sixth Amendment.[1029] Where, of course, a grand jury is used, it must be fairly constituted and free from prejudicial influences.[1030]

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302 U.S. 319, 325 (1937), or whether it "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses," Rochin v. California, 342 U.S. 165, 169 (1952).

[1026] Duncan v. Louisiana, 391 U.S. 145, 149–50 n.14 (1968).

[1027] Hurtado v. California, 110 U.S. 516 (1884). The Court has also rejected an argument that due process requires that criminal prosecutions go forward only on a showing of probable cause. Albright v. Oliver, 510 U.S. 266 (1994) (holding that there is no civil rights action based on the Fourteenth Amendment for arrest and imposition of bond without probable cause).

[1028] Smith v. O'Grady, 312 U.S. 329 (1941) (guilty plea of layman unrepresented by counsel to what prosecution represented as a charge of simple burglary but which was in fact a charge of "burglary with explosives" carrying a much lengthier sentence voided). *See also* Cole v. Arkansas, 333 U.S. 196 (1948) (affirmance by appellate court of conviction and sentence on ground that evidence showed defendant guilty under a section of the statute not charged violated due process); *In re* Ruffalo, 390 U.S. 544 (1968) (disbarment in proceeding on charge which was not made until after lawyer had testified denied due process); Rabe v. Washington, 405 U.S. 313 (1972) (affirmance of obscenity conviction because of the context in which a movie was shown—grounds neither covered in the statute nor listed in the charge—was invalid).

[1029] See Sixth Amendment, Notice of Accusation, *supra.*

[1030] Norris v. Alabama, 294 U.S. 587 (1935); Cassell v. Texas, 339 U.S. 282 (1950); Eubanks v. Louisiana, 356 U.S. 584 (1958); Hernandez v. Texas, 347 U.S. 475 (1954); Pierre v. Louisiana, 306 U.S. 354 (1939). On prejudicial publicity, *see* Beck v. Washington, 369 U.S. 541 (1962).

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Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine.—Criminal statutes that lack sufficient definiteness or specificity are commonly held "void for vagueness." [1031] Such legislation "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." [1032] "Men of common intelligence cannot be required to guess at the meaning of [an] enactment." [1033]

For instance, the Court voided for vagueness a criminal statute providing that a person was a "gangster" and subject to fine or imprisonment if he was without lawful employment, had been either convicted at least three times for disorderly conduct or had been convicted of any other crime, and was "known to be a member of a gang of two or more persons." The Court observed that neither common law nor the statute gave the words "gang" or "gangster" definite meaning, that the enforcing agencies and courts were free to construe the terms broadly or narrowly, and that the phrase "known to be a member" was ambiguous. The statute was held void, and the Court refused to allow specification of details in the particular

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[1031] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[1032] Musser v. Utah, 333 U.S. 95, 97 (1948). "The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt." Id. at 97. "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with 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).

[1033] Winters v. New York, 333 U.S. 507, 515–16 (1948). "The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable test to ascertain guilt." Id. *Cf.* Colten v. Kentucky, 407 U.S. 104, 110 (1972). Thus, a state statute imposing severe, cumulative punishments upon contractors with the state who pay their workers less than the "current rate of per diem wages in the locality where the work is performed" was held to be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Const. Co., 269 U.S. 385 (1926). Similarly, a statute which allowed jurors to require an acquitted defendant to pay the costs of the prosecution, elucidated only by the judge's instruction to the jury that the defendant should only have to pay the costs if it thought him guilty of "some misconduct" though innocent of the crime with which he was charged, was found to fall short of the requirements of due process. Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

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indictment to save it because it was the statute, not the indictment, that prescribed the rules to govern conduct.[1034]

A statute may be so vague or so threatening to constitutionally protected activity that it can be pronounced wholly unconstitutional; in other words, "unconstitutional on its face."[1035] Thus, for instance, a unanimous Court in *Papachristou v. City of Jacksonville*[1036] struck down as invalid on its face a vagrancy ordinance that 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 . . . ."[1037] The ordinance was found to be facially invalid, according to Justice Douglas for the Court, because it did not give fair notice, it did not require specific intent to commit an unlawful act, it permitted and encouraged arbitrary and erratic arrests and convictions, it committed too much discretion to policemen, and it criminalized activities that by modern standards are normally innocent.[1038]

In *FCC v. Fox*, 567 U.S. ___, No. 10–1293, slip op. (2012) the Court held that the Federal Communiations Commission (FCC) had violated the Fifth Amendment due process rights of Fox Television and ABC, Inc., because the FCC had not given fair notice that broad-

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[1034] Lanzetta v. New Jersey, 306 U.S. 451 (1939); Edelman v. California, 344 U.S. 357 (1953).

[1035] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Goguen, 415 U.S. 566 (1974). Generally, a vague statute that regulates in the area of First Amendment guarantees will be pronounced wholly void. Winters v. New York, 333 U.S. 507, 509–10 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

[1036] 405 U.S. 156 (1972).

[1037] 405 U.S. at 156 n.1. Similar concerns regarding vagrancy laws had been expressed previously. *See*, *e.g.*, Winters v. New York, 333 U.S. 507, 540 (1948) (Justice Frankfurter dissenting); Edelman v. California, 344 U.S. 357, 362 (1953) (Justice Black dissenting); Hicks v. District of Columbia, 383 U.S. 252 (1966) (Justice Douglas dissenting).

[1038] Similarly, an ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by was found impermissibly vague and void on its face because it encroached on the freedom of assembly. Coates v. City of Cincinnati, 402 U.S. 611 (1971). *See* Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) (conviction under statute imposing penalty for failure to "move on" voided); Bouie v. City of Columbia, 378 U.S. 347 (1964) (conviction on trespass charges arising out of a sit-in at a drugstore lunch counter voided since the trespass statute did not give fair notice that it was a crime to refuse to leave private premises after being requested to do so); Kolender v. Lawson, 461 U.S. 352 (1983) (requirement that person detained in valid *Terry* stop provide "credible and reliable" identification is facially void as encouraging arbitrary enforcement).

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casting isolated instances of expletives or brief nudity could lead to punishment. 18 U.S.C. § 1464 bans the broadcast of "any obscene, indecent, or profane language", but the FCC had a long-standing policy that it would not consider "fleeting" instances of indecency to be actionable, and had confirmed such a policy by issuance of an industry guidance. The policy was not announced until after the instances at issues in this case (two concerned isolated utterances of expletives during two live broadcasts aired by Fox Television, and a brief exposure of the nude buttocks of an adult female character by ABC). The Commission policy in place at the time of the broadcasts, therefore, gave the broadcasters no notice that a fleeting instance of indecency could be actionable as indecent.

On the other hand, some less vague statutes may be held unconstitutional only in application to the defendant before the Court.[1039] For instance, where the terms of a statute could be applied both to innocent or protected conduct (such as free speech) and unprotected conduct, but the valuable effects of the law outweigh its potential general harm, such a statute will be held unconstitutional only as applied.[1040] Thus, in *Palmer v. City of Euclid*,[1041] an ordinance punishing "suspicious persons" defined as "[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself" was found void only as applied to a particular defendant. In *Palmer*, the Court found that the defendant, having dropped off a passenger and begun talking into a two-way radio, was engaging in conduct which could not reasonably be anticipated as fitting within the "without any visible or lawful business" portion of the ordinance's definition.

Loitering statutes that are triggered by failure to obey a police dispersal order are suspect, and may be struck down if they leave a police officer absolute discretion to give such orders.[1042] Thus, a Chicago ordinance that required police to disperse all persons in the company of "criminal street gang members" while in a public place with "no apparent purpose," failed to meet the "requirement that a legislature establish minimal guidelines to govern law en-

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[1039] Where the terms of a vague statute do not threaten a constitutionally protected right, and where the conduct at issue in a particular case is clearly proscribed, then a due process challenge is unlikely to be successful. Where the conduct in question is at the margins of the meaning of an unclear statute, however, it will be struck down as applied. *E.g.*, United States v. National Dairy Corp., 372 U.S. 29 (1963).

[1040] Palmer v. City of Euclid, 402 U.S. 544 (1971); Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 494–95 (1982).

[1041] 402 U.S. 544 (1971).

[1042] Kolender v. Lawson, 461 U.S. 352, 358 (1983).

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forcement."[1043] The Court noted that "no apparent purpose" is inherently subjective because its application depends on whether some purpose is "apparent" to the officer, who would presumably have the discretion to ignore such apparent purposes as engaging in idle conversation or enjoying the evening air.[1044] On the other hand, where such a statute additionally required a finding that the defendant was intent on causing inconvenience, annoyance, or alarm, it was upheld against facial challenge, at least as applied to a defendant who was interfering with the ticketing of a car by the police.[1045]

Statutes with vague standards may nonetheless be upheld if the text of statute is interpreted by a court with sufficient clarity. Thus, the civil commitment of persons of "such conditions of emotional instability . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons" was upheld by the Court, based on a state court's construction of the statute as only applying to persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The underlying conditions—habitual course of misconduct in sexual matters and lack of power to control impulses and likelihood of attack on others—were viewed as calling for evidence of past conduct pointing to probable consequences and as being as susceptible of proof as many of the criteria constantly applied in criminal proceedings.[1046]

Conceptually related to the problem of definiteness in criminal statutes is the problem of notice. Ordinarily, it can be said that ignorance of the law affords no excuse, or, in other instances, that the nature of the subject matter or conduct may be sufficient to alert one that there are laws which must be observed.[1047] On occasion the Court has even approved otherwise vague statutes because the statute forbade only "willful" violations, which the Court construed as requiring knowledge of the illegal nature of the proscribed con-

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[1043] City of Chicago v. Morales, 527 U.S. 41 (1999).

[1044] 527 U.S. at 62.

[1045] Colten v. Kentucky, 407 U.S. 104 (1972).

[1046] Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940).

[1047] *E.g.*, United States v. Freed, 401 U.S. 601 (1971). Persons may be bound by a novel application of a statute, not supported by Supreme Court or other "fundamentally similar" case precedent, so long as the court can find that, under the circumstance, "unlawfulness . . . is apparent" to the defendant. United States v. Lanier, 520 U.S. 259, 271–72 (1997).

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duct.[1048] Where conduct is not in and of itself blameworthy, however, a criminal statute may not impose a legal duty without notice.[1049]

The question of notice has also arisen in the context of "judge-made" law. Although the Ex Post Facto Clause forbids retroactive application of state and federal criminal laws, no such explicit restriction applies to the courts. Thus, when a state court abrogated the common law rule that a victim must die within a "year and a day" in order for homicide charges to be brought in *Rogers v. Tennessee*,[1050] the question arose whether such rule could be applied to acts occurring before the court's decision. The dissent argued vigorously that unlike the traditional common law practice of adapting legal principles to fit new fact situations, the court's decision was an outright reversal of existing law. Under this reasoning, the new "law" could not be applied retrospectively. The majority held, however, that only those holdings which were "unexpected and indefensible by reference to the law which had been express prior to the conduct in issue"[1051] could not be applied retroactively. The relatively archaic nature of "year and a day rule", its abandonment by most jurisdictions, and its inapplicability to modern times were all cited as reasons that the defendant had fair warning of the possible abrogation of the common law rule.

Entrapment.—Certain criminal offenses, because they are consensual actions taken between and among willing parties, present police with difficult investigative problems.[1052] Thus, in order to deter such criminal behavior, police agents may "encourage" persons to engage in criminal behavior, such as selling narcotics or contra-

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[1048] *E.g.*, Boyce Motor Lines v. United States, 342 U.S. 337 (1952); Colautti v. Franklin, 439 U.S. 379, 395 (1979). *Cf.* Screws v. United States, 325 U.S. 91, 101–03 (1945) (plurality opinion). The Court have even done so when the statute did not explicitly include such a *mens rea* requirement. *E.g.*, Morissette v. United States, 342 U.S. 246 (1952).

[1049] *See*, *e.g.*, Lambert v. California, 355 U.S. 225 (1957) (invalidating a municipal code that made it a crime for anyone who had ever been convicted of a felony to remain in the city for more than five days without registering.). In *Lambert*, the Court emphasized that the act of being in the city was not itself blameworthy, holding that the failure to register was quite "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." Id. at 228, 229–30.

[1050] 532 U.S. 451 (2001).

[1051] Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

[1052] Some of that difficulty may be alleviated through electronic and other surveillance, which is covered by the search and seizure provisions of the Fourth Amendment, or informers may be used, which also has constitutional implications.

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band,[1053] or they may may seek to test the integrity of public employees, officers or public officials by offering them bribes.[1054] In such cases, an "entrapment" defense is often made, though it is unclear whether the basis for the defense is the Due Process Clause, the supervisory authority of the federal courts to deter wrongful police conduct, or merely statutory construction (interpreting criminal laws to find that the legislature would not have intended to punish conduct induced by police agents).[1055]

The Court has employed the so-called "subjective approach" in evaluating the defense of entrapment.[1056] This subjective approach

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[1053] For instance, in Sorrells v. United States, 287 U.S. 435, 446–49 (1932) and Sherman v. United States, 356 U.S. 369, 380 (1958) government agents solicited defendants to engage in the illegal activity, in United States v. Russell, 411 U.S. 423, 490 (1973), the agents supplied a commonly available ingredient, and in Hampton v. United States, 425 U.S. 484, 488–89 (1976), the agents supplied an essential and difficult to obtain ingredient.

[1054] For instance, this strategy was seen in the "Abscam" congressional bribery controversy. The defense of entrapment was rejected as to all the "Abscam" defendants. *E.g.*, United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983); United States v. Williams, 705 F.2d 603 (2d Cir. 1983); United States v. Jannotti, 673 F.2d 578 (3d Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982).

[1055] For a thorough evaluation of the basis for and the nature of the entrapment defense, *see* Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 Sup. Ct. Rev. 111. The Court's first discussion of the issue was based on statutory grounds, *see* Sorrells v. United States, 287 U.S. 435, 446–49 (1932), and that basis remains the choice of some Justices. Hampton v. United States, 425 U.S. 484, 488–89 (1976) (plurality opinion of Justices Rehnquist and White and Chief Justice Burger). In Sherman v. United States, 356 U.S. 369, 380 (1958) (concurring), however, Justice Frankfurter based his opinion on the supervisory powers of the courts. In United States v. Russell, 411 U.S. 423, 490 (1973), however, the Court rejected the use of that power, as did a plurality in *Hampton*, 425 U.S. at 490. The *Hampton* plurality thought the Due Process Clause would never be applicable, no matter what conduct government agents engaged in, unless they violated some protected right of the defendant, and that inducement and encouragement could never do that. Justices Powell and Blackmun, on the other hand, 411 U.S. at 491, thought that police conduct, even in the case of a predisposed defendant, could be so outrageous as to violate due process. The *Russell* and *Hampton* dissenters did not clearly differentiate between the supervisory power and due process but seemed to believe that both were implicated. 411 U.S. at 495 (Justices Brennan, Stewart, and Marshall); *Russell*, 411 U.S. at 439 (Justices Stewart, Brennan, and Marshall). The Court again failed to clarify the basis for the defense in Mathews v. United States, 485 U.S. 58 (1988) (a defendant in a federal criminal case who denies commission of the crime is entitled to assert an "inconsistent" entrapment defense where the evidence warrants), and in Jacobson v. United States, 503 U.S. 540 (1992) (invalidating a conviction under the Child Protection Act of 1984 because government solicitation induced the defendant to purchase child pornography).

[1056] An "objective approach," although rejected by the Supreme Court, has been advocated by some Justices and recommended for codification by Congress and the state legislatures. *See American Law Institute*, Model Penal Code § 2.13 (Official Draft, 1962); National Commission on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 702(2) (Final Draft, 1971). The objective approach disregards the defendant's predisposition and looks to the inducements used by government agents. If the government employed means of persuasion or inducement creating a substantial risk that the person tempted will engage in the conduct, the defense would be

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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."[1057] 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.[1058] 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."[1059]

Criminal Identification Process.—In criminal trials, the reliability and weight to be accorded an eyewitness identification ordinarily are for the jury to decide, guided by instructions by the trial judge and subject to judicial prerogatives under the rules of evidence to exclude otherwise relevant evidence whose probative value is substantially outweighed by its prejudicial impact or potential to mislead. At times, however, a defendant alleges an out-of-court identification in the presence of police is so flawed that it is inadmissible as a matter of fundamental justice under due process.[1060] These cases most commonly challenge such police-arranged procedures as lineups, showups, photo-

available. Sorrells v. United States, 287 U.S. 435, 458–59 (1932) (separate opinion of Justice Roberts); Sherman v. United States, 356 U.S. 369, 383 (1958) (Justice Frankfurter concurring); United States v. Russell, 411 U.S. 423, 441 (1973) (Justice Stewart dissenting); Hampton v. United States, 425 U.S. 484, 496–97 (1976) (Justice Brennan dissenting).

[1057] Jacobson v. United States, 503 U.S. 540, 548–49 (1992). Here the Court held that the government had failed to prove that the defendant was initially predisposed to purchase child pornography, even though he had become so predisposed following solicitation through an undercover "sting" operation. For several years government agents had sent the defendant mailings soliciting his views on pornography and child pornography, and urging him to obtain materials in order to fight censorship and stand up for individual rights.

[1058] 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).

[1059] Jacobson v. United States, 503 U.S. 540, 553–54 (1992).

[1060] A hearing by the trial judge on whether an eyewitness identification should be barred from admission is not constitutionally required to be conducted out of the presence of the jury. Watkins v. Sowders, 449 U.S. 341 (1981).

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graphic displays, and the like.[1061] But not all cases have alleged careful police orchestration.[1062]

The Court generally disfavors judicial suppression of eyewitness identifications on due process grounds in lieu of having identification testimony tested in the normal course of the adversarial process.[1063] Two elements are required for due process suppression. First, law enforcement officers must have participated in an identification process that was *both* suggestive and unnecessary.[1064] Second, the identification procedures must have created a substantial prospect for misidentification. Determination of these elements is made by examining the "totality of the circumstances" of a case.[1065] The Court has not recognized any *per se* rule for excluding an eyewitness identification on due

[1061] *E.g.*, Manson v. Brathwaite, 432 U.S. 98, 114–17 (1977) (only one photograph provided to witness); Neil v. Biggers, 409 U.S. 188, 196–201 (1972) (showup in which police walked defendant past victim and ordered him to speak); Coleman v. Alabama, 399 U.S. 1 (1970) (lineup); Foster v. California, 394 U.S. 440 (1969) (two lineups, in one of which the suspect was sole participant above average height, and arranged one-on-one meeting between eyewitness and suspect); Simmons v. United States, 390 U.S. 377 (1968) (series of group photographs each of which contained suspect); Stovall v. Denno, 388 U.S. 293 (1967) (suspect brought to witness's hospital room).

[1062] Perry v. New Hampshire, 565 U.S. ___, No. 10–8974, slip op. (2012) (prior to being approached by police for questioning, witness by chance happened to see suspect standing in parking lot near police officer; no manipulation by police alleged).

[1063] *See* Perry v. New Hampshire, 565 U.S. ___, No. 10–8974, slip op. at 6–7, 15–17 (2012).

[1064] "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. 188, 198 (1972). An identification process can be found to be suggestive regardless of police intent. Perry v. New Hampshire, 565 U.S. ___, No. 10–8974, slip op. at 2 & n.1 (2012) (circumstances of identification found to be suggestive but not contrived; no due process relief). The necessity of using a particular procedure depends on the circumstances. *E.g.*, Stovall v. Denno, 388 U.S. 293 (1967) (suspect brought handcuffed to sole witness's hospital room where it was uncertain whether witness would survive her wounds).

[1065] 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's degree of attention, the accuracy of the witness's 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).

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process grounds.[1066] Defendants have had difficulty meeting the Court's standards: Only one challenge has been successful.[1067]

Fair Trial.—As noted, the provisions of the Bill of Rights now applicable to the states contain basic guarantees of a fair trial—right to counsel, right to speedy and public trial, right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the like. But this does not exhaust the requirements of fairness. "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."[1068] Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[1069]

For instance, bias or prejudice either inherent in the structure of the trial system or as imposed by external events will deny one's right to a fair trial. Thus, in *Tumey v. Ohio*[1070] it was held to violate due process for a judge to receive compensation out of the fines imposed on convicted defendants, and no compensation beyond his salary) "if he does not convict those who are brought before him."

[1066] The Court eschewed a *per se* exclusionary rule in due process cases at least as early as *Stovall*. 388 U.S. 293, 302 (1967). In Manson v. Brathwaite, the Court evaluated application of a *per se* rule versus the more flexible, *ad hoc* "totality of the circumstances" rule, and found the latter to be preferable in the interests of deterrence and the administration of justice. 432 U.S. 98, 111–14 (1977). The rule in due process cases differs from the *per se* exclusionary rule adopted in the *Wade-Gilbert* line of cases on denial of the right to counsel under the Sixth Amendment in post-indictment lineups. Cases refining the *Wade-Gilbert* holdings include Kirby v. Illinois, 406 U.S. 682 (1972) (right to counsel inapplicable to post-arrest police station identification made before formal initiation of criminal proceedings; due process protections remain available) and United States v. Ash, 413 U.S. 300 (1973) (right to counsel inapplicable at post-indictment display of photographs to prosecution witnesses out of defendant's presence; record insufficient to assess possible due process claim).

[1067] Foster v. California, 394 U.S. 440 (1969) (5–4) ("[T]he pretrial confrontations [between the witness and the defendant] clearly were so arranged as to make the resulting identifications virtually inevitable."). In a limited class of cases, pretrial identifications have been found to be constitutionally objectionable on a basis other than due process. *See* discussion of Assistance of Counsel under Amend. VI, "Lineups and Other Identification Situations."

[1068] Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934). *See also* Buchalter v. New York, 319 U.S. 427, 429 (1943).

[1069] Lisenba v. California, 314 U.S. 219, 236 (1941).

[1070] 273 U.S. 510, 520 (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).

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Or, in other cases, the Court has found that contemptuous behavior in court may affect the impartiality of the presiding judge, so as to disqualify such judge from citing and sentencing the contemnors.[1071] Due process is also violated by the participation of a biased or otherwise partial juror, although there is no presumption that all jurors with a potential bias are in fact prejudiced.[1072]

Public hostility toward a defendant that intimidates a jury is, or course, a classic due process violation.[1073] 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.[1074] For instance, the impact of televising trials on a jury has been a source of some concern.[1075]

[1071] Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971) ("it is generally wise where the marks of unseemly conduct have left personal stings [for a judge] to ask a fellow judge to take his place"); Taylor v. Hayes, 418 U.S. 488, 503 (1974) (where "marked personal feelings were present on both sides," a different judge should preside over a contempt hearing). *But see* Ungar v. Sarafite, 376 U.S. 575 (1964) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to authority"). In the context of alleged contempt before a judge acting as a one-man grand jury, the Court reversed criminal contempt convictions, saying: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re* Murchison, 349 U.S. 133, 136 (1955).

[1072] Ordinarily the proper avenue of relief is a hearing at which the juror may be questioned and the defense afforded an opportunity to prove actual bias. Smith v. Phillips, 455 U.S. 209 (1982) (juror had job application pending with prosecutor's office during trial). *See also* Remmer v. United States, 347 U.S. 227 (1954) (bribe offer to sitting juror); Dennis v. United States, 339 U.S. 162, 167–72 (1950) (government employees on jury). But, a trial judge's refusal to question potential jurors about the contents of news reports to which they had been exposed did not violate the defendant's right to due process, it being sufficient that the judge on *voir dire* asked the jurors whether they could put aside what they had heard about the case, listen to the evidence with an open mind, and render an impartial verdict. Mu'Min v. Virginia, 500 U.S. 415 (1991). Nor is it a denial of due process for the prosecution, after a finding of guilt, to call the jury's attention to the defendant's prior criminal record, if the jury has been given a sentencing function to increase the sentence which would otherwise be given under a recidivist statute. Spencer v. Texas, 385 U.S. 554 (1967). For discussion of the requirements of jury impartiality about capital punishment, *see* discussion under Sixth Amendment, *supra*.

[1073] Frank v. Mangum, 237 U.S. 309 (1915); Moore v. Dempsey, 261 U.S. 86 (1923).

[1074] 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).

[1075] Initially, the televising of certain trials was struck down on the grounds that the harmful potential effect on the jurors was substantial, that the testimony presented at trial may be distorted by the multifaceted influence of television upon the conduct of witnesses, that the judge's ability to preside over the trial and guarantee fairness is considerably encumbered to the possible detriment of fairness, and that the defendant is likely to be harassed by his television exposure. Estes v. Texas, 381 U.S. 532 (1965). Subsequently, however, in part because of improvements in technology which caused much less disruption of the trial process and in part because of

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The fairness of a particular rule of procedure may also be the basis for due process claims, but such decisions must be based on the totality of the circumstances surrounding such procedures.[1076] For instance, a court may not restrict the basic due process right to testify in one's own defense by automatically excluding all hypnotically refreshed testimony.[1077] Or, though a state may require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, due process requires reciprocal discovery in such circumstances, necessitating that the state give the defendant pretrial notice of its rebuttal evidence on the alibi issue.[1078] Due process is also violated when the accused is compelled to stand trial before a jury while dressed

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the lack of empirical data showing that the mere presence of the broadcast media in the courtroom necessarily has an adverse effect on the process, the Court has held that due process does not altogether preclude the televising of state criminal trials. Chandler v. Florida, 449 U.S. 560 (1981). The decision was unanimous but Justices Stewart and White concurred on the basis that *Estes* had established a *per se* constitutional rule which had to be overruled, id. at 583, 586, contrary to the Court's position. Id. at 570–74.

[1076] For instance, the presumption of innocence has been central to a number of Supreme Court cases. 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, although the burden on the defendant is heavy to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction. Taylor v. Kentucky, 436 U.S. 478 (1978). However, an instruction on the presumption of innocence need not be given in every case. Kentucky v. Whorton, 441 U.S. 786 (1979) (reiterating that the totality of the circumstances must be looked to in order to determine if failure to so instruct denied due process). The circumstances emphasized in *Taylor* included skeletal instructions on burden of proof combined with the prosecutor's remarks in his opening and closing statements inviting the jury to consider the defendant's prior record and his indictment in the present case as indicating guilt. *See also* Sandstrom v. Montana, 442 U.S. 510 (1979) (instructing jury trying person charged with "purposely or knowingly" causing victim's death that "law presumes that a person intends the ordinary consequences of his voluntary acts" denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event state would not have carried its burden of proving guilt). *See also* 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)); Middleton v. McNeil, 541 U.S. 433 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear). Similarly, improper arguments by a prosecutor do not necessarily constitute "plain error," and a reviewing court may consider in the context of the entire record of the trial the trial court's failure to redress such error in the absence of contemporaneous objection. United States v. Young, 470 U.S. 1 (1985).

[1077] Rock v. Arkansas, 483 U.S. 44 (1987).

[1078] Wardius v. Oregon, 412 U.S. 470 (1973).

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in identifiable prison clothes, because it may impair the presumption of innocence in the minds of the jurors.[1079]

The use of visible physical restraints, such as shackles, leg irons, or belly chains, in front of a jury, has been held to raise due process concerns. In *Deck v. Missouri*,[1080] the Court noted a rule dating back to English common law against bringing a defendant to trial in irons, and a modern day recognition that such measures should be used "only in the presence of a special need." [1081] The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and "affronts the dignity and decorum of judicial proceedings." [1082] Even where guilt has already been adjudicated, and a jury is considering the application of the death penalty, the latter two considerations would preclude the routine use of visible restraints. Only in special circumstances, such as where a judge has made particularized findings that security or flight risk requires it, can such restraints be used.

The combination of otherwise acceptable rules of criminal trials may in some instances deny a defendant due process. Thus, based on the particular circumstance of a case, two rules that (1) denied a defendant the right to cross-examine his own witness in order to elicit evidence exculpatory to the defendant [1083] and (2) denied a defendant the right to introduce the testimony of witnesses about matters told them out of court on the ground the testimony would be hearsay, denied the defendant his constitutional right to present his own defense in a meaningful way.[1084] Similarly, a questionable procedure may be saved by its combination with another. Thus, it does

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[1079] 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); Carey v. Musladin, 549 U.S. 70 (2006) (effect on defendant's fair-trial rights of private-actor courtroom conduct—in this case, members of victim's family wearing buttons with the victim's photograph—has never been addressed by the Supreme Court and therefore 18 U.S.C. § 2254(d)(1) precludes *habeas* relief; see Amendment 8, Limitations on Habeas Corpus Review of Capital Sentences).

[1080] 544 U.S. 622 (2005).

[1081] 544 U.S. at 626. In Illinois v. Allen, 397 U.S. 337, 344 (1970), the Court stated, in dictum, that "no person should be tried while shackled and gagged except as a last resort."

[1082] 544 U.S. at 630, 631 (internal quotation marks omitted).

[1083] The defendant called the witness because the prosecution would not.

[1084] 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 voluntari-

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not deny a defendant due process to subject him initially to trial before a non-lawyer police court judge when there is a later trial *de novo* available under the state's court system.[1085]

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." [1086]

The above-quoted language was dictum,[1087] but the principle it enunciated has required state officials to controvert allegations that knowingly false testimony had been used to convict [1088] and has upset convictions found to have been so procured.[1089] Extending the

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ness of the confession); Holmes v. South Carolina, 547 U.S. 319 (2006) (overturning rule that evidence of third-party guilt can be excluded if there is strong forensic evidence establishing defendant's culpability). *But see* Montana v. Egelhoff, 518 U.S. 37 (1996) (state may bar defendant from introducing evidence of intoxication to prove lack of *mens rea*).

[1085] North v. Russell, 427 U.S. 328 (1976).

[1086] Mooney v. Holohan, 294 U.S. 103, 112 (1935).

[1087] 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).

[1088] 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).

[1089] 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).

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principle, the Court in *Miller v. Pate*[1090] overturned a conviction obtained after the prosecution had represented to the jury that a pair of men's shorts found near the scene of a sex attack belonged to the defendant and that they were stained with blood; the defendant showed in a *habeas corpus* proceeding that no evidence connected him with the shorts and furthermore that the shorts were not in fact bloodstained, and that the prosecution had known these facts.

This line of reasoning has even resulted in the disclosure to the defense of information not relied upon by the prosecution during trial.[1091] In *Brady v. Maryland*,[1092] 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.[1093] "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."[1094]

[1090] 386 U.S. 1 (1967).

[1091] The Constitution does not require the government, prior to entering into a binding plea agreement with a criminal defendant, to disclose impeachment information relating to any informants or other witnesses against the defendant. United States v. Ruiz, 536 U.S. 622 (2002). Nor has it been settled whether inconsistent prosecutorial theories in separate cases can be the basis for a due process challenge. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (Court remanded case to determine whether death sentence was based on defendant's role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting).

[1092] 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.

[1093] Although the state court in *Brady* had allowed a partial retrial so that the accomplice's confession could be considered in the jury's determination of whether to impose capital punishment, it had declined to order a retrial of the guilt phase of the trial. The defendant's appeal of this latter decision was rejected, as the issue, as the Court saw it, was whether the state court could have excluded the defendant's confessed participation in the crime on evidentiary grounds, as the defendant had confessed to facts sufficient to establish grounds for the crime charged.

[1094] Moore v. Illinois, 408 U.S. 786, 794–95 (1972) (finding *Brady* inapplicable because the evidence withheld was not material and not exculpatory). *See also* Wood v. Bartholomew, 516 U.S. 1 (1995) (per curiam) (holding no due process violation

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In *United States v. Agurs*,[1095] the Court summarized and somewhat expanded the prosecutor's obligation to disclose to the defense exculpatory evidence in his possession, even in the absence of a request, or upon a general request, by defendant. First, as noted, if the prosecutor knew or should have known that testimony given to the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[1096] Second, as established in *Brady*, if the defense specifically requested certain evidence and the prosecutor withheld it,[1097] the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[1098] 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. Under this third prong, if the prosecutor did not reveal the relevant information, reversal of a conviction may be required, but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt.[1099]

This tripartite formulation, however, suffered from two apparent defects. First, it added a new level of complexity to a *Brady* inquiry by requiring a reviewing court to establish the appropriate

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where prosecutor's failure to disclose the result of a witness' polygraph test would not have affected the outcome of the case). The beginning in *Brady* toward a general requirement of criminal discovery was not carried forward. *See* the division of opinion in Giles v. Maryland, 386 U.S. 66 (1967).

In Cone v. Bell, 556 U.S. ___, No. 07–1114, slip op. at 23, 27 (2009), the Court emphasized the distinction between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment, and concluded that, although the evidence that had been suppressed was not material to the defendant's conviction, the lower courts had erred in failing to assess its effect with respect to the defendant's capital sentence.

[1095] 427 U.S. 97 (1976).

[1096] 427 U.S. at 103–04. This situation is the Mooney v. Holohan-type of case.

[1097] A statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263, 283–84 (1999); Banks v. Dretke, 540 U.S. 668, 693 (2004).

[1098] 427 U.S. at 104–06. This the *Brady* situation.

[1099] 427 U.S. at 106–14. This was the *Agurs* fact situation. Similarly, there is no obligation that law enforcement officials preserve breath samples that have been used in a breath-analysis test; to meet the *Agurs* materiality standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be 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); Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam) (the routine destruction of a bag of cocaine 11 years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process).

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level of materiality by classifying the situation under which the exculpating information was withheld. Second, it was not clear, if the fairness of the trial was at issue, why the circumstances of the failure to disclose should affect the evaluation of the impact that such information would have had on the trial. Ultimately, the Court addressed these issues in *United States v. Bagley* [1100].

In *Bagley*, the Court established a uniform test for materiality, choosing the most stringent requirement that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different.[1101] This materiality standard, found in contexts outside of *Brady* inquiries,[1102] is applied not only to exculpatory material, but also to material that would be relevant to the impeachment of witnesses.[1103] Thus, where inconsistent earlier statements by a witness to an abduction were not disclosed, the Court weighed the specific effect that impeachment of the witness would have had on establishing the required elements of the crime and of the punishment, finally concluding that there was no reasonable probability that the jury would have reached a different result.[1104]

The Supreme Court has also held that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.' . . . '[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.'" [1105]

Proof, Burden of Proof, and Presumptions.—It had long been presumed that "reasonable doubt" was the proper standard for crimi-

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[1100] 473 U.S. 667 (1985).

[1101] 473 U.S. at 682. Or, to phrase it differently, a *Brady* violation is established by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, 435 (1995). *Accord* Smith v. Cain, 565 U.S. ___, No. 10–8145, slip op. (2012) (prior inconsistent statements of sole eyewitness withheld from defendant; state lacked other evidence sufficient to sustain confidence in the verdict independently).

[1102] *See* United States v. Malenzuela-Bernal, 458 U.S. 858 (1982) (testimony made unavailable by Government deportation of witnesses); Strickland v. Washington, 466 U.S. 668 (1984) (incompetence of counsel).

[1103] 473 U.S. at 676–77.

[1104] Strickler v. Greene, 527 U.S. 263 (1999). *But see* Banks v. Dretke, 540 U.S. 668, 692–94 (2004) (failure of prosecution to correct perjured statement that witness had not been coached and to disclose that separate witness was a paid government informant established prejudice for purposes of habeas corpus review); Smith v. Cain, 565 U.S. ___, No. 10–8145, slip op. (2012) (prior inconsistent statements of sole eyewitness withheld from defendant; state lacked other evidence sufficient to sustain confidence in the verdict independently).

[1105] Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (per curiam), quoting Kyles v. Whitley, 514 U.S. 419, 438, 437 (1995).

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nal cases,[1106] but, because the standard was so widely accepted, it was only relatively recently that the Court had the opportunity to pronounce it guaranteed by due process. In 1970, the Court held in *In re Winship* that 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." [1107]

The standard is closely related to the presumption of innocence, which helps to ensure a defendant a fair trial,[1108] and requires that a jury consider a case solely on the evidence.[1109] "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.'" [1110]

The Court had long held that, under the Due Process Clause, it would set aside convictions that are supported by no evidence at

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[1106] 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).

[1107] *In re* Winship, 397 U.S. 358, 364 (1970). *See* Estelle v. Williams, 425 U.S. 501, 503 (1976); Henderson v. Kibbe, 431 U.S. 145, 153 (1977); Ulster County Court v. Allen, 442 U.S. 140, 156 (1979); Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979). *See also* Sullivan v. Louisiana, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt). On the interrelationship of the reasonable doubt burden and defendant's entitlement to a presumption of innocence, *see* Taylor v. Kentucky, 436 U.S. 478, 483–86 (1978), and Kentucky v. Whorton, 441 U.S. 786 (1979).

[1108] *E.g.*, Deutch v. United States, 367 U.S. 456, 471 (1961). *See also* Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam) (jury instruction that explains "reasonable doubt" as doubt that would give rise to a "grave uncertainty," as equivalent to a "substantial doubt," and as requiring "a moral certainty," suggests a higher degree of certainty than is required for acquittal, and therefore violates the Due Process Clause). *But see* Victor v. Nebraska, 511 U.S. 1 (1994) (considered as a whole, jury instructions that define "reasonable doubt" as requiring a "moral certainty" or as equivalent to "substantial doubt" did not violate due process because other clarifying language was included.)

[1109] 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.

[1110] 397 U.S. at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). Justice Harlan's *Winship* concurrence, id. at 368, proceeded on the basis that, because 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.

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all.[1111] The holding of the *Winship* case, however, left open the question as to whether appellate courts should weigh the sufficiency of trial evidence. Thus, in *Jackson v. Virginia*,[1112] the Court held that federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves that the evidence on the record 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.[1113]

Because due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged,[1114] the Court held in *Mullaney v. Wilbur*[1115] that it was unconstitutional to require a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter. The Court indicated that a balancing-of-interests test should be used to determine when the Due Process Clause required the prosecution to carry the burden of proof and when some part of the burden might be shifted to the defendant. The decision, however, called into question the practice in many states under which some burdens of persuasion[1116] 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.

[1111] 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).

[1112] 443 U.S. 307 (1979).

[1113] 443 U.S. at 3116, 318–19. On a somewhat related point, the Court has ruled that a general guilty verdict on a multiple-object conspiracy need not be set aside if the evidence is inadequate to support conviction as to one of the objects of the conspiracy, but is adequate to support conviction as to another. Griffin v. United States, 112 U.S. 466 (1991).

[1114] Bunkley v. Florida, 538 U.S. 835 (2003); Fiore v. White, 528 U.S. 23 (1999). These cases both involved defendants convicted under state statutes that were subsequently interpreted in a way that would have precluded their conviction. The Court remanded the cases to determine if the new interpretation was in effect at the time of the previous convictions, in which case those convictions would violate due process.

[1115] 421 U.S. 684 (1975). *See also* Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979).

[1116] The general notion of "burden of proof" can be divided into the "burden of production" (providing probative evidence on a particular issue) and a "burden of persuasion" (persuading the factfinder with respect to an issue by a standard such as proof beyond a reasonable doubt). *Mullaney*, 421 U.S. at 695 n.20.

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The Court, however, summarily rejected the argument that *Mullaney* means that the prosecution must negate an insanity defense,[1117] and, later, in *Patterson v. New York*,[1118] upheld a state statute that required a defendant asserting "extreme emotional disturbance" as an affirmative defense to murder[1119] to prove such by a preponderance of the evidence. According to the Court, the constitutional deficiency in *Mullaney* was that the statute made malice an element of the offense, permitted malice to be presumed upon proof of the other elements, and then required the defendant to prove the absence of malice. In *Patterson*, by contrast, the statute obligated the state to prove each element of the offense (the death, the intent to kill, and the causation) beyond a reasonable doubt, while allowing the defendant to prove an affirmative defense by preponderance of the evidence that would reduce the degree of the offense.[1120] This distinction has been criticized as formalistic, as the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses.[1121]

[1117] 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.

[1118] 432 U.S. 197 (1977).

[1119] Proving the defense would reduce a murder offense to manslaughter.

[1120] The decisive issue, then, was whether the statute required the state to prove beyond a reasonable doubt each element of the offense. *See also* Dixon v. United States, 548 U.S. 1 (2006) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). In *Dixon*, the prosecution had the burden of proving all elements of two federal firearms violations, one requiring a "willful" violation (having knowledge of the facts that constitute the offense) and the other requiring a "knowing" violation (acting with knowledge that the conduct was unlawful). Although establishing other forms of *mens rea* (such as "malicious intent") might require that a prosecutor prove that a defendant's intent was without justification or excuse, the Court held that neither of the forms of *mens rea* at issue in *Dixon* contained such a requirement. Consequently, the burden of establishing the defense of duress could be placed on the defendant without violating due process.

[1121] 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 that historically have made a substantial difference in the punishment and stigma flowing from a criminal act the state always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. 432 U.S. at 216. *Patterson* was followed in Martin v. Ohio, 480 U.S. 228 (1987) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is "prior calculation and design"). Justice Powell, again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. Id. at 236, 240.

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Despite the requirement that states prove each element of a criminal offense, criminal trials generally proceed with a presumption that the defendant is sane, and a defendant may be limited in the evidence that he may present to challenge this presumption. In *Clark v. Arizona*,[1122] the Court considered a rule adopted by the Supreme Court of Arizona that prohibited the use of expert testimony regarding mental disease or mental capacity to show lack of *mens rea*, ruling that the use of such evidence could be limited to an insanity defense. In *Clark*, the Court weighed competing interests to hold that such evidence could be "channeled" to the issue of insanity due to the controversial character of some categories of mental disease, the potential of mental-disease evidence to mislead, and the danger of according greater certainty to such evidence than experts claim for it.[1123]

Another important distinction that can substantially affect a prosecutor's burden is whether a fact to be established is an element of a crime or instead is a sentencing factor. Although a criminal conviction is generally established by a jury using the "beyond a reasonable doubt" standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient "preponderance of the evidence" standard. The Court has taken a formalistic approach to this issue, allowing states to designate essentially which facts fall under which of these two categories. For instance, the Court has held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence.[1124]

Although the Court has generally deferred to the legislature's characterizations in this area, it limited this principle in *Apprendi v. New Jersey*. In *Apprendi* the Court held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[1125] This led, in turn, to the Court's overruling conflicting prior case law that had held constitutional the use of aggra-

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[1122] 548 U.S. 735 (2006).

[1123] 548 U.S. at 770, 774.

[1124] McMillan v. Pennsylvania, 477 U.S. 79 (1986). It should be noted that these type of cases may also implicate the Sixth Amendment, as the right to a jury extends to all facts establishing the elements of a crime, while sentencing factors may be evaluated by a judge. *See* discussion in "Criminal Proceedings to Which the Guarantee Applies," *supra*.

[1125] 530 U.S. 466, 490 (2000) (interpreting New Jersey's "hate crime" law). It should be noted that, prior to its decision in *Apprendi*, the Court had held that sentencing factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi*, *McMillan* was subsequently reaffirmed in Harris v. United States, 536 U.S. 545 (2002).

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vating sentencing factors by judges when imposing capital punishment.[1126] These holdings are subject to at least one exception, however,[1127] and the decisions might be evaded by legislatures revising criminal provisions to increase maximum penalties, and then providing for mitigating factors within the newly established sentencing range.

Another closely related issue is statutory presumptions, where proof of a "presumed fact" that is a required element of a crime, is established by another fact, the "basic fact."[1128] In *Tot v. United States*,[1129] the Court held that a statutory presumption was valid under the Due Process Clause only if it met a "rational connection" test. In that case, the Court struck down a presumption that a person possessing an illegal firearm had shipped, transported, or received such in interstate commerce. "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience."

In *Leary v. United States*,[1130] this due process test was stiffened to require that, for such a "rational connection" to exist, it must "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Thus, the Court voided a provision that permitted a jury to infer from a defendant's possession of marijuana his knowledge of its illegal importation. A lengthy canvass of factual materials established to the Court's satisfaction that, although the

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[1126] Walton v. Arizona, 497 U.S. 639 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

[1127] This limiting principle does not apply to sentencing enhancements based on recidivism. *Apprendi*, 530 U.S. at 490. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[1128] *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).

[1129] 319 U.S. 463, 467–68 (1943). *Compare* United States v. Gainey, 380 U.S. 63 (1965) (upholding presumption from presence at site of illegal still that defendant was "carrying on" or aiding in "carrying on" its operation), *with* United States v. Romano, 382 U.S. 136 (1965) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still).

[1130] 395 U.S. 6, 36 (1969).

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greater part of marijuana consumed in the United States is of foreign origin, there was still a good amount produced domestically and there was no way to assure that the majority of those possessing marijuana have any reason to know whether their marijuana is imported.[1131] The Court left open the question whether a presumption that survived the "rational connection" test "must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use."[1132]

In a later 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."[1133] 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. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*."[1134] Thus, due process was not violated by the application of the statute that provides that "the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle."[1135] The division of the Court in these cases

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[1131] 395 U.S. at 37–54. Although some of the reasoning in *Yee Hem*, *supra*, was disapproved, it was factually distinguished as involving users of "hard" narcotics.

[1132] 395 U.S. at 36 n.64. The matter was also left open in Turner v. United States, 396 U.S. 398 (1970) (judged by either "rational connection" or "reasonable doubt," a presumption that the possessor of heroin knew it was illegally imported was valid, but the same presumption with regard to cocaine was invalid under the "rational connection" test because a great deal of the substance was produced domestically), and in Barnes v. United States, 412 U.S. 837 (1973) (under either test a presumption that possession of recently stolen property, if not satisfactorily explained, is grounds for inferring possessor knew it was stolen satisfies due process).

[1133] Ulster County Court v. Allen, 442 U.S. 140, 167 (1979).

[1134] 442 U.S. at 167.

[1135] 442 U.S. at 142. The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. 442 U.S. at 168. *See also* Estelle v. McGuire, 502 U.S. 62 (1991) (upholding a jury instruction that, to dissenting Justices O'Connor and Stevens, id. at 75, seemed to direct the jury to draw the inference that evidence that a child had been "battered" in the past meant that the defendant, the child's father, had necessarily done the battering).

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and in the *Mullaney v. Wilbur* line of cases clearly shows the unsettled nature of the issues they concern.

The Problem of the Incompetent or Insane Defendant.—It is a denial of due process to try or sentence a defendant who is insane or incompetent to stand trial.[1136] 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.[1137] Although there is no constitutional requirement that the state assume the burden of proving a defendant competent, the state must provide the defendant with a chance to prove that he is incompetent to stand trial. Thus, a statutory presumption that a criminal defendant is competent to stand trial or a requirement that the defendant bear the burden of proving incompetence by a preponderance of the evidence does not violate due process.[1138]

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 he will not, then the state must either release the defendant or institute the customary civil commitment proceeding that would be required to commit any other citizen.[1139]

Where a defendant is found competent to stand trial, a state appears to have significant discretion in how it takes account of mental illness or defect at the time of the offense in determining crimi-

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[1136] Pate v. Robinson, 383 U.S. 375, 378 (1966) (citing Bishop v. United States, 350 U.S. 961 (1956)). The standard for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam), cited with approval in Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008). The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. Indiana v. Edwards, *supra*.

[1137] Pate v. Robinson, 383 U.S. 375, 378 (1966). For treatment of the circumstances when a trial court should inquire into the mental competency of the defendant, *see* Drope v. Missouri, 420 U.S. 162 (1975). Also, an indigent who makes a preliminary showing that his sanity at the time of his offense will be a substantial factor in his trial is entitled to a court-appointed psychiatrist to assist in presenting the defense. Ake v. Oklahoma, 470 U.S. 68 (1985).

[1138] Medina v. California, 505 U.S. 437 (1992). It is a violation of due process, however, for a state to require that a defendant must prove competence to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).

[1139] Jackson v. Indiana, 406 U.S. 715 (1972).

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nal responsibility.[1140] The Court has identified several tests that are used by states in varying combinations to address the issue: the M'Naghten test (cognitive incapacity or moral incapacity),[1141] volitional incapacity,[1142] and the irresistible-impulse test.[1143] "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."[1144]

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.[1145] 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."[1146] Thus, the insanity-defense 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."[1147] It follows, however, that a state may not indefinitely confine an insanity-defense acquittee who is no longer mentally ill but who has an untreatable personality disorder that may lead to criminal conduct.[1148]

[1140] Clark v. Arizona, 548 U.S. 735 (2006).

[1141] *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), states that "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep., at 722.

[1142] *See* Queen v. Oxford, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible").

[1143] *See* State v. Jones, 50 N.H. 369 (1871) ("If the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty; he is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance").

[1144] *Clark*, 548 U.S. at 752. In *Clark*, the Court considered an Arizona statute, based on the *M'Naghten* case, that was amended to eliminate the defense of cognitive incapacity. The Court noted that, despite the amendment, proof of cognitive incapacity could still be introduced as it would be relevant (and sufficient) to prove the remaining moral incapacity test. Id. at 753.

[1145] 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.

[1146] 463 U.S. at 368.

[1147] 463 U.S. at 370.

[1148] Foucha v. Louisiana, 504 U.S. 71 (1992).

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The Court held in *Ford v. Wainwright* that the Eighth Amendment prohibits the state from executing a person who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding that satisfies the requirements of due process.[1149] Due process is 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.[1150] The Court, however, left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[1151]

In *Atkins v. Virginia*, the Court held that the Eighth Amendment also prohibits the state from executing a person who is mentally retarded, and added, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[1152]

Issues of substantive due process may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper*,[1153] the Court had found that an individual has a significant "liberty interest" in avoiding the unwanted administration of antipsychotic drugs. In *Sell v. United States*,[1154] the Court found that this liberty interest could in "rare" instances be outweighed by the government's interest in bringing an incompetent individual to trial. First, however, the government must engage in a fact-specific inquiry as to whether this interest is

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[1149] 477 U.S. 399 (1986).

[1150] 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.

[1151] 477 U.S. at 416–17.

[1152] 536 U.S. at 317 (citation omitted), quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986). The Court quoted this language again in Schriro v. Smith, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." 546 U.S. 6, 7 (2005) (per curiam). States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge." Id.

[1153] 494 U.S. 210 (1990) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others).

[1154] 539 U.S. 166 (2003).

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important in a particular case.[1155] Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant's ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.

Guilty Pleas.—A defendant may plead guilty instead of insisting that the prosecution prove him guilty. Often the defendant does so as part of a "plea bargain" with the prosecution, where the defendant is guaranteed a light sentence or is allowed to plead to a lesser offense.[1156] Although the government may not structure its system so as to coerce a guilty plea,[1157] a guilty plea that is entered voluntarily, knowingly, and understandingly, even to obtain an advantage, is sufficient to overcome constitutional objections.[1158] The guilty plea and the often concomitant plea bargain are important and necessary components of the criminal justice system,[1159] and it is permissible for a prosecutor during such plea bargains to require a defendant to forgo his right to a trial in return for escaping additional charges that are likely upon conviction to result in a more severe penalty.[1160] But the prosecutor does deny due process

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[1155] For instance, if the defendant is likely to remain civilly committed absent medication, this would diminish the government's interest in prosecution. 539 U.S. at 180.

[1156] There are a number of other reasons why a defendant may be willing to plead guilty. There may be overwhelming evidence against him or his sentence after trial will be more severe than if he pleads guilty.

[1157] United States v. Jackson, 390 U.S. 570 (1968).

[1158] 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).

[1159] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[1160] 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

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if he penalizes the assertion of a right or privilege by the defendant by charging more severely or recommending a longer sentence.[1161]

In accepting a guilty plea, the court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly,[1162] 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." [1163]

States v. Goodwin, 457 U.S. 368 (1982) (after defendant was charged with a misdemeanor, refused to plead guilty and sought a jury trial in district court, the government obtained a four-count felony indictment and conviction).

[1161] 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 post-trial conduct, in which vindictiveness is more likely and is not permitted. *Accord*, Thigpen v. Roberts, 468 U.S. 27 (1984). The distinction appears to represent very fine line-drawing, but it appears to be one the Court is committed to.

[1162] 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. However, this does not mean that a court accepting a guilty plea must explain all the elements of a crime, as it may rely on counsel's representations to the defendant. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (where defendant maintained that shooting was done by someone else, guilty plea to aggravated manslaughter was still valid, as such charge did not require defendant to be the shooter). *See also* Blackledge v. Allison, 431 U.S. 63 (1977) (defendant may collaterally challenge guilty plea where defendant had been told not to allude to existence of a plea bargain in court, and such plea bargain was not honored).

[1163] 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).

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Sentencing.—In the absence of errors by the sentencing judge,[1164] or of sentencing jurors considering invalid factors,[1165] the significance of procedural due process at sentencing is limited.[1166] In *Williams v. New York*,[1167] the Court upheld the imposition of the death penalty, despite a jury's recommendation of mercy, where the judge acted based on information in a presentence report not shown to the defendant or his counsel. The Court viewed as highly undesirable the restriction of judicial discretion in sentencing by requiring adherence to rules of evidence which would exclude highly relevant and informative material. Further, disclosure of such information to the defense could well dry up sources who feared retribution or embarrassment. Thus, hearsay and rumors can be considered in sentencing. In *Gardner v. Florida*,[1168] however, the Court limited the application of *Williams* to capital cases.[1169]

[1164] In Townsend v. Burke, 334 U.S. 736, 740–41 (1948) the Court overturned a sentence imposed on an uncounseled defendant by a judge who in reciting defendant's record from the bench made several errors and facetious comments. "[W]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."

[1165] In Hicks v. Oklahoma, 447 U.S. 343 (1980), the jury had been charged in accordance with a habitual offender statute that if it found defendant guilty of the offense charged, which would be a third felony conviction, it should assess punishment at 40 years imprisonment. The jury convicted and gave defendant 40 years. Subsequently, in another case, the habitual offender statute under which Hicks had been sentenced was declared unconstitutional, but Hicks' conviction was affirmed on the basis that his sentence was still within the permissible range open to the jury. The Supreme Court reversed. Hicks was denied due process because he was statutorily entitled to the exercise of the jury's discretion and could have been given a sentence as low as ten years. That the jury might still have given the stiffer sentence was only conjectural. On other due process restrictions on the determination of the applicability of recidivist statutes to convicted defendants, *see* Chewning v. Cunningham, 368 U.S. 443 (1962); Oyler v. Boles, 368 U.S. 448 (1962); Spencer v. Texas, 385 U.S. 554 (1967); Parke v. Raley, 506 U.S. 20 (1992).

[1166] Due process does not impose any limitation upon the sentence that a legislature may affix to any offense; that function is in the Eighth Amendment. Williams v. Oklahoma, 358 U.S. 576, 586–87 (1959). *See also* Collins v. Johnston, 237 U.S. 502 (1915). On recidivist statutes, *see* Graham v. West Virginia, 224 U.S. 616, 623 (1912); Ughbanks v. Armstrong, 208 U.S. 481, 488 (1908), and, under the Eighth Amendment, Rummel v. Estelle, 445 U.S. 263 (1980).

[1167] 337 U.S. 241 (1949). *See also* Williams v. Oklahoma, 358 U.S. 576 (1959).

[1168] 430 U.S. 349 (1977).

[1169] In *Gardner*, the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge sentenced the defendant to death, relying in part on a confidential presentence report which he did not characterize or make available to defense or prosecution. Justices Stevens, Stewart, and Powell found that because death was significantly different from other punishments and because sentencing procedures were subject to higher due process standards than when *Williams* was decided, the report must be made part of the record for review so that the factors motivating imposition of the death penalty may be known, and ordinarily must be made available to the defense. 430 U.S. at 357–61. All but one of the other Justices joined the result on various other bases. Justice Brennan without elaboration

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In *United States v. Grayson*,[1170] a noncapital case, the Court relied heavily on *Williams* in holding that a sentencing judge may properly consider his *belief* that the defendant was untruthful in his trial testimony in deciding to impose a more severe sentence than he would otherwise have imposed. the Court declared that, under the current scheme of individualized indeterminate sentencing, the judge must be free to consider the broadest range of information in assessing the defendant's prospects for rehabilitation; defendant's truthfulness, as assessed by the trial judge from his own observations, is relevant information.[1171]

There are various sentencing proceedings, however, that so implicate substantial rights that additional procedural protections are required.[1172] Thus, in *Specht v. Patterson*,[1173] the Court considered a defendant who had been convicted of taking indecent liberties, which carried a maximum sentence of ten years, but was sentenced under a sex offenders statute to an indefinite term of one day to life. The sex offenders law, the Court observed, did not make the commission of the particular offense the basis for sentencing. Instead, by triggering a new hearing to determine whether the convicted person was a public threat, a habitual offender, or mentally ill, the law in effect constituted a new charge that must be accompanied by procedural safeguards. And in *Mempa v. Rhay*,[1174] the Court held that, when sentencing is deferred subject to probation and the terms of probation are allegedly violated so that the convicted defendant is returned for sentencing, he must then be represented by counsel, inasmuch as it is a point in the process where substantial rights of the defendant may be affected.

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thought the result was compelled by due process, id. at 364, while Justices White and Blackmun thought the result was necessitated by the Eighth Amendment, id. at 362, 364, as did Justice Marshall in a different manner. Id. at 365. Chief Justice Burger concurred only in the result, id. at 362, and Justice Rehnquist dissented. Id. at 371. *See also* Lankford v. Idaho, 500 U.S. 110 (1991) (due process denied where judge sentenced defendant to death after judge's and prosecutor's actions misled defendant and counsel into believing that death penalty would not be at issue in sentencing hearing).

[1170] 438 U.S. 41 (1978).

[1171] 438 U.S. at 49–52. *See also* United States v. Tucker, 404 U.S. 443, 446 (1972); Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973). *Cf.* 18 U.S.C. § 3577.

[1172] *See, e.g,*Kent v. United States, 383 U.S. 541, 554, 561, 563 (1966), where the Court required that before a juvenile court decided to waive jurisdiction and transfer a juvenile to an adult court it must hold a hearing and permit defense counsel to examine the probation officer's report which formed the basis for the court's decision. *Kent* was ambiguous whether it was based on statutory interpretation or constitutional analysis. *In re* Gault, 387 U.S. 1 (1967), however, appears to have constitutionalized the language.

[1173] 386 U.S. 605 (1967).

[1174] 389 U.S. 128 (1967).

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Due process considerations can also come into play in sentencing if the state attempts to withhold relevant information from the jury. For instance, in*Simmons v. South Carolina*, the Court held that due process requires that if prosecutor makes an argument for the death penalty based on the future dangerousness of the defendant to society, the jury must then be informed if the only alternative to a death sentence is a life sentence without possibility of parole.[1175] But, in *Ramdass v. Angelone*,[1176] the Court refused to apply the reasoning of *Simmons* because the defendant was not technically parole ineligible at time of sentencing.

A defendant should not be penalized for exercising a right to appeal. Thus, it is a denial of due process for a judge to sentence a convicted defendant on retrial to a longer sentence than he received after the first trial if the object of the sentence is to punish the defendant for having successfully appealed his first conviction or to discourage similar appeals by others.[1177] 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.[1178]

Because the possibility of vindictiveness in resentencing is *de minimis* when it is the jury that sentences, however, the requirement of justifying a more severe sentence upon resentencing is inapplicable to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence.[1179] The presumption of vindictiveness is also inapplicable if the first sentence was imposed following a guilty plea. Here the Court reasoned that a trial

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[1175] 512 U.S. 154 (1994). *See also* Shafer v. South Carolina, 532 U.S. 36 (2001) (amended South Carolina law still runs afoul of *Simmons*).

[1176] 530 U.S. 156 (2000).

[1177] 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*, because 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*.

[1178] 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).

[1179] Chaffin v. Stynchcombe, 412 U.S. 17 (1973). The Court concluded that the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial nor the sentence imposed, nor would it feel either the personal or institutional interests of judges leading to efforts to discourage the seeking of new trials. Justices Stewart, Brennan, and Marshall thought the principle was applicable to jury sentencing and that prophylactic limitations appropriate to the problem should be developed. Id. at 35, 38. Justice Douglas dissented on other grounds. Id. at 35. The *Pearce* presumption that an increased, judge-imposed second

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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.[1180]

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."[1181] This holding has been reaffirmed,[1182] although the Court has also held that, when a state does provide appellate review, it may not so condition the privilege as to deny it irrationally to some persons, such as indigents.[1183]

A state is not free, however, to have no corrective process in which defendants may pursue remedies for federal constitutional violations. In *Frank v. Mangum*,[1184] 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, the Court has 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,[1185] and the Court has held that to burden this process, such

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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).

[1180] Alabama v. Smith, 490 U.S. 794 (1989).

[1181] 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).

[1182] 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).

[1183] The line of cases begins with Griffin v. Illinois, 351 U.S. 12 (1956), in which it was deemed to violate both the Due Process and the Equal Protection Clauses for a state to deny to indigent defendants free transcripts of the trial proceedings, which would enable them adequately to prosecute appeals from convictions. *See* analysis under "Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection—Generally," *infra.*

[1184] 237 U.S. 309, 335 (1915).

[1185] 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).

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as by limiting the right to petition for *habeas corpus*, is to deny the convicted defendant his constitutional rights.[1186]

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 the 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."[1187] If a state provides a mode of redress, then a defendant must first exhaust that mode. If he is unsuccessful, or if a state does not provide an adequate mode of redress, then the defendant may petition a federal court for relief through a writ of *habeas corpus*.[1188]

When appellate or other corrective process is made available, because 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.[1189] But, in *Moore v. Dempsey*,[1190] 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

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[1186] *Ex parte* Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945).

[1187] Carter v. Illinois, 329 U.S. 173, 175–76 (1946).

[1188] In Case v. Nebraska, 381 U.S. 336 (1965) (per curiam), the Court had taken for review a case that raised the issue of whether a state could simply omit any corrective process for hearing and determining claims of federal constitutional violations, but it dismissed the case when the state in the interim enacted provisions for such process. Justices Clark and Brennan each wrote a concurring opinion.

[1189] Frank v. Mangum, 237 U.S. 309 (1915).

[1190] 261 U.S. 86 (1923).

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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* [1191] and now taken for granted.

The Court has held, however, that the Due Process Clause does not provide convicted persons a right to postconviction access to the state's evidence for DNA testing.[1192] Chief Justice Roberts, in a five-to-four decision, noted that 46 states had enacted statutes dealing specifically with access to DNA evidence, and that the Federal Government had enacted a statute that allows federal prisoners to move for court-ordered DNA testing under specified conditions. Even the states that had not enacted statutes dealing specifically with access to DNA evidence must, under the Due Process Clause, provide adequate postconviction relief procedures. The Court, therefore, saw "no reason to constitutionalize the issue." [1193] It also expressed concern that "[e]stablishing a freestanding right to access DNA evidence for testing would force us to act as policymakers . . . . We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when?" [1194]

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." [1195] This view is not now the law, and may never have been wholly correct.[1196] In 1948 the Court declared that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights"; [1197] "many," indicated less than

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[1191] 297 U.S. 278 (1936).

[1192] District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. ___, No. 08–6 (2009).

[1193] 557 U.S. ___, No. 08–6, slip op. at 2.

[1194] 557 U.S. ___, No. 08–6, slip op. at 20 (citation omitted). Justice Stevens, in a dissenting opinion joined by Justices Ginsburg and Breyer and in part by Justice Souter, concluded, "[T]here is no reason to deny access to the evidence and there are many reasons to provide it, not least of which is a fundamental concern in ensuring that justice has been done in this case." Id. at 17.

[1195] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

[1196] *Cf. In re* Bonner, 151 U.S. 242 (1894).

[1197] Price v. Johnston, 334 U.S. 266, 285 (1948).

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"all," and it was clear that the Due Process and Equal Protection Clauses to some extent do apply to prisoners.[1198] 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 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 . . . ." [1199] 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.[1200]

Save for challenges to conditions of confinement of pretrial detainees,[1201] the Court has generally treated challenges to prison conditions as a whole under the Cruel and Unusual Punishments Clause of the Eighth Amendment,[1202] while challenges to particular incidents and practices are pursued under the Due Process Clause [1203] or more specific provisions, such as the First Amendment's speech and religion clauses.[1204] Prior to formulating its current approach, the Court recognized several rights of prisoners. Prisoners have the right to petition for redress of grievances, which includes access to

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[1198] "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).

[1199] 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).

[1200] 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).

[1201] 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.

[1202] *See* "Prisons and Punishment," *supra*.

[1203] *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).

[1204] *E.g.*, Procunier v. Martinez, 416 U.S. 396 (1974); Jones v. North Carolina Prisoners' 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).

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the courts for purposes of presenting their complaints,[1205] and to bring actions in federal courts to recover for damages wrongfully done them by prison administrators.[1206] And they have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline.[1207]

In *Turner v. Safley*,[1208] the Court announced a general standard for measuring prisoners' claims of deprivation of constitutional rights: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." [1209] 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.[1210] A further indicium of reasonableness is present if accommodation would have a negative effect on the liberty or safety of guards, other inmates,[1211] or visitors.[1212] On the other hand, "if an inmate claimant can point to an alternative that

[1205] *Ex parte* Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1978). Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim. *See* Lewis v. Casey, 518 U.S. 343 (1996) (no requirement that the state "enable [a] prisoner to discover grievances, and to litigate effectively").

[1206] Haines v. Kerner, 404 U.S. 519 (1972); Preiser v. Rodriguez, 411 U.S. 475 (1973).

[1207] Lee v. Washington, 390 U.S. 333 (1968). There was some question as to the standard to be applied to racial discrimination in prisons after Turner v. Safley, 482 U.S. 78 (1987) (prison regulations upheld if "reasonably related to legitimate penological interests"). In Johnson v. California, 543 U.S. 499 (2005), however, the Court held that discriminatory prison regulations would continue to be evaluated under a "strict scrutiny" standard, which requires that regulations be narrowly tailored to further compelling governmental interests. Id. at 509–13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to 60 days before they are given a regular housing assignment).

[1208] 482 U.S. 78 (1987)

[1209] 482 U.S. at 89 (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). *See* Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding restrictions on prison visitation by unrelated children or children over which a prisoner's parental rights have been terminated and visitation where a prisoner has violated rules against substance abuse).

[1210] For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. 539 U.S. at 135.

[1211] 482 U.S. at 90, 92.

[1212] Hudson v. Palmer, 468 U.S. 517, 526 (1984).

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fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests," it would suggest unreasonableness.[1213]

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.[1214] 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.[1215] 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.[1216] Due process is not implicated at all by negligent deprivation of life, liberty, or property by prison officials.[1217]

A change of the conditions under which a prisoner is housed, including one imposed as a matter of discipline, may implicate a protected liberty interest if such a change imposes an "atypical and significant hardship" on the inmate.[1218] In *Wolff v. McDonnell*,[1219] the Court promulgated due process standards to govern the imposition of discipline upon prisoners. Due process applies, but, because prison disciplinary proceedings are not part of a criminal prosecution, the full panoply of a defendant's rights is not available. Rather, the analysis must proceed by identifying the interest in "liberty" that the clause protects. Thus, where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of "liberty" entitles him to the minimum procedures appropriate under the circumstances.[1220] What the minimum procedures consist of is to be determined by balancing the prison-

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[1213] 482 U.S. at 91.

[1214] Hudson v. Palmer, 468 U.S. 517, 526 (1984); Block v. Rutherford, 468 U.S. 576 (1984) (holding also that needs of prison security support a rule denying pretrial detainees contact visits with spouses, children, relatives, and friends).

[1215] Hudson v. Palmer, 468 U.S. 517, 530 (1984).

[1216] 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").

[1217] Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986).

[1218] Sandin v. Conner, 515 U.S. 472, 484 (1995) (30-day solitary confinement not atypical "in relation to the ordinary incidents of prison life").

[1219] 418 U.S. 539 (1974).

[1220] 418 U.S. at 557. This analysis, of course, tracks the interest analysis discussed under "The Interests Protected: Entitlements and Positivist Recognition," *supra*.

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er'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 in *Wolff* held 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."[1221] In addition, an "inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[1222] Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt threaten 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.[1223] 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.[1224]

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. Because 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

[1221] 418 U.S. at 563.

[1222] 418 U.S. at 566. However, the Court later ruled that the 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).

[1223] 418 U.S. at 561–72. The Court continues to adhere to its refusal to require appointment of counsel. Vitek v. Jones, 445 U.S. 480, 496–97 (1980), and id. at 497–500 (Justice Powell concurring); Baxter v. Palmigiano, 425 U.S. 308 (1976).

[1224] Superintendent v. Hill, 472 U.S. 445, 454, 457 (1985).

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at all; consequently, there was nothing to hold a hearing about.[1225] The same principles govern interstate prison transfers.[1226]

Transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited.[1227] 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, for two reasons, be preceded by a hearing. First, the statute gave the inmate a liberty interest, because it presumed that he would not be moved absent a finding that 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.[1228]

The *kind* of hearing that 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*.[1229] 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 that 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 governmental authority,[1230] it was long assumed that the administrators of the systems did not have to accord procedural due process either in the grant-

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[1225] Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976).

[1226] Olim v. Wakinekona, 461 U.S. 238 (1983).

[1227] Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship"). In *Wilkinson*, the Court upheld Ohio's multi-level review process, despite the fact that a prisoner was provided only summary notice as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one 30-day review and then annually. Id. at 219–20.

[1228] Vitek v. Jones, 445 U.S. 480 (1980).

[1229] 494 U.S. 210 (1990).

[1230] 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

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ing 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*,[1231] the trial judge had deferred sentencing and placed the convicted defendant on probation; when facts subsequently developed that indicated a violation of the conditions of probation, he was summoned and summarily sentenced to prison. The Court held that he was entitled to counsel at the deferred sentencing hearing.

In *Morrissey v. Brewer* [1232] 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." [1233] What process is due, then, turned upon the state's interests. Its principal interest was that, having once convicted a defendant, imprisoned him, and, at some risk, released him for rehabilitation purposes, 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. Yet, the state has no interest in revoking parole without some informal procedural guarantees," inasmuch as such guarantees will not interfere with its reasonable interests.[1234]

Minimal due process, the Court held, requires that at both stages of the revocation process—the arrest of the parolee and the formal revocation—the parolee is entitled to certain rights. Promptly following arrest of the parolee, there should be an informal hearing to determine whether reasonable grounds exist for revocation of parole; this preliminary hearing should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly

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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.

[1231] 389 U.S. 128 (1967).

[1232] 408 U.S. 471 (1972).

[1233] 408 U.S. at 480, 482.

[1234] 408 U.S. at 483.

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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.[1235]

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."[1236] Ordinarily, the written statement need not indicate that the sentencing court or review board considered alternatives to incarceration,[1237] 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.[1238]

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 documen-

[1235] 408 U.S. at 484–87.
[1236] 408 U.S. at 489.
[1237] Black v. Romano, 471 U.S. 606 (1985).
[1238] Bearden v. Georgia, 461 U.S. 660, 672 (1983).

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tary 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.[1239]

With respect to the granting of parole, the Court's analysis of the Due Process Clause's meaning in *Greenholtz v. Nebraska Penal Inmates*[1240] is much more problematical. The theory was rejected that the mere establishment of the possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to a due process protected expectation of being dealt with in any particular way. On the other hand, the Court did recognize that a parole statute could create an expectancy of release entitled to some measure of constitutional protection, although a determination would need to be made on a case-by-case basis,[1241] and the full panoply of due process guarantees is not required.[1242] Where, however, government by its statutes and regulations creates no obligation of the pardoning authority and thus creates no legitimate expectancy of release, the prisoner may not by showing the favorable exercise of the authority in the great number of cases demonstrate such a legitimate expectancy. The power of the executive to pardon, or grant clemency, being a matter of grace, is rarely subject to judicial review.[1243]

[1239] Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[1240] 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.

[1241] 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. *Accord* Swarthout v. Cooke, 562 U.S. ___, 10–333, slip op. (2011) (*per curiam*).

[1242] The Court in *Greenholtz* held that procedures designed to elicit specific facts were inappropriate under the circumstances, and minimizing the risk of error should be the prime consideration. This goal may be achieved by the board's largely informal methods; eschewing formal hearings, notice, and specification of particular evidence in the record. The inmate in this case was afforded an opportunity to be heard and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due. *Accord* Swarthout v. Cooke, 562 U.S. ___, 10–333, slip op. (2011) (*per curiam*).

[1243] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998). The mere existence of purely discretionary authority and the frequent exercise of it creates no entitlement. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Jago v. Van Curen, 454 U.S. 14 (1981). The former case involved not parole but commutation of a life sentence, commutation being necessary to become eligible for parole. The statute gave the Board total discretion to commute, but in at least 75% of the cases prisoner received a favorable action and virtually all of the prisoners who had

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The Problem of the Juvenile Offender.—All fifty states and the District of Columbia provide for dealing with juvenile offenders outside the criminal system for adult offenders.[1244] Their 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 the 20th 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.[1245]

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* [1246] that the application of due process to juvenile proceedings would not endanger the good intentions vested in the system nor diminish the features of the system which were deemed desirable—emphasis upon rehabilitation rather than punishment, a measure of informality, avoidance of the stigma of criminal conviction, the low visibility of the process—but that the consequences of the absence of due process standards made their application necessary.[1247]

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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.

[1244] 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. 2006).

[1245] *In re* Gault, 387 U.S. 1, 12–29 (1967).

[1246] 387 U.S. 1 (1967).

[1247] "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 white-

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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.[1248] 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*.[1249] Subsequently, the Court held that the "essentials of due process and fair treatment" required that a juvenile could be adjudged delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if committed by an adult,[1250] but still later the Court held that jury trials were not constitutionally required in juvenile trials.[1251]

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washed walls, regimented routine and institutional hours . . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." 387 U.S. at 27–28.

[1248] 387 U.S. at 31–35. Justice Harlan concurred in part and dissented in part, id. at 65, agreeing on the applicability of due process but disagreeing with the standards of the Court. Justice Stewart dissented wholly, arguing that the application of procedures developed for adversary criminal proceedings to juvenile proceedings would endanger their objectives and contending that the decision was a backward step toward undoing the reforms instituted in the past. Id. at 78.

[1249] Kent v. United States, 383 U.S. 541 (1966), noted on this point in *In re* Gault, 387 U.S. 1, 30–31 (1967).

[1250] *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.

[1251] 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

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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 . . . ."[1252] In another case the Court ruled that, although the Fourth Amendment applies to searches of students by public school authorities, neither the warrant requirement nor the probable cause standard is appropriate.[1253] Instead, a simple reasonableness standard governs all searches of students' persons and effects by school authorities.[1254]

The Court ruled in *Schall v. Martin*[1255] 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 guar-

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.

[1252] Fare v. Michael C., 442 U.S. 707, 725 (1979).

[1253] 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 school rule; evidence of drug activity held admissible in a prosecution under the juvenile laws). In Safford Unified School District #1 v. Redding, 557 U.S. ___, No. 08–479 (2009), the Court found unreasonable a strip search of a 13-year-old girl suspected of possessing ibuprofen. *See* Fourth Amendment, "Public Schools," *supra*.

[1254] This single rule, the Court explained, will permit school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." 469 U.S. at 342 n.9.

[1255] 467 U.S. 253 (1984).

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anteeing 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.[1256] With the Court having clarified the constitutional 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*,[1257] 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.[1258] In weighing validity under the Eighth Amendment, the Court has looked to state practice to determine whether a consensus against execution exists.[1259] 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 with juvenile offenders, several other classes of persons are subject to confinement by court processes deemed civil rather than criminal. Within this category of "protective commitment" are involuntary commitments for treatment of insanity and other degrees of mental disability, alcoholism, narcotics addiction, sexual psychopathy, and the like. In *O'Connor v. Donaldson*,[1260] 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."[1261] The jury had found that Donaldson was not dangerous to himself or to others, and the Court ruled that he had been unconstitutionally con-

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[1256] *See* Samuel M. Davis, Rights of Juveniles: The Juvenile Justice System, ch. 4, Waiver of Jurisdiction (2d ed. 1989).

[1257] 492 U.S. 361 (1989).

[1258] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[1259] *See* analysis of Eighth Amendment principles, under "Capital Punishment," *supra*.

[1260] 422 U.S. 563 (1975). The Court bypassed "the difficult issues of constitutional law" raised by the lower courts' resolution of the case, that is, the right to treatment of the involuntarily committed, discussed under "Liberty Interests of People with Mental Disabilities: Commitment and Treatment," *supra*.

[1261] 422 U.S. at 576. Prior to O'Connor v. Donaldson, only in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), had the Court considered the issue. 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).

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fined.[1262] Left to another day were such questions as "when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness"[1263] 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 post-deprivation remedy can cure the due process violation.[1264]

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 the government to assume a greater share of the risk of error in proving the existence of such illness as a precondition to confinement. Thus, the evidentiary standard of a preponderance, normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings. On the other hand, the criminal standard of beyond a reasonable doubt is not necessary because the state's aim is not punitive and because some or even much of the consequence of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment. The Court therefore imposed a standard of "clear and convincing" evidence.[1265]

In *Parham v. J.R.*, the Court confronted difficult questions as to what due process requires 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.[1266] 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

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[1262] 422 U.S. at 576–77. The Court remanded to allow the trial court to determine whether Donaldson should recover personally from his doctors and others for his confinement, under standards formulated under 42 U.S.C. § 1983. *See* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

[1263] O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).

[1264] Zinermon v. Burch, 494 U.S. 113 (1990).

[1265] 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).

[1266] 442 U.S. 584 (1979). *See also* Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).

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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.[1267] 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.[1268] Left to future resolution was the question of the due process requirements for postadmission review of the necessity for continued confinement.[1269]

EQUAL PROTECTION OF THE LAWS

Scope and Application

State Action.—The Fourteenth Amendment, by its terms, limits discrimination only by governmental entities, not by private parties.[1270] As the Court has noted, "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[1271] Although state action requirements also apply to other provisions of the Constitution[1272] and to federal governmental ac-

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[1267] 442 U.S. at 598–617. The dissenters agreed on this point. Id. at 626–37.

[1268] 442 U.S. at 617–20. The dissenters would have required a preconfinement hearing. Id. at 637–38.

[1269] 442 U.S. at 617. The dissent would have mandated a formal postadmission hearing. Id. at 625–26.

[1270] The Amendment provides that "[n]o State" and "nor shall any State" engage in the proscribed conduct. There are, of course, numerous federal statutes that prohibit discrimination by private parties. *See*, *e.g.*, Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a *et seq.* These statutes, however, are generally based on Congress's power to regulate commerce. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[1271] Shelley v. Kraemer, 334 U.S. 1, 13 (1948). "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." *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

[1272] The doctrine applies to other rights protected of the Fourteenth Amendment, such as privileges and immunities and failure to provide due process. It also applies to Congress's enforcement powers under section 5 of the Amendment. For discussion of the latter, *see* Section 5, Enforcement, "State Action," *infra*. Several

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tions,[1273] the doctrine is most often associated with the application of the Equal Protection Clause to the states.[1274]

Certainly, an act passed by a state legislature that directs a discriminatory result is state action and would violate the first section of the Fourteenth Amendment.[1275] In addition, acts by other branches of government "by whatever instruments or in whatever modes that action may be taken" can result in a finding of "state action."[1276] But the difficulty for the Court has been when the conduct complained of is not so clearly the action of a state. For instance, is it state action when a minor state official's act was not authorized or perhaps was even forbidden by state law? What if a private party engages in discrimination while in a special relationship with governmental authority? "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.[1277]

The state action doctrine is not just a textual interpretation of the Fourteenth Amendment, but may also serve the purposes of federalism. Thus, following the Civil War, when the Court sought to

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other constitutional rights are similarly limited—the Fifteenth Amendment (racial discrimination in voting), the Nineteenth Amendment (sex discrimination in voting) and the Twenty-sixth Amendment (voting rights for 18-year olds)—although the Thirteenth Amendment, banning slavery and involuntary servitude, is not.

[1273] The scope and reach of the "state action" doctrine is the same whether a state or the National Government is concerned. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[1274] 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).

[1275] United States v. Raines, 362 U.S. 17, 25 (1960). A prime example is the statutory requirement of racially segregated schools condemned in Brown v. Board of Education, 347 U.S. 483 (1954). *See also* 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.

[1276] *Ex parte* Virginia, 100 U.S. 339, 346 (1880). "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." Id. at 346–47

[1277] Terry v. Adams, 345 U.S. 461, 473 (1953) (concurring) (concerning the Fifteenth Amendment).

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reassert states' rights, it imposed a rather rigid state action standard, limiting the circumstances under which discrimination suits could be pursued. During the civil rights movement of the 1950s and 1960s, however 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.[1278] "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." [1279]

Operation of the state action doctrine was critical in determining whether school systems were segregated unconstitutionally by race. The original *Brown* cases as well as many subsequent cases arose in the context of statutorily mandated separation of the races, and therefore the finding of state action occasioned no controversy.[1280] In the South, the aftermath of the case more often involved disputes over which remedies were needed to achieve a unitary system than it did the requirements of state action.[1281] But if racial segregation is not the result of state action in some aspect,

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[1278] The history of the state action doctrine makes clear that the Court has considerable discretion and that the weighing of the opposing values and interests will lead to substantially different applications of the tests. "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).

[1279] 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).

[1280] Brown v. Board of Education, 347 U.S. 483 (1954).

[1281] *See* "Brown's Aftermath," *supra*.

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then its existence is not subject to constitutional remedy.[1282] Distinguishing between the two situations has occasioned much controversy.

For instance, in a case arising from a Denver, Colorado school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that *de jure* racial segregation caused by "intentionally segregative school board actions" is to be treated as if it had been mandated by statute, and is to be distinguished from *de facto* segregation arising from actions not associated with the state.[1283] In addition, when it is proved that a meaningful portion of a school system is segregated as a result of official action, the responsible agency must then bear the burden of proving that other school segregation within the system is adventitious and not the result of official action.[1284] Moreover, the Court has also apparently adopted a rule 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 devolve upon the agency so that so that subsequent facially neutral or ambiguous school board policies can form the basis for a judicial finding of intentional discrimination.[1285]

Different results follow, however, 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-

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[1282] *Compare* Washington v. Seattle School Dist., 458 U.S. 457 (1982), *with* Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982).

[1283] "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." 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).

[1284] It is not the responsibility of complainants to show that each school in a system is *de jure* segregated to be entitled to a system-wide desegregation plan. 413 U.S. at 208–13. The continuing validity of the *Keyes* shifting-of-the-burden principle, after Washington v. Davis, 426 U.S. 229 (1976), and Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), was asserted in Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 455–458 & n.7, 467–68 (1979), and Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 540–42 (1979).

[1285] 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).

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district segregation."[1286] 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.[1287] 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*,[1288] in which the Court found unconstitutional state action in the discriminatory administration of an ordinance that was 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 unattributable to the state for purposes of the Fourteenth Amendment. "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."[1289] When the denial of equal protection is not commanded by law or by administrative regulation but is nonetheless accomplished through police enforcement of "custom"[1290] or through hortatory admonitions by public officials to private parties to act in a

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[1286] Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

[1287] *Ex parte* Virginia, 100 U.S. 339 (1880). Similarly, the acts of a state governor are state actions, Cooper v. Aaron, 358 U.S. 1, 16–17 (1958); Sterling v. Constantin, 287 U.S. 378, 393 (1932), as are the acts of prosecuting attorneys, Mooney v. Holohan, 294 U.S. 103, 112, 113 (1935), state and local election officials, United States v. Classic, 313 U.S. 299 (1941), and law enforcement officials. Griffin v. Maryland, 378 U.S. 130 (1964); Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945). One need not be an employee of the state to act "under color of" state law; mere participation in an act with state officers suffices. United States v. Price, 383 U.S. 787 (1966).

[1288] 118 U.S. 356 (1886).

[1289] United States v. Classic, 313 U.S. 299, 326 (1941). *See also* Screws v. United States, 325 U.S. 91, 109 (1945) (citation omitted); 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 Nat'l Bank v. Bennett, 284 U.S. 239, 246 (1931), "acts done 'by virtue of public position under a State government . . . and . . . in the name and for the State' . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law." Note that, for purposes of being amenable to suit in federal court, however, the immunity of the states does not shield state officers who are alleged to be engaging in illegal or unconstitutional action. *Ex parte* Young, 209 U.S. 123 (1908). *Cf.* Screws v. United States, 325 U.S. at 147–48. .

[1290] *Cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

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discriminatory manner,[1291] the action is state action. In addition, when a state clothes a private party with official authority, that private party may not engage in conduct forbidden the state.[1292]

Beyond this are cases where a private individual discriminates, and the question is whether a state has encouraged the effort or has impermissibly aided it.[1293] Of notable importance and a subject of controversy since it was decided is *Shelley v. Kraemer*.[1294] 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, this situation is to be distinguished from where "the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."[1295] 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. . . ."[1296]

Arguments about the scope of *Shelley* began immediately. Did the rationale mean that no private decision to discriminate could

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[1291] 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.

[1292] 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).

[1293] 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.

[1294] 334 U.S. 1 (1948).

[1295] 334 U.S. at 13–14.

[1296] "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." 334 U.S. at 19. In Hurd v. Hodge, 334 U.S. 24 (1948), the Court outlawed judicial enforce-

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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.[1297] But the Court has experienced no difficulty in finding that state court enforcement of common-law rules in a way that has an impact upon speech and press rights is state action and triggers the application of constitutional rules.[1298]

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*,[1299] 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, however, the court instead 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.[1300]

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ment of restrictive covenants in the District of Columbia as violating 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.

[1297] 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 and certiorari dismissed*, 349 U.S. 70 (1955); Black v. Cutter Laboratories, 351 U.S. 292 (1956). The central issue in the "sit-in" cases, whether state enforcement of trespass laws at the behest of private parties acting on the basis of their own discriminatory motivations, was evaded by the Court, in finding some other form of state action and reversing all convictions. Individual Justices did elaborate, however. *Compare* Bell v. Maryland, 378 U.S. 226, 255–60 (1964) (opinion of Justice Douglas), *with* id. at 326 (Justices Black, Harlan, and White dissenting).

[1298] In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and progeny, defamation actions based on common-law rules were found to implicate First Amendment rights and Court imposed varying limitations on such rules. *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.

[1299] 396 U.S. 435 (1970). The matter had previously been before the Court in Evans v. Newton, 382 U.S. 296 (1966).

[1300] 396 U.S. at 445. Note the use of the same rationale in another context in Palmer v. Thompson, 403 U.S. 217, 226 (1971). On a different result in the "Girard College" will case, *see* Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957), discussed *infra*.

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The case of *Reitman v. Mulkey* [1301] was similar to *Shelley* in both its controversy and the uncertainty of its rationale. In *Reitman*, the Court struck down an amendment to the California Constitution that prohibited the state and its subdivisions and agencies from forbidding racial discrimination in private housing. The Court, finding the provision to deny equal protection of the laws, appeared to ground its decision on either of two lines of reasoning. First was that the provision constituted state action to impermissibly encourage private racial discrimination. Second was that the provision made discriminatory racial practices immune from the ordinary legislative process, and thus impermissibly burdened minorities in the achievement of legitimate aims.[1302] In a subsequent case, *Hunter v. Erickson*,[1303] the latter rationale was used 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.[1304]

Two later decisions involving state referenda on busing for integration confirm that the condemning factor of *Mulkey* and *Hunter* was the imposition of barriers to racial amelioration legislation.[1305] Both cases agree that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed

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[1301] 387 U.S. 369 (1967). The decision was 5-to-4, Justices Harlan, Black, Clark, and Stewart dissenting. Id. at 387.

[1302] *See*, *e.g.*, 387 U.S. at 377 (language suggesting both lines of reasoning). *But see* City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) (ministerial acts associated with a referendum repealing a low-income housing ordinance did not constitute state action, as the referendum process was facially neutral, and the potentially discriminatory repeal was never enforced).

[1303] 393 U.S. 385 (1969).

[1304] In contrast, other ordinances would become effective when passed, except that petitions could be submitted to revoke those ordinances by referendum. 393 U.S. at 389–90 (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, relying on *Mulkey* to conclude 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.

[1305] 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.

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as embodying a presumptively invalid racial classification."[1306] It is thus not impermissible merely 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.[1307] 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."[1308] State action has been 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 the state prescribed a general election ballot made up of party nominees chosen in the primaries.[1309] 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.[1310] When state courts on petition of interested parties removed the City of Macon as trustees of a segregated park that had been left in trust for such use in a will, and appointed new trustees in order to keep the park segregated, the Court reversed, finding that the City was still inextricably involved in the maintenance and operation of the park.[1311]

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. The Court emphasized that the build-

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[1306] *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).

[1307] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (private discrimination is not constitutionally forbidden "unless to some significant extent the State in any of its manifestations has been found to have become involved in it").

[1308] 365 U.S. at 722.

[1309] Smith v. Allwright, 321 U.S. 649, 664 (1944).

[1310] 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).

[1311] 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).

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ing 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 that the financial success of the restaurant benefitted the governmental agency. The "degree of state participation and involvement in discriminatory action," therefore, was sufficient to condemn it.[1312]

The question arose, then, what degree of state participation was "significant"? Would licensing of a business clothe the actions of that business with sufficient state involvement? Would regulation? Or provision of police and fire protection? Would enforcement of state trespass laws be invalid if it effectuated discrimination? The "sit-in" cases of the early 1960s presented all these questions and more but did not resolve them.[1313] The basics of an answer came in *Moose Lodge No. 107 v. Irvis*,[1314] 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.'"[1315] Moreover, although 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."[1316] And there was nothing in the licensing relationship here that approached "the symbiotic relationship between lessor and lessee" that the Court had found in *Burton*.[1317]

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

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[1312] Burton v. Wilmington Parking Authority, 365 U.S. 715, 724 (1961).

[1313] *See*, *e.g.*, the various opinions in Bell v. Maryland, 378 U.S. 226 (1964).

[1314] 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.

[1315] 407 U.S. at 173.

[1316] 407 U.S. at 176–77.

[1317] 407 U.S. at 174–75.

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the action of the latter may be fairly treated as that of the State itself."[1318] 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 action, must be the subject of the complaint."[1319] Therefore, the Court found no such nexus between the state and a public utility's action in terminating service to a customer. Neither the fact that the business was subject to state regulation, nor that the state had conferred in effect a monopoly status upon the utility, nor that in reviewing the company's tariff schedules the regulatory commission had in effect approved the termination provision (but had not required the practice, had "not put its own weight on the side of the proposed practice by ordering it")[1320] operated to make the utility's action the state's action.[1321] 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. . . ."[1322] And the actions are to be attributable to the state apparently only if the state compelled the actions and not if the state merely established the process through statute or regulation under which the private party acted.

Thus, when a private party, having someone's goods in his possession and seeking to recover the charges owned on storage of the goods, acts under a permissive state statue to sell the goods and retain his charges out of the proceeds, his actions are not govern-

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[1318] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (under the Due Process Clause).

[1319] Powe v. Miles, 407 F.2d. 73, 81 (2d Cir. 1968). *See also* NCAA v. Tarkanian, 488 U.S. 179 (1988) (where individual state has minimal influence over national college athletic association's activities, the application of association rules leading to a state university's suspending its basketball coach could not be ascribed to the state.). *But see* Brentwood Academy v. Tennessee Secondary School Athletic Assoc., 531 U.S. 288 (2001) (where statewide public school scholastic association is "overwhelmingly" composed of public school officials for that state, this "entwinement" is sufficient to ascribe actions of association to state).

[1320] 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. 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.

[1321] 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).

[1322] Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) (due process).

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mental action and need not follow the dictates of the Due Process Clause.[1323] Or, where a state workers' compensation statute was amended to allow, but not require, an insurer to suspend payment for medical treatment while the necessity of the treatment was being evaluated by an independent evaluator, this action was not fairly attributable to the state, and thus pre-deprivation notice of the suspension was not required.[1324] 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.[1325]

In a few cases, the Court has indicated that discriminatory action by private parties may be precluded by the Fourteenth Amendment if the particular party involved is exercising a "public function."[1326] For instance, in *Marsh v. Alabama*,[1327] a Jehovah's Witness had been convicted of trespass after passing out literature on the streets of a company-owned town, but the Court reversed. It is not entirely clear from the Court's opinion 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" and 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."[1328] A subsequent attempt to extend *Marsh* to privately owned shopping centers was at first successful, but was soon turned back, resulting in a sharp curtailment of the "public function" doctrine.[1329]

[1323] 436 U.S. at 164–66. If, however, a state officer acts with the private party in securing the property in dispute, that is sufficient to create the requisite state action and the private party may be subjected to suit if the seizure does not comport with due process. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

[1324] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

[1325] Blum v. Yaretsky, 457 U.S. 991 (1982).

[1326] This rationale is one of those that emerges from various opinions in Terry v. Adams, 345 U.S. 461 (1953) (holding that a political association limited to white voters that held internal elections to designate which of its member would run in the Texas Democratic primaries was acting as part of the state-established electoral system).

[1327] 326 U.S. 501 (1946).

[1328] 326 U.S. at 506.

[1329] *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.

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Attempts to apply this theory to other kinds of private conduct, such as operation of private utilities,[1330] use of permissive state laws to secure property claimed to belong to creditors,[1331] maintaining schools for "problem" children referred by public institutions,[1332] provision of workers' compensation coverage by private insurance companies,[1333] and operation of nursing homes in which patient care is almost all funded by public resources,[1334] proved unavailing. 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."[1335] The "public function" doctrine is to be limited to a delegation of "a power 'traditionally exclusively reserved to the State.'"[1336]

Public function did play an important part, however, in the Court's finding state action in the exercise of peremptory challenges in jury selection by non-governmental parties. Using tests developed in an earlier case involving garnishment and attachment,[1337] the Court found state action in the racially discriminatory use of such challenges during *voir dire* in a civil case.[1338] The Court first asked "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 considered 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."[1339] There was no question that the 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.

[1330] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).
[1331] Flagg Bros. v. Brooks, 436 U.S. 149, 157–159 (1978).
[1332] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).
[1333] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).
[1334] Blum v. Yaretsky, 457 U.S. 991, 1011–1012 (1982).
[1335] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).
[1336] Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)).
[1337] Lugar v. Edmondson Oil Corp., 457 U.S. 922 (1982).
[1338] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).
[1339] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620–22 (1991) (citations omitted).

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In addition, jury selection was found to be 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.[1340] 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." [1341] 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." [1342]

The Court soon applied these same principles to hold that the exercise of peremptory challenges by the defense in a criminal case also constitutes state action,[1343] even though in a criminal case it is the government and the defendant who are adversaries. The same generalities apply with at least equal force: there is overt and significant governmental assistance in creating and structuring the process, a criminal jury serves an important governmental function and its selection is also important, and the courtroom setting intensifies harmful effects of discriminatory actions. An earlier case [1344] holding that a public defender was not a state actor when engaged in general representation of a criminal defendant was distinguished, with the Court emphasizing that "exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense," because it involves selection of persons to wield governmental power.[1345]

[1340] 500 U.S. at 624, 625.

[1341] 500 U.S. at 628.

[1342] 500 U.S. at 639, 643.

[1343] Georgia v. McCollum, 505 U.S. 42 (1992). It was, of course, beyond dispute that a prosecutor's exercise of peremptory challenges constitutes state action. *See* Swain v. Alabama, 380 U.S. 202 (1965); Batson v. Kentucky, 476 U.S. 79 (1986).

[1344] Polk County v. Dodson, 454 U.S. 512 (1981).

[1345] 505 U.S. at 54. Justice O'Connor, again dissenting, pointed out that the Court's distinction was inconsistent with *Dodson's* declaration that public defenders are not vested with state authority "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Id. at 65–66. Justice Scalia, also dissenting again, decried reduction of *Edmonson* "to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state." Id. at 69–70. Chief Justice Rehnquist, who had dissented in *Edmonson*, concurred in *McCollum* in the belief that it was controlled by *Edmonson*, and Justice Thomas, who had not participated in *Edmonson*, expressed similar views in a concurrence.

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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 subject to constitutional constraints. Many lower courts had held state action to exist in such circumstances.[1346] However the question might have been answered under prior Court holdings, it is evident that the more recent cases would not generally support a finding of state action in these cases. In *Rendell-Baker v. Kohn*,[1347] a 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*,[1348] a 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.[1349] "That programs undertaken by the State result in substantial funding of the activities of a private entity is no more per-

[1346] 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 benefits, *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); Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975).

[1347] 457 U.S. 830 (1982).

[1348] 457 U.S. 991 (1982).

[1349] The rules developed by the Court for general 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," Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) *quoting* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), 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." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). To the latter point, see Flagg Bros. v. Brooks, 436 U.S. 149, 166 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

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suasive 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."[1350]

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*[1351] 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, although the Court had recognized due process violations for failure to provide adequate medical care to incarcerated prisoners,[1352] and for failure to ensure reasonable safety for involuntarily committed mental patients,[1353] 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 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."[1354] Although 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."[1355] "[I]t is well to remember . . . that the harm was inflicted not by the State of Wisconsin, but by [the child's] father."[1356]

Judicial inquiry into the existence of "state action" may lead to different results depending on what remedy is sought to be enforced. While cases may be brought against a private actor to compel him to halt his discriminatory action (for example, to enjoin him to admit blacks to a lunch counter), one could just as readily bring suit against the government to compel it to cease aiding the private actor in his discriminatory conduct. Enforcing the latter remedy might well avoid constitutional issues that an order directed to

[1350] 457 U.S. at 1011.
[1351] 489 U.S. 189, 197 (1989).
[1352] Estelle v. Gamble, 429 U.S. 97 (1976).
[1353] Youngberg v. Romeo, 457 U.S. 307 (1982).
[1354] 489 U.S. at 201.
[1355] 489 U.S. at 202.
[1356] 489 U.S. at 203.

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the private party would raise.[1357] In either case, however, 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*,[1358] the Court struck down the provision of free textbooks by a state to racially segregated private schools (which were set up 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 other invidious discriminations."[1359] 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

[1357] For example, if a Court finds a relationship between the state and a discriminating private group (which may have rights of association protected by the First Amendment), a remedy directed against the relationship might succeed, where a direction to such group to eliminate such discrimination might not. *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).

[1358] 413 U.S. 455 (1973).

[1359] Gilmore v. City of Montgomery, 417 U.S. 556, 568–69 (1974) (quoting Norwood v. Harrison, 413 U.S. 455, 466, 467 (1973)).

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grounds."[1360] The lower court was directed to sift facts and weigh circumstances on a case-by-case basis in making determinations.[1361]

It should be noted, however, that, without mentioning these cases, the Court has interposed a potentially significant barrier to use of the principle set out in them. In a 1976 decision, which it has since expanded, 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 show that revocation of the benefit would cause the institutions to cease the complained-of conduct.[1362]

"Person".—In the case in which it was first called upon to interpret this clause, the Court doubted whether "any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[1363] Nonetheless, in deciding the *Granger Cases* shortly thereafter, the Justices, as with the due process clause, seemingly entertained no doubt that the railroad corporations were entitled to invoke the protection of the clause.[1364] 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."[1365] The word has been given the broadest possible meaning.

[1360] Gilmore v. City of Montgomery, 417 U.S. 556, 570 (1974).

[1361] 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." 417 U.S. at 573–74. *See also* Blum v. Yaretsky, 457 U.S. 991 (1982) (plaintiffs unsuccessfully sued public officials, objecting not to regulatory decision made by the officials as to Medicaid payments, but to decisions made by the nursing home in discharging and transferring patients).

[1362] Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). *See* id. at 46, 63–64 (Justice Brennan concurring and dissenting).

[1363] *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).

[1364] Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & N.W. 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).

[1365] Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886). The background and developments from this utterance are treated in H. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism chs. 9, 10, and pp. 566–84 (1968). Justice Black, in

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"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. . . ."[1366] The only qualification is that a municipal corporation cannot invoke the clause against its state.[1367]

"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.[1368] As to business entities, it was first held that a foreign corporation that was not doing business in a state in a manner that subjected it to the process of a state's courts was not "within the jurisdiction" of the state and could not complain that resident creditors were given preferences in the distribution of assets of an insolvent corporation.[1369] This holding was subsequently qualified, however, with the Court holding that a foreign corporation seeking to recover possession of property wrongfully taken in one state, but suing in another state in which it was not licensed to do business, was "within the jurisdiction" of the latter state, so that unequal burdens could not be imposed on the maintenance of the suit.[1370] 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.[1371] On the other hand, if 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.[1372]

Connecticut Gen. 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.

[1366] 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).

[1367] City of Newark v. New Jersey, 262 U.S. 192 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933).

[1368] *But 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).

[1369] Blake v. McClung, 172 U.S. 239, 261 (1898); Sully v. American Nat'l Bank, 178 U.S. 289 (1900).

[1370] Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923).

[1371] Hillsborough v. Cromwell, 326 U.S. 620 (1946).

[1372] Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926). *See also* Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886).

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Equal Protection: Judging Classifications by Law

A guarantee of equal protection of the laws was contained in every draft leading up to the final version of section 1 of the Fourteenth Amendment.[1373] The desire to provide a firm constitutional basis for already-enacted civil rights legislation[1374] and to place repeal beyond the accomplishment of a simple majority in a future Congress was important to its sponsors.[1375] 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.[1376] Although the Court early recognized that African-Americans were the primary intended beneficiaries of the protections thus adopted,[1377] the spare language was majestically unconfined to so limited a class or to so limited a purpose. Though efforts to argue for an expansive interpretation met with little initial success,[1378] the equal protection standard ultimately came to be applicable to all classifications by legislative and other official bodies. Now, the Equal Protection Clause looms large in the fields of civil rights and fundamental liberties 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.[1379] It is still most often applied there, although it

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[1373] 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).

[1374] 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).

[1375] 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).

[1376] 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); *see also* 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).

[1377] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

[1378] In Buck v. Bell, 274 U.S. 200, 208 (1927), Justice Holmes characterized the Equal Protection Clause as "the usual last resort of constitutional arguments."

[1379] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination against Chinese on the West Coast).

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appears in many other contexts as well,[1380] including so-called "class-of-one" challenges.[1381] 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."[1382] Thus, the mere fact of classification will not void legislation,[1383] because in the exercise of its powers a legislature has considerable discretion in recognizing the differences between and among persons and situations.[1384] "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."[1385] Or, more suc-

[1380] Vacco v. Quill, 521 U.S. 793 (1997) (assisted suicide prohibition does not violate Equal Protection Clause by distinguishing between terminally ill patients on life-support systems who are allowed to direct the removal of such systems and patients who are not on life support systems and are not allowed to hasten death by self-administering prescribed drugs).

[1381] The Supreme Court has recognized successful equal protection claims brought by a class-of-one, where a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for that difference. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (village's demand for an easement as a condition of connecting the plaintiff's property to the municipal water supply was irrational and wholly arbitrary). However, the class-of-one theory, which applies with respect to legislative and regulatory action, does not apply in the public employment context. Engquist v. Oregon Department of Agriculture, 128 S. Ct. 2146, 2149 (2008) (allegation that plaintiff was fired not because she was a member of an identified class but simply for "arbitrary, vindictive, and malicious reasons" does not state an equal protection claim). In *Engquist*, the Court noted that "the government as employer indeed has far broader powers than does the government as sovereign," id. at 2151 (quoting Waters v. Churchill, 511 U.S. 661, 671 (1994), and that it is a "common-sense realization" that government offices could not function if every employment decision became a constitutional matter. Id. at 2151, 2156.

[1382] Tigner v. Texas, 310 U.S. 141, 147 (1980).

[1383] Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899). From the same period, *see also* 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). For later cases, *see* 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).

[1384] Barrett v. Indiana, 229 U.S. 26 (1913).

[1385] Barbier v. Connolly, 113 U.S. 27, 32 (1885).

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cinctly, "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." [1386]

How then is the line between permissible and invidious classification to be determined? In *Lindsley v. Natural Carbonic Gas Co.*,[1387] 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 *F.S. Royster Guano Co. v. Virginia*,[1388] the court put forward the following test: "[T]he 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 legisla-

[1386] Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[1387] 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).

[1388] 253 U.S. 412 (1920).

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tion, so that all persons similarly circumstanced shall be treated alike."[1389] Use of the latter standard did in fact result in some invalidations.[1390]

But then, coincident with the demise of substantive due process in the area of economic regulation,[1391] the Court reverted to the former standard, deferring to the legislative judgment on questions of economics and related matters; even when an impermissible purpose could have been attributed to the classifiers it was usually possible to conceive of a reason that would justify the classification.[1392] 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.[1393]

In recent years, the Court has been remarkably inconsistent in setting forth the standard which it is using, and the results have

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[1389] 253 U.S. at 415. *See also* Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

[1390] *E.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (striking down a tax on the out-of-state income of domestic corporations that did business in the state, when domestic corporations that engaged only in out-of-state business were exempted); Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935) (striking down a graduated tax on gross receipts as arbitrary because it was insufficiently related to net profits); Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936) (striking down a milk-price-control regulation that distinguished between certain milk producers based on their dates of entry into the market).

[1391] 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."

[1392] *E.g.*, Tigner v. Texas, 310 U.S. 141 (1940) (exclusion of agriculture and livestock from price-fixing statute justified by heightened concerns surrounding concentrations of power in other industries); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (where apprenticeship was a requirement to obtain a river pilot license, allowing river pilots to apprentice mostly friends and relatives justified upon desire to create a cohesive piloting community); Goesaert v. Cleary, 335 U.S. 464 (1948) (court will not question legislature's determination that allowing women to bartend gives rise to moral and social problems, but that such problems are relieved when a barmaid's husband or father is the owner of the bar); Railway Express Agency v. New York, 336 U.S. 106 (1949) (upholding ban on advertising on the side of delivery trucks except by the business employing the truck, as legislature could determine that the nature and extent of the distraction presented by the latter advertising did not present the same threat to traffic); McGowan v. Maryland, 366 U.S. 420 (1961) (allowing the sale of certain products on Sunday, while prohibiting the sale of others, does not exceed a state's wide discretion to affect some groups of citizens differently than others).

[1393] 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).

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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,[1394] and it has applied this relaxed standard to social welfare regulations.[1395] In other cases, it has used 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,[1396] although it has usually ended up upholding the classification. Finally, purportedly applying the rational basis test, the Court has invalidated some classifications in the areas traditionally most subject to total deference.[1397]

Attempts to develop a consistent principle have so far been unsuccessful. In *Railroad Retirement Board v. Fritz*,[1398] the Court ac-

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[1394] City of New Orleans v. Dukes, 427 U.S. 297, 303–04 (1976); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[1395] 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).

[1396] *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).

[1397] *E.g.*, Lindsey v. Normet, 405 U.S. 56, 74–79 (1972) (requirement for tenant to post forfeitable bond for twice the amount of rent expected to accrue pending appellate decision on landlord-tenant dispute violates Equal Protection); Eisenstadt v. Baird, 405 U.S. 438 (1972) (state cannot provide dissimilar access to contraceptives for married and unmarried persons); James v. Strange, 407 U.S. 128 (1972) (statute allowing state to seek recoupment of attorney fees from indigent defendants who were provided legal counsel may not treat defendants differently from other civil debtors); Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (state may not exclude households containing a person unrelated to other members of the household from food stamp program); 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), used 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.

[1398] 449 U.S. 166, 174–79 (1980). The quotation is at 176–77 n.10. The extent of deference is notable, inasmuch as the legislative history seemed clearly to establish that the purpose the Court purported to discern as the basis for the classification was not the congressional purpose at all. Id. at 186–97 (Justice Brennan dissenting). The Court observed, however, that it was "constitutionally irrelevant" whether the plausible basis was in fact within Congress's reasoning, inasmuch as the Court

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knowledged 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*,[1399] in an opinion written by a different Justice,[1400] 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.[1401]

In short, it is uncertain which formulation of the rational basis standard the Court will adhere to.[1402] 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.[1403] Clarity in this area, then, must await presentation to the Court of a classification that 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

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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).

[1399] 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.

[1400] Justice Blackmun wrote the Court's opinion in *Wilson*, Justice Rehnquist in *Fritz*.

[1401] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466.

[1402] In City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (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).

[1403] 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 the Court found the classifications not rationally related to the goals, without discussing which standard it was using.

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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*,[1404] 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[1405] purported to enunciate no *per se* rule, however, although subsequent summary treatment of a host of segregation measures may have implicitly done so, until in striking down state laws prohibiting interracial marriage or cohabitation the Court declared that racial classifications "bear a far heavier burden of justification" than other classifications and were invalid because no "overriding statutory purpose"[1406] was shown and they were not necessary to some "legitimate overriding purpose."[1407] "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[1408] 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.[1409] A measure that does not draw a distinction explicitly on race but that does draw a line between those who seek to use the law to do away with or modify racial discrimination and those

[1404] 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.

[1405] Brown v. Board of Education, 347 U.S. 483 (1954).

[1406] McLaughlin v. Florida, 379 U.S. 184, 192, 194 (1964).

[1407] 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.

[1408] Personnel Administrator v. Feeney, 442 U.S. 256, 272 (1979), *quoted in* Washington v. Seattle School Dist., 458 U.S. 457, 485 (1982).

[1409] 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

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who oppose such efforts does in fact create an explicit racial classification and is constitutionally suspect.[1410]

Toward the end of the Warren Court, there emerged a trend to treat classifications on the basis of nationality or alienage as suspect,[1411] to accord sex classifications a somewhat heightened traditional review while hinting that a higher standard might be appropriate if such classifications passed lenient review,[1412] and to pass on statutory and administrative treatments of illegitimates inconsistently.[1413] 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.[1414]

However, in a major evaluation of equal protection analysis early in this period, the Court reaffirmed a two-tier approach, determining that where the interests involved that did not occasion strict scrutiny, the Court would decide the case on minimum rationality standards. Justice Powell, writing for the Court in *San Antonio School Dist. v. Rodriguez*,[1415] decisively rejected 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,[1416] a holding that has several times been strongly reaffirmed by the Court.[1417] 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 chal-

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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).

[1410] Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle School Dist., 458 U.S. 457 (1982).

[1411] Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

[1412] Reed v. Reed, 404 U.S. 71 (1971); for the hint, *see* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

[1413] *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).

[1414] *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).

[1415] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[1416] 411 U.S. at 44–45. The Court asserted that only when there is an absolute deprivation of some right or interest because of inability to pay will there be strict scrutiny. Id. at 20.

[1417] *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).

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lenge, "serve important governmental objectives and must be substantially related to achievement of those objectives."[1418] And classifications that disadvantage illegitimates are subject to a similar though less exacting scrutiny of purpose and fit.[1419] 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.[1420]

The Court has so far resisted further expansion of classifications that must be justified by a standard more stringent than rational basis. For example, the Court has held that age classifica-

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[1418] 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.

[1419] 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.

[1420] 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).

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tions are neither suspect nor entitled to intermediate scrutiny.[1421] Although the Court resists the creation of new suspect or "quasi-suspect" classifications, it may still, on occasion, apply the *Royster Guano* rather than the *Lindsley* standard of rationality.[1422]

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.[1423]

It is thought [1424] that the "fundamental right" theory had its origins in *Skinner v. Oklahoma ex rel. Williamson*,[1425] 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." [1426] A stiffening of the traditional test could be noted in the opinion of the Court striking down certain restrictions on voting eligibility [1427] and the phrase "compelling state interest" was used several times in Justice Brennan's opinion in *Shapiro v. Thompson*.[1428] Thereafter, the phrase was used in

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[1421] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding mandatory retirement at age 50 for state police); Vance v. Bradley, 440 U.S. 93 (1979) (mandatory retirement at age 60 for foreign service officers); Gregory v. Ashcroft, 501 U.S. 452 (1991) (mandatory retirement at age 70 for state judges). *See also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985) (holding that a lower court "erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation").

[1422] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); *see* discussion, *supra*.

[1423] Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

[1424] Shapiro v. Thompson, 394 U.S. at 660 (Justice Harlan dissenting).

[1425] 316 U.S. 535, 541 (1942).

[1426] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[1427] 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).

[1428] 394 U.S. 618, 627, 634, 638 (1969).

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several voting cases in which restrictions were voided, and the doctrine was asserted in other cases.[1429]

Although no opinion of the Court attempted to delineate the process by which certain "fundamental" rights were differentiated from others,[1430] it was evident from the cases that the right to vote,[1431] the right of interstate travel,[1432] the right to be free of wealth distinctions in the criminal process,[1433] and the right of procreation [1434] 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. In *Rodriguez*,[1435] the Court also sought to rationalize and restrict this branch of active review, as that case involved both a claim that *de facto* wealth classifications should be suspect and a claim that education was a fundamental interest, so that providing less of it to people because they were poor triggered a compelling state interest standard. The Court readily agreed that education was an important value in our society. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." [1436] 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* did not ultimately prevent the Court's adoption of a "three-tier" or "sliding-tier" standard of review, Justice Powell's admonition that only interests expressly or impliedly protected by the Constitution should be considered "fundamental" did not prevent the expansion of the list of such interests. The difficulty was that Court decisions on the right to vote, the right to travel, the right to procreate, as well as other rights, premise the constitutional violation to be of the Equal Protection Clause, which does not itself guarantee the right but prevents the differential govern-

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[1429] 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).

[1430] 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).

[1431] *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

[1432] *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[1433] *E.g.*, Tate v. Short, 401 U.S. 395 (1971).

[1434] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

[1435] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[1436] 411 U.S. at 30, 33–34. *But see* id. at 62 (Justice Brennan dissenting), 70, 110–17 (Justices Marshall and Douglas dissenting).

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mental treatment of those attempting to exercise the right.[1437] Thus, state limitation on the entry into marriage was soon denominated an incursion on a fundamental right that required a compelling justification.[1438] Although denials of public funding of abortions were held to implicate no fundamental interest—abortion's being a fundamental interest—and no suspect classification—because only poor women needed public funding[1439]—other denials of public assistance because of illegitimacy, alienage, or sex have been deemed to be governed by the same standard of review as affirmative harms imposed on those grounds.[1440] And, in *Plyler v. Doe*,[1441] the complete denial of education to the children of illegal aliens was found subject to intermediate scrutiny and invalidated.

Thus, the nature of active review in equal protection jurisprudence remains in flux, subject to shifting majorities and varying degrees of concern about judicial activism and judicial restraint. But the cases, more fully reviewed hereafter, clearly indicate that a sliding scale of review is a fact of the Court's cases, however much its doctrinal explanation lags behind.

Testing Facially Neutral Classifications Which Impact on Minorities

A classification made 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.[1442] 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.

[1437] 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).

[1438] Zablocki v. Redhail, 434 U.S. 374 (1978).

[1439] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[1440] *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).

[1441] 457 U.S. 202 (1982).

[1442] *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 focusing on an issue of racial import creates a classification that is suspect. Washington v. Seattle School Dist., 458 U.S. 457, 467–74 (1982).

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In *Washington v. Davis*, the Court held that is necessary that one claiming harm based on the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate.[1443] For a time, 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, lower courts had questioned this proposition.[1444] Further, the Court had considered various civil rights statutes which provided that when employment practices are challenged for disqualifying a disproportionate numbers of blacks, discriminatory purpose need not be proved and that demonstrating a rational basis for the challenged practices was not a sufficient defense.[1445] Thus, the lower federal courts developed a constitutional "disproportionate impact" analysis under which, absent some justification going substantially beyond what would be necessary to validate most other classifications, a violation could be established without regard to discriminatory purpose by showing that a statute or practice adversely affected a class.[1446] These cases were

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[1443] 426 U.S. 229, 242 (1976) ("[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.") 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). *See also* 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).

[1444] 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 drew the conclusion (and the *Davis* Court read it as actually deciding) that, because 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).

[1445] 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).

[1446] *See* Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (listing and disapproving cases). Cases that the Court did not cite include those in which the Fifth Circuit wrestled with the distinction between *de facto* and *de jure* segregation. In

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disapproved in *Davis*, but the Court noted 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." [1447]

The application of *Davis* in the following Terms led to both elucidation and not a little confusion. Looking to a challenged zoning decision of a local board that had a harsher impact upon blacks and low-income persons than upon others, the Court in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.* [1448] explained in some detail how inquiry into motivation would work. 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.[1449] 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

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 therefore that a school board decision that results in segregation is intentional in the constitutional sense, regardless of its motivation. United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir.), vacated and remanded for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976), *modified and adhered to*, 564 F.2d 162, *reh. denied*, 579 F.2d 910 (5th Cir. 1977–78), *cert denied*, 443 U.S. 915 (1979). *See also* United States v. Texas Educ. Agency, 600 F.2d 518 (5th Cir. 1979). This form of analysis was, however, substantially cabined in Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 278–80 (1979), although foreseeability as one kind of proof was acknowledged by Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979).

[1447] Washington v. Davis, 426 U.S. at 242 (1976).

[1448] 429 U.S. 252 (1977).

[1449] 429 U.S. at 265–66, 270 n.21. *See also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977) (once plaintiff shows defendant acted from impermissible motive in not rehiring him, burden shifts to defendant to show result would have been same in the absence of that motive; constitutional violation not established merely by showing of wrongful motive); Hunter v. Underwood, 471 U.S. 222 (1985) (circumstances of enactment made it clear that state constitutional amendment requiring disenfranchisement for crimes involving moral turpitude had been adopted for purpose of racial discrimination, even though it was realized that some poor whites would also be disenfranchised thereby).

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the state action even when the governing legislation appears neutral on its face," but this is a rare case.[1450] 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."[1451] 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 a sex discrimination challenge a state law giving an absolute preference in civil service hiring to veterans. Veterans who obtain at least a passing grade on the relevant examination may exercise the preference at any time and as many times as they wish and are ranked ahead of all non-veterans, no matter what their score. The lower court observed that the statutory and administrative exclusion of women from the armed forces until the recent past meant that virtually all women were excluded from state civil service positions and held that results so clearly foreseen could not be said to be unintended. Reversing, the Supreme Court found that the veterans preference law was not overtly or covertly gender-based; too many men are non-veterans to permit such a conclusion, and some women are 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."[1452]

[1450] *Arlington Heights*, 429 U.S. at 266.

[1451] 429 U.S. 267–68.

[1452] 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. Brink-

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Moreover, in *City of Mobile v. Bolden* [1453] a plurality of the Court apparently attempted to do away with the totality of circumstances test and to separately evaluate 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 by listing and weighing a series of factors which in totality showed invidious discrimination, but the Court did not consider whether its ruling was premised on discriminatory purpose or adverse impact.[1454] But in the plurality opinion in *Mobile*, each of the factors, viewed "alone," was deemed insufficient to show purposeful discrimination.[1455] Moreover, the plurality suggested that some of the factors thought to be derived from its precedents and forming part of the totality test in opinions of the lower federal courts—such as minority access to the candidate selection process, governmental responsiveness to minority interests, and the history of past discrimination—were of quite limited significance in determining discriminatory intent.[1456] But, contemporaneously with Congress's statutory rejection of the *Mobile* plurality standards,[1457] the Court, in *Rogers v. Lodge*,[1458] appeared to disavow much of *Mobile* and to permit the federal courts to find discriminatory purpose on the basis of "circumstantial evi-

man, 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.

[1453] 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.

[1454] White v. Regester, 412 U.S. 755 (1972), was the prior case. *See also* Whitcomb v. Chavis, 403 U.S. 124 (1971). Justice White, the author of *Register*, dissented in *Mobile*, 446 U.S. at 94, on the basis that "the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White v. Register*." Justice Blackmun, id. at 80, and Justices Brennan and Marshall, agreed with him as alternate holdings, id. at 94, 103.

[1455] 446 U.S. at 65–74.

[1456] 446 U.S. at 73–74. The principal formulation of the test was in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976), and its components are thus frequently referred to as the *Zimmer* factors.

[1457] 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.

[1458] 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.

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dence"[1459] 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[1460] 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."[1461] 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."[1462] Standing alone this fact was not sufficient, but a historical showing of past discrimination, of systemic exclusion of blacks from the political process as well as educational segregation and discrimination, combined with continued unresponsiveness of elected officials to the needs of the black community, indicated the presence of discriminatory motivation. The Court also looked to the "depressed socio-economic status" of the black population as being both a result of past discrimination and a barrier to black access to voting power.[1463] 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 also seemed to allow what it had said in *Davis* and *Arlington Heights* it would not permit.[1464] Noting that disproportion alone is insufficient to establish a violation, the Court nonetheless held that the plaintiff's showing

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[1459] 458 U.S. at 618–22 (describing and disagreeing with the *Mobile* plurality, which had used the phrase at 446 U.S. 74). The *Lodge* Court approved the prior reference that motive analysis required an analysis of "such circumstantial and direct evidence" as was available. Id. at 618 (quoting *Arlington Heights*, 429 U.S. at 266).

[1460] The Court confirmed the Mobile analysis that the "fundamental interest" side of heightened equal protection analysis requires a showing of intent when the criteria of classification are neutral and did not reach the Fifteenth Amendment issue in this case. 458 U.S. at 619 n.6.

[1461] 458 U.S. at 618 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

[1462] 458 U.S. at 623–24.

[1463] 458 U.S. at 624–27. The Court also noted the existence of other factors showing the tendency of the system to minimize the voting strength of blacks, including the large size of the jurisdiction and the maintenance of majority vote and single-seat requirements and the absence of residency requirements.

[1464] Castaneda v. Partida, 430 U.S. 482 (1977). The decision was 5-to-4, Justice Blackmun writing the opinion of the Court and Chief Justice Burger and Justices Stewart, Powell, and Rehnquist dissenting. Id. at 504–07.

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that 79 percent of the county's population was Spanish-surnamed, whereas 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.[1465] 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.[1466] 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.

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.[1467] It soon, however, entertained cases assailing specific tax laws under this provision,[1468] 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 governments, might be obnoxious to the constitutional prohibition."[1469] The Court observed, however, that the Equal Protection Clause "was not intended to compel the State to adopt an iron rule of equal taxation" and propounded some conclusions that remain valid today.[1470]

[1465] 430 U.S. at 493–94. This had been recognized in Washington v. Davis, 426 U.S. 229, 241 (1976), and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 n.13 (1977).

[1466] Castaneda v. Partida, 430 U.S. 482, 494, 497–99 (1977).

[1467] Davidson v. City of New Orleans, 96 U.S. 97, 106 (1878).

[1468] 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).

[1469] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890).

[1470] 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 different 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

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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." [1471] A state may adjust its taxing system in such a way as

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not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution." 134 U.S. at 237. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); and City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[1471] 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 ½ 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).

Gambling: slot machines on excursion riverboats are taxed at a maximum rate of 20 percent, while slot machines at a racetrack are taxed at a maximum rate of 36 percent. Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

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).

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to favor certain industries or forms of industry[1472] and may tax different types of taxpayers differently, despite the fact that they compete.[1473] 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."[1474] Classification may not be arbitrary. It must be based on a real and substantial difference[1475] and the difference need not be great or conspicuous,[1476] but there must be no discrimination in favor of one as against another of the same

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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).

[1472] 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); Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

[1473] Puget Sound Co. v. Seattle, 291 U.S. 619, 625 (1934). *See* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[1474] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

[1475] Southern Ry. v. Greene, 216 U.S. 400, 417 (1910); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 400 (1928).

[1476] Keeney v. New York, 222 U.S. 525, 536 (1912); Tax Comm'rs v. Jackson, 283 U.S. 527, 538 (1931).

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class.[1477] Also, discriminations of an unusual character are scrutinized with special care.[1478] A gross sales tax graduated at increasing rates with the volume of sales,[1479] a heavier license tax on each unit in a chain of stores where the owner has stores located in more than one country,[1480] and a gross receipts tax levied on corporations operating taxicabs, but not on individuals,[1481] 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.[1482] 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.[1483]

One not within the class claimed to be discriminated against cannot challenge the constitutionality of a statute on the ground that it denies equal protection of the law.[1484] If a tax applies to a class that may be separately taxed, those within the class may not complain because the class might have been more aptly defined or because others, not of the class, are taxed improperly.[1485]

Foreign Corporations and Nonresidents.—The Equal Protection Clause does not require identical taxes upon all foreign and domestic corporations in every case.[1486] 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.[1487] 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 corpora-

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[1477] Giozza v. Tiernan, 148 U.S. 657, 662 (1893).

[1478] 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).

[1479] 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).

[1480] Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).

[1481] 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).

[1482] Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931).

[1483] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

[1484] Darnell v. Indiana, 226 U.S. 390, 398 (1912); Farmers Bank v. Minnesota, 232 U.S. 516, 531 (1914).

[1485] Morf v. Bingaman, 298 U.S. 407, 413 (1936).

[1486] Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 88 (1913). *See also* Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 157 (1918).

[1487] Philadelphia Fire Ass'n v. New York, 119 U.S. 110, 119 (1886).

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tions of the same kind,"[1488] 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.[1489] 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.[1490] 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.[1491] Even though the right of a foreign corporation to do business in a state rests on a license, the Equal Protection Clause is held to insure it equality of treatment, at least so far as ad valorem taxation is concerned.[1492] The Court, in *WHYY Inc. v. Glassboro*,[1493] held that a foreign nonprofit corporation licensed to do business in the taxing state is denied equal protection of the law where an exemption from state property taxes granted to domestic corporations is denied to a foreign corporation solely because it was organized under the laws of a sister state and where there is no greater administrative burden in evaluating a foreign corporation than a domestic corporation in the taxing state.

State taxation of insurance companies, insulated from Commerce Clause attack by the McCarran-Ferguson Act, must pass similar hurdles under the Equal Protection Clause. In *Metropolitan Life Ins. Co. v. Ward*,[1494] 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

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[1488] Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 511 (1926).

[1489] Southern Ry. v. Green, 216 U.S. 400, 418 (1910).

[1490] Concordia Ins. Co. v. Illinois, 292 U.S. 535 (1934).

[1491] 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.

[1492] Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571, 572 (1949).

[1493] 393 U.S. 117 (1968).

[1494] 470 U.S. 869, 878 (1985). The vote was 5–4, with Justice Powell's opinion for the Court 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.

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commerce, while the Equal Protection Clause merely requires a rational relation to a valid state purpose.[1495] 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.[1496]

Income Taxes.—A state law that taxes the entire income of domestic corporations that do business in the state, including that derived within the state, while exempting entirely the income received outside the state by domestic corporations that do no local business, is arbitrary and invalid.[1497] 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.[1498] A retroactive statute imposing a graduated tax at rates different from those in the general income tax law, on dividends received in a prior year that were deductible from gross income under the law in effect when they were received, does not violate the Equal Protection Clause.[1499]

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.[1500] 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.[1501] 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.[1502] Vested and contingent remainders may be treated differently.[1503] The exemption of property bequeathed to charitable or educational insti-

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[1495] 470 U.S. at 880.

[1496] 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).

[1497] 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 a municipal income tax imposed on gross wages of employed persons but only on net profits of the self-employed, of corporations, and of business enterprises.

[1498] Shaffer v. Carter, 252 U.S. 37, 56, 57 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

[1499] Welch v. Henry, 305 U.S. 134 (1938).

[1500] Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 288, 300 (1898).

[1501] Billings v. Illinois, 188 U.S. 97 (1903).

[1502] Campbell v. California, 200 U.S. 87 (1906).

[1503] Salomon v. State Tax Comm'n, 278 U.S. 484 (1929).

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tutions may be limited to those within the state.[1504] 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.[1505]

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.[1506] A state maintenance tax act, which taxes vehicle property carriers for hire at greater rates than it taxes similar vehicles carrying property not for hire, is reasonable, because 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 extensive than that of one engaged in business as a common carrier.[1507] 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 are taxes on property not so employed.[1508] Common motor carriers of freight operating over regular routes between fixed termini may be taxed at higher rates than other carriers, common and private.[1509] 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.[1510] 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 from the tax.[1511] Also sustained as valid have been exemptions of vehicles weighing less than 3,000 pounds from graduated registration fees imposed on carriers for hire, notwithstanding that the exempt vehicles, when loaded, may outweigh those taxed;[1512] and exemptions from vehicle registration and license fees levied on private carriers operating a motor vehicle in the business of transporting persons or prop-

[1504] Board of Educ. v. Illinois, 203 U.S. 553 (1906).
[1505] Maxwell v. Bugbee, 250 U.S. 525 (1919).
[1506] Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).
[1507] Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 78 (1939).
[1508] Alward v. Johnson, 282 U.S. 509 (1931).
[1509] Bekins Van Lines v. Riley, 280 U.S. 80 (1929).
[1510] Morf v. Bingaman, 298 U.S. 407 (1936).
[1511] Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).
[1512] Carley & Hamilton v. Snook, 281 U.S. 66 (1930).

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erty for hire, the exemptions including one for vehicles hauling people and farm products exclusively between points not having railroad facilities and not passing through or beyond municipalities having railroad facilities.[1513]

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,[1514] whether the exemption results from the terms of the statute itself or the conduct of a state official implementing state policy.[1515] 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.[1516] 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.[1517]

Early cases drew the distinction between intentional and systematic discriminatory action by state officials in undervaluing some property while taxing at full value other property in the same class—an action that could be invalidated under the Equal Protection Clause—and mere errors in judgment resulting in unequal valuation or undervaluation—actions that did not support a claim of discrimination.[1518] Subsequently, however, the Court in *Allegheny Pittsburgh Coal Co. v. Webster County Comm'n*,[1519] 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, whereas assessments on property that has stayed in the same hands since 1976 may rise no more that 2% per year.[1520] *Allegheny Pittsburgh* was distinguished, the disparity in assessments being said to result from administrative failure to implement state policy rather than from implementation

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[1513] Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n, 295 U.S. 285 (1935).

[1514] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[1515] Missouri v. Dockery, 191 U.S. 165 (1903).

[1516] Kentucky Union Co. v. Kentucky, 219 U.S. 140, 161 (1911).

[1517] 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).

[1518] 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).

[1519] 488 U.S. 336 (1989).

[1520] Nordlinger v. Hahn, 505 U.S. 1 (1992).

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of a coherent state policy.[1521] 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.[1522]

Allegheny Pittsburgh was similarly distinguished in *Armour v. City of Indianapolis*,[1523] where the Court held that Indianapolis, which had abandoned one method of assessing payments against affected lots for sewer projects for another, could forgive outstanding assessments payments without refunding assessments already paid. In *Armour*, owners of affected lots had been given the option of paying in one lump sum, or of paying in 10, 20 or 30-year installment plan. Despite arguments that the forgiveness of the assessment resulted in a significant disparity in the assessment paid by similarly-situated homeowners, the Court found that avoiding the administrative burden of continuing to collect the outstanding fees was a rational basis for the City's decision.[1524]

An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level.[1525] 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.[1526] 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.[1527]

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.[1528] 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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[1521] 505 U.S. at 14–15.
[1522] 505 U.S. at 12–13.
[1523] 566 U.S. ___, No. 11–161, slip op. (2012).
[1524] 566 U.S. ___, No. 11–161, slip op. at 7–10.
[1525] Sioux City Bridge v. Dakota County, 260 U.S. 441, 446 (1923).
[1526] Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946); Allegheny Pittsburgh Coal Co. v. Webster County Comm'n, 488 U.S. 336 (1989).
[1527] St. Louis-San Francisco Ry v. Middlekamp, 256 U.S. 226, 230 (1921).
[1528] Memphis & Charleston Ry. v. Pace, 282 U.S. 241 (1931).

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inequality.[1529] 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.[1530] 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.[1531] 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 fewer than 25 miles of main line within the district than for those having more.[1532]

Police Power Regulation

Classification.—Justice Holmes' characterization of the Equal Protection Clause as the "usual last refuge of constitutional arguments"[1533] 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."[1534] The Court has made it clear that only the totally irrational classification in the economic field will be struck down,[1535] and it has held that legislative classifications that im-

[1529] Kansas City So. Ry. v. Road Improv. Dist. No. 6, 256 U.S. 658 (1921); Thomas v. Kansas City So. Ry., 261 U.S. 481 (1923).

[1530] Road Improv. Dist. v. Missouri Pacific R.R., 274 U.S. 188 (1927).

[1531] Branson v. Bush, 251 U.S. 182 (1919).

[1532] Columbus & Greenville Ry. v. Miller, 283 U.S. 96 (1931).

[1533] Buck v. Bell, 274 U.S. 200, 208 (1927).

[1534] McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

[1535] 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

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pact severely upon some businesses and quite favorably upon others may be saved through stringent deference to legislative judgment.[1536] 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.[1537] The Court has condemned a variety of statutory classifications as failing the rational basis test, although some of the cases are of doubtful vitality today

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in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a superlegislature 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.

[1536] The "grandfather" clause upheld in *Dukes* preserved the operations of two concerns that had operated in the Quarter for 20 years. The classification was sustained on the basis of (1) the City Council proceeding step-by-step and eliminating vendors of more recent vintage, (2) the Council deciding that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Quarter, and (3) the Council believing that both "grandfathered" vending interests had themselves become part of the distinctive character and charm of the Quarter. 427 U.S. at 305–06. *See also* Friedman v. Rogers, 440 U.S. 1, 17–18 (1979); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970).

[1537] 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 newspaper 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 condi-

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and some have been questioned. Thus, the Court invalidated a statute that forbade stock insurance companies to act through agents who were their salaried employees but permitted mutual compa-

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tion of appearing in a Kansas court. Martin v. Walton, 368 U.S. 25 (1961). Two dissenters, Justices Douglas and Black, would sustain the requirement, if limited in application to an attorney who practiced only in Missouri.

Cable Television: exemption from regulation under the Cable Communications Policy Act of facilities that serve only dwelling units under common ownership. FCC v. Beach Communications, 508 U.S. 307 (1993). Regulatory efficiency is served by exempting those systems for which the costs of regulation exceed the benefits to consumers, and potential for monopoly power is lessened when a cable system operator is negotiating with a single-owner.

Cattle: a classification of sheep, as distinguished from cattle, in a regulation restricting the use of public lands for grazing. Bacon v. Walker, 204 U.S. 311 (1907). *See also* Omaechevarria v. Idaho, 246 U.S. 343 (1918).

Cotton gins: in a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons. Corporation Comm'n v. Lowe, 281 U.S. 431 (1930).

Debt adjustment business: operation only as incident to legitimate practice of law. Ferguson v. Skrupa, 372 U.S. 726 (1963).

Eye glasses: law exempting sellers of ready-to-wear glasses from regulations forbidding opticians to fit or replace lenses without prescriptions from ophthalmologist or optometrist and from restrictions on solicitation of sale of eye glasses by use of advertising matter. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Fish processing: stricter regulation of reduction of fish to flour or meal than of canning. Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936).

Food: bread sold in loaves must be of prescribed standard sizes, Schmidinger v. Chicago, 226 U.S. 578 (1913); food preservatives containing boric acid may not be sold, Price v. Illinois, 238 U.S. 446 (1915); lard not sold in bulk must be put up in containers holding one, three or five pounds or some whole multiple thereof, Armour & Co. v. North Dakota, 240 U.S. 510 (1916); milk industry may be placed in a special class for regulation, Lieberman v. Van De Carr, 199 U.S. 552 (1906); vendors producing milk outside city may be classified separately, Adams v. Milwaukee, 228 U.S. 572 (1913); producing and nonproducing vendors may be distinguished in milk regulations, St. John v. New York, 201 U.S. 633 (1906); different minimum and maximum milk prices may be fixed for distributors and storekeepers, Nebbia v. New York, 291 U.S. 502 (1934); price differential may be granted for sellers of milk not having a well advertised trade name, Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251 (1936); oleomargarine colored to resemble butter may be prohibited, Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902); table syrups may be required to be so labeled and disclose identity and proportion of ingredients, Corn Products Ref. 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). *See also* North v. Russell, 427 U.S. 328, 338 (1976).Geographic distinctions in regulatory laws

Hotels: requirement that keepers of hotels having over fifty guests employ night watchmen. Miller v. Strahl, 239 U.S. 426 (1915).

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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).

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nies to operate in this manner.[1538] A law that 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.[1539] The same result befell a statute that permitted mill

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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 & St. L. Ry. v. Beckwith, 129 U.S. 26 (1889); Minneapolis & St. L. Ry. v. Emmons, 149 U.S. 364 (1893); assessing railroads with entire expense of altering a grade crossing, New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894); liability for fire communicated by locomotive engines, St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1 (1897); required weed cutting; Missouri, Kan., & Tex. Ry. v. May, 194 U.S. 267 (1904); presumption against a railroad failing to give prescribed warning signals, Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933); required use of locomotive headlights of a specified form and power, Atlantic Coast Line Ry. v. Georgia, 234 U.S. 280 (1914); presumption that railroads are liable for damage caused by operation of their locomotives, Seaboard Air Line Ry. v. Watson, 287 U.S. 86 (1932); required sprinkling of streets between tracks to lay the dust, Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919). State "full-crew" laws do not violate the Equal Protection Clause by singling out the railroads for regulation and by making no provision for minimum crews on any other segment of the transportation industry, Firemen v. Chicago, R.I. & P. Ry. 393 U.S. 129 (1968).

Sales in bulk: requirement of notice of bulk sales applicable only to retail dealers. Lemieux v. Young, 211 U.S. 489 (1909).

Secret societies: regulations applied only to one class of oath-bound associations, having a membership of 20 or more persons, where the class regulated has a tendency to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

Securities: a prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, *e.g.*, cotton, grain. Otis v. Parker, 187 U.S. 606 (1903).

Sunday closing law: notwithstanding that they prohibit the sale of certain commodities and services while permitting the vending of others not markedly different, and, even as to the latter, frequently restrict their distribution to small retailers as distinguished from large establishments handling salable as well as nonsalable items, such laws have been upheld. Despite the desirability of having a required day of rest, a certain measure of mercantile activity must necessarily continue on that day and in terms of requiring the smallest number of employees to forego their day of rest and minimizing traffic congestion, it is preferable to limit this activity to retailers employing the smallest number of workers; also, it curbs evasion to refuse to permit stores dealing in both salable and nonsalable items to be open at all. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super 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).

[1538] Hartford Ins. Co. v. Harrison, 301 U.S. 459 (1937).

[1539] Smith v. Cahoon, 283 U.S. 553 (1931).

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dealers without well-advertised trade names the benefit of a price differential but that restricted this benefit to such dealers entering the business before a certain date.[1540] In a decision since overruled, the Court struck down a law that 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.[1541]

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.[1542] Statutes limiting hours of labor for employees in mines, smelters,[1543] mills, factories,[1544] or on public works [1545] 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.[1546] The exemption of mines employing fewer than ten persons from a law pertaining to measurement of coal to determine a miner's wages is not unreasonable.[1547] All corporations [1548] or public service corporations [1549] 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 workers' compensation act according to the respective hazards of each,[1550] and the exemption of farm laborers and domestic servants does not render such an act invalid.[1551] A statute providing that no person shall be denied op-

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[1540] 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).

[1541] 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.

[1542] Central State Univ. v. American Ass'n of Univ. Professors, 526 U.S. 124 (1999) (upholding limitation on the authority of public university professors to bargain over instructional workloads).

[1543] Holden v. Hardy, 169 U.S. 366 (1988).

[1544] Bunting v. Oregon, 243 U.S. 426 (1917).

[1545] Atkin v. Kansas, 191 U.S. 207 (1903).

[1546] Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914). *See also* Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901).

[1547] McLean v. Arkansas, 211 U.S. 539 (1909).

[1548] Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922).

[1549] Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922).

[1550] Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

[1551] 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).

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portunity for employment because he is not a member of a labor union does not offend the Equal Protection Clause.[1552] At a time when protective labor legislation generally was falling under "liberty of contract" applications of the Due Process Clause, the Court generally approved protective legislation directed solely to women workers,[1553] and this solicitude continued into present times in the approval of laws that were more questionable,[1554] but passage of the sex discrimination provision of the Civil Rights Act of 1964 has generally called into question all such protective legislation addressed solely to women.[1555]

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,[1556] or to vendors of commodities but not to vendors of labor,[1557] have been upheld. Contrary to its earlier view, the Court now holds that an antitrust act that exempts agricultural products in the hands of the producer is valid.[1558] 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.[1559] 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.[1560] A grant of monopoly privileges, if otherwise an appropriate exercise of the police power, is immune to attack under that clause.[1561] Likewise, enforcement of an unfair sales act, under which 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

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[1552] Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). Nor 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).

[1553] *E.g.*, Muller v. Oregon, 208 U.S. 412 (1908).

[1554] Goesaert v. Cleary, 335 U.S. 464 (1948).

[1555] Title VII, 78 Stat. 253, 42 U.S.C. § 2000e. On sex discrimination generally, *see* "Classifications Meriting Close Scrutiny—Sex," *supra*.

[1556] Mallinckrodt Works v. St. Louis, 238 U.S. 41 (1915).

[1557] International Harvester Co. v. Missouri, 234 U.S. 199 (1914).

[1558] Tigner v. Texas, 310 U.S. 141 (1940) (overruling Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902)).

[1559] Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910).

[1560] Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905).

[1561] 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).

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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.[1562]

Administrative Discretion.—A municipal ordinance that vests in supervisory authorities a naked and arbitrary power to grant or withhold consent to the operation of laundries in wooden buildings, without consideration of the circumstances of individual cases, constitutes a denial of equal protection of the law when consent is withheld from certain persons solely on the basis of nationality.[1563] 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,[1564] or from building line restrictions.[1565] Written permission of the mayor or president of the city council may be required before any person shall move a building on a street.[1566] 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.[1567] In a later case,[1568] 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."[1569] Thus, a formula for dispensing aid to dependent children that imposed an upper limit on the amount one family could

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[1562] Safeway Stores v. Oklahoma Grocers, 360 U.S. 334, 339–41 (1959).

[1563] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[1564] Fischer v. St. Louis, 194 U.S. 361 (1904).

[1565] Gorieb v. Fox, 274 U.S. 603 (1927).

[1566] Wilson v. Eureka City, 173 U.S. 32 (1899).

[1567] Gundling v. Chicago, 177 U.S. 183 (1900).

[1568] Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

[1569] 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).

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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.[1570] Similarly, a state welfare assistance formula that, after calculation of individual need, provided less of the determined amount to families with dependent children than to those persons in the aged and infirm categories did not violate equal protection because a state could reasonably believe that the aged and infirm are the least able to bear the hardships of an inadequate standard of living, and that the apportionment of limited funds was therefore rational.[1571] Although 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,[1572] acting to invalidate a provision only once, and then on the premise that Congress was actuated by an improper purpose.[1573]

Similarly, the Court has rejected the contention that access to housing, despite its great importance, is of any fundamental interest that 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.[1574]

However, a statute that prohibited the dispensing of contraceptive devices to single persons for birth control but not for disease prevention purposes and that contained no limitation on dispensation to married persons was held to violate the Equal Protection

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[1570] Dandridge v. Williams, 397 U.S. 471, 483–87 (1970).

[1571] 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).

[1572] *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).

[1573] Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (also questioning rationality).

[1574] 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 amount 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.

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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.[1575] Also denying equal protection was a law affording married parents, divorced parents, and unmarried mothers an opportunity to be heard with regard to the issue of their fitness to continue or to take custody of their children, an opportunity the Court decided was mandated by due process, but presuming the unfitness of the unmarried father and giving him no hearing.[1576]

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.[1577] 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.[1578] Heavier penalties may be imposed upon habitual criminals for like offenses,[1579] even after a pardon for an earlier offense,[1580] and such persons may be made ineligible for parole.[1581] 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.[1582]

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 that they ultimately spend in custody, good time count-

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[1575] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[1576] Stanley v. Illinois, 405 U.S. 645, 658 (1972).

[1577] 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.

[1578] Collins v. Johnston, 237 U.S. 502, 510 (1915); Pennsylvania v. Ashe, 302 U.S. 51 (1937).

[1579] 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).

[1580] Carlesi v. New York, 233 U.S. 51 (1914).

[1581] Ughbanks v. Armstrong, 208 U.S. 481 (1908).

[1582] Pennsylvania v. Ashe, 302 U.S. 51 (1937).

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ing toward the date of eligibility for parole, does not deny the prisoners incarcerated in local jails equal protection. The distinction is rationally justified by the fact that good-time credit is designed to encourage prisoners to engage in rehabilitation courses and activities that exist only in state prisons and not in local jails.[1583]

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.[1584] A statute that 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.[1585] Similarly, a statute enabling the state to recover the costs of such transcripts and other legal defense fees by a civil action violated equal protection 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.[1586] But a bail reform statute that provided for liberalized forms of release and that 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.[1587] The Court has applied the clause strictly to prohibit numerous *de jure* and *de facto* distinctions based on wealth or indigency.[1588]

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 under-

[1583] McGinnis v. Royster, 410 U.S. 263 (1973). *Cf.* Hurtado v. United States, 410 U.S. 578 (1973).

[1584] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

[1585] 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).

[1586] James v. Strange, 407 U.S. 128 (1972).

[1587] Schilb v. Kuebel, 404 U.S. 357 (1971).

[1588] *See* "Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection—Generally," *supra*.

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stood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. . . . [The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation."[1589] Thus, a state law that on its face discriminated against African-Americans was void.[1590] 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."[1591]

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,[1592] but the Court in *Plessy v. Ferguson*[1593] adopted a principle first propounded in litigation attacking racial segregation in

[1589] Strauder v. West Virginia, 100 U.S. 303, 306–07 (1880).

[1590] Strauder v. West Virginia, 100 U.S. 303 (1880) (law limiting jury service to white males). Moreover it will not do to argue that a law that segregates the races or prohibits contacts between them discriminates equally against both races. Buchanan v. Warley, 245 U.S. 60 (1917) (ordinance prohibiting blacks from occupying houses in blocks where whites were predominant and whites from occupying houses in blocks where blacks were predominant). *Compare* Pace v. Alabama, 106 U.S. 583 (1883) (sustaining conviction under statute that imposed a greater penalty for adultery or fornication between a white person and a Negro than was imposed for similar conduct by members of the same race, using "equal application" theory), *with* McLaughlin v. Florida, 379 U.S. 184, 188 (1964), *and* Loving v. Virginia, 388 U.S. 1, 10 (1967) (rejecting theory).

[1591] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (discrimination against Chinese).

[1592] *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).

[1593] 163 U.S. 537 (1896).

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the schools of Boston, Massachusetts.[1594] *Plessy* concerned not schools but a state law requiring "equal but separate" facilities for rail transportation and requiring the separation of "white and colored" passengers. "The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in exercise of their police power." [1595] 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." [1596]

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,[1597] 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.[1598] 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.[1599]

In 1938, the Court began to move away from "separate but equal." It held that a state that operated a law school open to whites only and did not operate any law school open to African-Americans vio-

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[1594] Roberts v. City of Boston, 59 Mass. 198, 206 (1849).

[1595] 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.

[1596] 163 U.S. at 544–45. The act of Congress in providing for separate schools in the District of Columbia was specifically noted. Justice Harlan's well-known dissent contended that the purpose and effect of the law in question was discriminatory and stamped African-Americans with a badge of inferiority. "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Id. at 552, 559.

[1597] Gong Lum v. Rice, 275 U.S. 78 (1927).

[1598] Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

[1599] Berea College v. Kentucky, 211 U.S. 45 (1908).

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lated an applicant's right to equal protection, even though the state offered to pay his tuition at an out-of-state law school. The requirement of the clause was for equal facilities within the state.[1600] 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.[1601] 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.[1602]

Brown v. Board of Education.—"Separate but equal" was formally abandoned in *Brown v. Board of Education*,[1603] which involved 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."[1604]

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 compli-

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[1600] Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). *See also* Sipuel v. Board of Regents, 332 U.S. 631 (1948).

[1601] Sweatt v. Painter, 339 U.S. 629 (1950).

[1602] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[1603] 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).

[1604] Brown v. Board of Education, 347 U.S. 483, 489–90, 492–95 (1954).

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ance," although "[o]nce such a start has been made," some additional time would be needed because of problems arising in the course of compliance and the lower courts were to allow it if on inquiry delay were found to be "in the public interest and [to be] consistent with good faith compliance . . . to effectuate a transition to a racially nondiscriminatory school system." In any event, however, the lower courts were to require compliance "with all deliberate speed."[1605]

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.[1606] 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.[1607] The lower courts eventually began voiding these laws for discriminatory application, permitting class actions,[1608] and the Supreme Court voided the exhaustion of state remedies requirement.[1609] In the early 1960s, various state practices—school closings,[1610] minority transfer plans,[1611] zoning,[1612] and the like—were ruled impermissible, and

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[1605] Brown v. Board of Education, 349 U.S. 294, 300–01 (1955).

[1606] Cooper v. Aaron, 358 U.S. 1 (1958).

[1607] *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).

[1608] *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).

[1609] McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963).

[1610] Griffin v. Prince Edward County School Bd., 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).

[1611] Goss v. Knoxville Bd. of Educ., 373 U.S. 683 (1963). Such plans permitted as of right a student assigned to a school in which students of his race were a minority to transfer to a school where the student majority was of his race.

[1612] Northcross v. Board of Educ. of Memphis, 333 F.2d 661 (6th Cir. 1964).

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the Court indicated that the time was running out for full implementation of the *Brown* mandate.[1613]

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.[1614] 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 [1615] led to a change of attitude in the lower courts and the Supreme Court. In *Green v. School Board of New Kent County*,[1616] 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." [1617] Furthermore, as the Court and lower courts had by then made clear, school desegregation encompassed not only the aboli-

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[1613] The first comment appeared in dictum in a nonschool case, Watson v. City of Memphis, 373 U.S. 526, 530 (1963), and was implied in Goss v. Board of Educ. of City of Knoxville, 373 U.S. 683, 689 (1963). In Bradley v. School Bd. of City of Richmond, 382 U.S. 103, 105 (1965), the Court announced that "[d]elays in desegregating school systems are no longer tolerable." A grade-a-year plan was implicitly disapproved in Calhoun v. Latimer, 377 U.S. 263 (1964), vacating and remanding 321 F.2d 302 (5th Cir. 1963). *See* Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966).

[1614] *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).

[1615] 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 and local officials in interpretations of the law and were accepted as authoritative by the courts and used. 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).

[1616] 391 U.S. 430 (1968); Raney v. Gould Bd. of Educ., 391 U.S. 443 (1968). These cases had been preceded by a circuit-wide promulgation of similar standards in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *modified and aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

[1617] *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 discrimina-

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tion of dual attendance systems for students, but also the merging into one system of faculty,[1618] staff, and services, so that no school could be marked as either a "black" or a "white" school.[1619]

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.[1620] 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."[1621]

In the October 1970 Term the Court in *Swann v. Charlotte-Mecklenburg Board of Education*[1622] 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.[1623] 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

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tion." *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.

[1618] 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).

[1619] United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *mod. and aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

[1620] 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).

[1621] Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969). The Court summarily reiterated its point several times in the Term. Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970); Northcross v. Board of Educ. of Memphis, 397 U.S. 232 (1970); Dowell v. Board of Educ. of Oklahoma City, 396 U.S. 269 (1969).

[1622] 402 U.S. 1 (1971); *see also* Davis v. Board of School Comm'rs of Mobile County, 402 U.S. 33 (1971).

[1623] McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

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teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown."[1624] Although "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 that 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.[1625] 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.[1626]

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.[1627] 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.[1628] 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.[1629]

[1624] 402 U.S. at 18.

[1625] 402 U.S. at 25–27.

[1626] 402 U.S. at 22–25.

[1627] 402 U.S. at 27–29.

[1628] 402 U.S. at 29–31.

[1629] 402 U.S. at 31–32. In Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), the Court held that after a school board has complied with a judicially-imposed desegregation plan in student assignments and thus undone the existing segregation, it is beyond the district court's power to order it subsequently to imple-

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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.[1630]

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*[1631] 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.[1632] 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."[1633] Too, the complexity of formulating and overseeing the implementation of a plan that would effect a *de facto* consolidation of multiple school dis-

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ment a new plan to undo the segregative effects of shifting residential patterns. The Court agreed with the dissenters, Justices Marshall and Brennan, id. at 436, 441, that the school board had not complied in other respects, such as in staff hiring and promotion, but it thought that was irrelevant to the issue of neutral student assignments.

[1630] 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.

[1631] 418 U.S. 717 (1974).

[1632] 418 U.S. at 745.

[1633] 418 U.S. at 741–42.

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tricts, the Court indicated, would impose a task that few, if any, judges are qualified to perform and one that would deprive the people of control of their schools through elected representatives.[1634] "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district."[1635]

"The controlling principle consistently expounded in our holdings," the Court wrote in the *Detroit* case, "is that the scope of the remedy is determined by the nature and extent of the constitutional violation."[1636] Although this axiom caused little problem when the violation consisted of statutorily mandated separation,[1637] it 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 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*.[1638] The lower courts had found the school segregation existing within one part of the city to be attributable to official action, but as to the central city they found the separation not to be the result of official action and refused to impose a remedy for those

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[1634] 418 U.S. at 742–43. This theme has been sounded in a number of cases in suits seeking remedial actions in particularly intractable areas. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974); O'Shea v. Littleton, 414 U.S. 488, 500–02 (1974). In Hills v. Gautreaux, 425 U.S. 284, 293 (1976), the Court wrote that it had rejected the metropolitan order because of "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities . . . ." In other places, the Court stressed the absence of interdistrict violations, id. at 294, and in still others paired the two reasons. Id. at 296.

[1635] 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 interdistrict order. Id . at 757, 762, 781.

[1636] 418 U.S. at 744. *See* Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976) ("[T]he Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power."); Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (Justice Powell concurring) ("a core principle of desegregation cases" is that set out in *Milliken*).

[1637] 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).

[1638] 413 U.S. 189 (1973).

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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 then 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.[1639]

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.[1640] 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."[1641] 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.[1642]

Second, in the first *Dayton* case the lower courts had found three constitutional violations that had resulted in some pupil segregation, and, based on these three, viewed as "cumulative violations,"

[1639] 413 U.S. at 207–11. Justice Rehnquist argued that imposition of a district-wide segregation order should not proceed from a finding of segregative intent and effect in only one portion, that in effect the Court was imposing an affirmative obligation to integrate without first finding a constitutional violation. Id. at 254 (dissenting). Justice Powell cautioned district courts against imposing disruptive desegregation plans, especially substantial busing in large metropolitan areas, and stressed the responsibility to proceed with reason, flexibility, and balance. Id. at 217, 236 (concurring and dissenting). *See* his opinion in Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (concurring).

[1640] 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).

[1641] Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

[1642] 427 U.S. at 436.

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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.'"[1643] 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."[1644] 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.[1645] Following the Supreme Court standards, the *Dayton* district court held that the plaintiffs had failed to prove official segregative intent, but was reversed by the appeals court. The *Columbus* district court had found and had been affirmed in finding racially discriminatory conduct and had ordered extensive busing. The Supreme Court held that the evidence adduced in both district courts showed that the school boards had carried out segregating actions affecting a substantial portion of each school system prior to and contemporaneously with the 1954 decision in *Brown v. Board of Education*. The *Keyes* presumption therefore required the school boards to show that systemwide discrimination had not existed, and they failed to do so. Because each system was a dual one in 1954, it was subject to an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and

[1643] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (quoting Hills v. Gautreaux, 425 U.S. 284, 294 (1976)).

[1644] 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 used in *Keyes* were still valid. Id. at 421.

[1645] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

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branch."[1646] 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 used to infer segregative intent, thus satisfying the *Davis-Arlington Heights* standards.[1647] 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.[1648]

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.[1649]

The broad scope of federal courts' remedial powers was more recently reaffirmed in *Missouri v. Jenkins*.[1650] 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

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[1646] 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).

[1647] 443 U.S. at 461–65.

[1648] 443 U.S. at 465–67.

[1649] 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.

[1650] 495 U.S. 33 (1990).

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in property taxes without first affording local officials "the opportunity to devise their own solutions." [1651]

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 public schools in both the North and South. Busing of schoolchildren 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 Court cautioned that courts must observe limits occasioned by the nature of the educational process and the well-being of children.[1652] Subsequent cases declared the principle that the remedy must be no more extensive than the violation found.[1653] Congress enacted several provisions of law, either permanent statutes or annual appropriations limits, that purported 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.[1654] Stronger proposals, for statutes or for constitutional amendments, were introduced in Congress, but none passed both houses.[1655]

Of considerable importance to the validity of such restrictions on remedies for *de jure* segregation violations is what has been char-

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[1651] 495 U.S. at 52. Similarly, the Court held in Spallone v. United States, 493 U.S. 265 (1990), that a district court had abused its discretion in imposing contempt sanctions directly on members of a city council for refusing to vote to implement a consent decree designed to remedy housing discrimination. Instead, the court should have proceeded first against the city alone, and should have proceeded against individual council members only if the sanctions against the city failed to produce compliance.

[1652] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 30–31 (1971).

[1653] Milliken v. Bradley, 418 U.S. 717, 744 (1974).

[1654] *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).

[1655] *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).

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acterized as the "political process" doctrine,[1656] which prohibits burdening the ability of protected minorities to secure legislation on their own behalf.[1657] This doctrine was applied to a pair of cases involving restrictions on busing and other remedies approved by state referenda. In *Washington v. Seattle School Dist.*,[1658] voters in Washington, following a decision by the elected school board in Seattle to undertake a mandatory busing program, approved a statewide 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 *Crawford v. Los Angeles Bd. of Educ.*,[1659] California state courts had interpreted the state constitution to require school systems to eliminate both *de jure* and *de facto* segregation. 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 the Washington measure unconstitutional, 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. The Court noted that local school boards retained authority over education policy on almost everything but busing. Thus, by singling out busing and making it more difficult to implement than anything else, the voters had expressly and knowingly enacted a law that had an intentional negative impact on a minority.[1660] The Court discerned no such impediment in the California measure, which it considered a simple repeal that merely foreclosed one particular discretionary court-

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[1656] Schuette v. BAMN, 572 U.S. ___, No. 12–682, slip op. at 6 (2014).

[1657] This doctrine originated in the case of Hunter v. Erickson, 393 U.S. 385 (1969) (Akron ordinance, which suspended an "open housing" ordinance and provided that any such future ordinance must be submitted to a vote of the people before it could become effective, violated Equal Protection).

[1658] 458 U.S. 457 (1982).

[1659] 458 U.S. 527 (1982).

[1660] 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.

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ordered remedy—mandatory busing—as inappropriate.[1661] Moreover, state school boards continued under an obligation to alleviate *de facto* segregation by every other feasible means.

The Court, however, subsequently declined to extend the reasoning of these cases to remedies for exclusively *de facto* racial segregation. In *Schuette v. BAMN*,[1662] the Court considered an amendment to the Michigan Constitution, approved by that state's voters, to prohibit the use of race-based preferences as part of the admissions process for state universities. In *Schuette*, a plurality of the Court characterized its prior holdings as applying only to those situations where states had both engaged in *de jure* discrimination and acted to limit the means available to remedy the injury caused.[1663] Finding no similar allegations of past discrimination in the Michigan university system, the Court declined to "restrict the right of Michigan voters to determine that race-based preferences granted by state entities should be ended."[1664] The Court also did not extend the reasoning, accepted in those prior cases, that imposing a procedural barrier to desegregation efforts had "the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest," noting that all members of a racial group do not necessarily share the same political interests.[1665]

Termination of Court Supervision.—With most school desegregation decrees having been entered decades ago, the issue arose as to what showing of compliance is necessary for a school district to free itself of continuing court supervision. The Court grappled with the issue, first in a case involving Oklahoma City public schools, then in a case involving the University of Mississippi college system. A desegregation decree may be lifted, the Court said in *Okla-*

[1661] Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 535–40 (1982).

[1662] 572 U.S. ___, No. 12–682, slip op. (2014).

[1663] The plurality opinion was written by Justice Kennedy, joined by Chief Justice Roberts and Justice Alito. Justice Scalia authored an opinion concurring in judgment, joined by Justice Thomas, which would have overturned *Seattle School Dist.* and the case on which it was based, *Hunter*. 572 U.S. ___, No. 12–682, slip op. at 7–8 (2014) (Scalia, J., concurring in judgment). Justice Breyer also wrote an opinion concurring in judgment, noting that the racial preference policy had been adopted by individual school administrations, not by elected officials, so that the ability of minorities to participate in the political process had not been diminished by resolving the issue thorugh public ballot. Id. at 5 (Breyer, J., concurring in judgment). Justice Sotomayor, joined by Justice Ginsburg, dissented, arguing that the plurality had "discarded" the "political process" doctrine, limiting it to instances of "invidious discrimination." Id. at 5, 22 (Sotomayor, J., dissenting). Justice Kagan recused herself.

[1664] 572 U.S. ___, No. 12–682, slip op. at 3–4.

[1665] 572 U.S. ___, No. 12–682, slip op. at 11.

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homa City Board of Education v. Dowell,[1666] 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." [1667] In *United States v. Fordice*,[1668] the Court determined that 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 also, to the extent practicable and consistent with sound educational practices, had to eradicate policies and practices that were traceable to the dual system and that continued to have segregative effects. The Court identified several surviving aspects of Mississippi's prior dual system that were constitutionally suspect and that had to 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, was suspect because it originated as a means of preserving segregation. Also suspect were the widespread duplication of programs, a possible remnant of the dual "separate-but-equal" system; institutional mission classifications that made three historically white schools the flagship "comprehensive" universities; and the retention and operation of all eight schools rather than the possible merger of some.

[1666] 498 U.S. 237 (1991).
[1667] 498 U.S. at 249–50.
[1668] 505 U.S. 717.

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Juries

It has been established since *Strauder v. West Virginia* [1669] that exclusion of an identifiable racial or ethnic group from a grand jury [1670] that indicts a defendant or a from petit jury [1671] that tries him, or from both,[1672] denies a defendant of the excluded race equal protection and necessitates reversal of his conviction or dismissal of his indictment.[1673] Even if the defendant's race differs from that of the excluded jurors, the Court held, the defendant has third-party standing to assert the rights of jurors excluded on the basis of race.[1674] "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." [1675] Thus, persons may bring actions seeking affirmative

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[1669] 100 U.S. 303 (1880). *Cf.* Virginia v. Rives, 100 U.S. 313 (1880). Discrimination on the basis of race, color, or previous condition of servitude in jury selection has also been statutorily illegal since enactment of § 4 of the Civil Rights Act of 1875, 18 Stat. 335, 18 U.S.C. § 243. *See Ex parte* Virginia, 100 U.S. 339 (1880). In Hernandez v. Texas, 347 U.S. 475 (1954), the Court found jury discrimination against Mexican-Americans to be a denial of equal protection, a ruling it reiterated in Castaneda v. Partida, 430 U.S. 482 (1977), finding proof of discrimination by statistical disparities, even though Mexican-surnamed individuals constituted a governing majority of the county and a majority of the selecting officials were Mexican-American.

[1670] 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).

[1671] Hollins v. Oklahoma, 295 U.S. 394 (1935); Avery v. Georgia, 345 U.S. 559 (1953).

[1672] 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).

[1673] 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).

[1674] Powers v. Ohio, 499 U.S. 400, 415 (1991). Campbell v. Louisiana, 523 U.S. 392 (1998) (grand jury). *See also* Peters v. Kiff, 407 U.S. 493 (1972) (defendant entitled to have his conviction or indictment set aside if he proves such exclusion). The Court in 1972 was substantially divided with respect to the reason for rejecting the "same class" rule—that the defendant be of the excluded class—but in Taylor v. Louisiana, 419 U.S. 522 (1975), involving a male defendant and exclusion of women, the Court ascribed the result to the fair-cross-section requirement of the Sixth Amendment, which would have application across-the-board.

[1675] Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 329 (1970).

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relief to outlaw discrimination in jury selection, instead of depending on defendants to raise the issue.[1676]

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[1677] or when it is shown that the number of African-Americans who served was grossly disproportionate to the percentage of African-Americans in the population and eligible for jury service.[1678] Once this *prima facie* showing has been made, the burden is upon the jurisdiction to prove that it had not practiced discrimination; it is not adequate that jury selection officials testify under oath that they did not discriminate.[1679] Although the Court in connection with a showing of great disparities in the racial makeup of jurors called has voided certain practices that made discrimination easy to accomplish,[1680] it has not outlawed discretionary selection pursuant to general standards of educational attainment and character that can be administered fairly.[1681] Similarly, it declined to rule that African-Americans must be included on all-white jury commissions that administer the jury selection laws in some states.[1682]

In *Swain v. Alabama*,[1683] 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 indicated that 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

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[1676] Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970).

[1677] Norris v. Alabama, 294 U.S. 587 (1935); Patton v. Mississippi, 332 U.S. 463 (1947); Hill v. Texas, 316 U.S. 400 (1942).

[1678] 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).

[1679] 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).

[1680] 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").

[1681] Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 331–37 (1970), and cases cited.

[1682] 396 U.S. at 340–41.

[1683] 380 U.S. 202 (1965).

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had ever served on a jury and that some exclusions were not the result of defense peremptory challenges, the 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."[1684] To rebut this showing, the prosecutor "must articulate a neutral explanation related to the particular case," but the explanation "need not rise to the level justifying exercise of a challenge for cause."[1685] In fact, "[a]lthough the prosecutor must present a comprehensible reason, '[t]he [rebuttal] does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[1686] Such a rebuttal having been offered, "the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but the 'ultimate burden of persuasion regarding racial motivation rests with, and never shifts from,

[1684] 476 U.S. 79, 96 (1986). Establishing a *prima facie* case can be done through a "wide variety of evidence, so long as the sum of proffered facts gives rise to an inference of discriminatory purpose." Id. at 93–94. A state, however, cannot require that a defendant prove a *prima facie* case under a "more likely than not" standard, as the function of the *Batson* test is to create an inference and shift the burden to the state to offer race-neutral reasons for the peremptory challenges. Only then does a court weigh the likelihood that racial discrimination occurred. Johnson v. California, 543 U.S. 499 (2005).

[1685] 476 U.S. at 98 (1986). The principles were applied in Trevino v. Texas, 503 U.S. 562 (1991), holding that a criminal defendant's allegation of a state's pattern of historical and habitual use of peremptory challenges to exclude members of racial minorities was sufficient to raise an equal protection claim under *Swain* as well as *Batson*. In Hernandez v. New York, 500 U.S. 352 (1991), a prosecutor was held to have sustained his burden of providing a race-neutral explanation for using peremptory challenges to strike bilingual Latino jurors; the prosecutor had explained that, based on the answers and demeanor of the prospective jurors, he had doubted whether they would accept the interpreter's official translation of trial testimony by Spanish-speaking witnesses. The *Batson* ruling applies to cases pending on direct review or not yet final when *Batson* was decided, Griffith v. Kentucky, 479 U.S. 314 (1987), but does not apply to a case on federal *habeas corpus* review, Allen v. Hardy, 478 U.S. 255 (1986).

[1686] Rice v. Collins, 546 U.S. 333, 338 (2006) (citation omitted). The holding of the case was that, in a habeas corpus action, the Ninth Circuit "panel majority improperly substituted its evaluation of the record for that of the state trial court." Id. at 337–38. Justice Breyer, joined by Justice Souter, concurred but suggested "that legal life without peremptories is no longer unthinkable" and "that we should reconsider *Batson's* test and the peremptory challenge system as a whole." Id. at 344.

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the opponent of the strike.'"[1687] "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous,"[1688] but, on more than one occasion, the Supreme Court has reversed trial courts' findings of no discriminatory intent.[1689] The Court has also extended *Batson* to apply to racially discriminatory use of peremptory challenges by private litigants in civil litigation,[1690] and by a defendant in a criminal case,[1691] 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, the answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus, the Court "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 pow-

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[1687] Rice v. Collins, 546 U.S. at 338 (citations omitted). "[O]nce it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. . . . [Nevertheless,] a peremptory strike shown to have been motivated in substantial part by a discriminatory intent could not be sustained based on any lesser showing by the prosecution." Snyder v. Louisiana, 128 S. Ct. 1203, 1212 (2008) (citation omitted).

To rule on a *Batson* objection based on a prospective juror's demeanor during *voir dire*, it is not necessary that the ruling judge have observed the juror personally. That a judge who observed a prospective juror should take those observations into account, among other things, does not mean that a demeanor-based explanation for a strike must be rejected if the judge did not observe or cannot recall the juror's demeanor. Thaler v. Haynes, 559 U.S. ___, No. 09–273, slip op. (2010).

[1688] Federal courts are especially deferential to state court decisions on discriminatory intent when conducting federal *habeas* review. Felkner v. Jackson, 562 U.S. ___, No. 10–797, slip op. at 4 (2011) (per curiam) (citation omitted)..

[1689] Snyder v. Louisiana, 128 S. Ct. 1203, 1207 (2008) (Supreme Court found prosecution's race-neutral explanation for its peremptory challenge of a black juror to be implausible, and found explanation's "implausibility . . . reinforced by prosecution's acceptance of white jurors" whom prosecution could have challenged for the same reason that it claimed to have challenged the black juror, id. at 1211). In Miller-El v. Dretke, 545 U.S. 231 (2005), the Court found discrimination in the use of peremptory strikes based on numerous factors, including the high ratio of minorities struck from the venire panel (of 20 blacks, nine were excused for cause and ten were peremptorily struck). Other factors the Court considered were the fact that the race-neutral reasons given for the peremptory strikes of black panelists "appeared equally on point as to some white jurors who served," id. at 241; the prosecution used "jury shuffling" (rearranging the order of panel members to be seated and questioned) twice when blacks were at the front of the line; the prosecutor asked different questions of black and white panel members; and there was evidence of a long-standing policy of excluding blacks from juries.

[1690] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[1691] Georgia v. McCollum, 505 U.S. 42 (1992).

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ers.[1692] That situation was distinguished, however, in a due process challenge to the federal system, where the foreman's responsibilities were "essentially clerical" and where the selection was from among the members of an already chosen jury.[1693]

Capital Punishment

In *McCleskey v. Kemp* [1694] the Court rejected an equal protection claim of a black defendant who received a death sentence following conviction for murder of a white victim, even though a statistical study showed that blacks charged with murdering whites were more than four times as likely to receive a death sentence in the state than were defendants charged with killing blacks. The Court distinguished *Batson v. Kentucky* by characterizing capital sentencing as "fundamentally different" from jury venire selection; consequently, reliance on statistical proof of discrimination is less rather than more appropriate.[1695] "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." [1696] 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.[1697]

[1692] Rose v. Mitchell, 443 U.S. 545, 551 n.4 (1979).

[1693] 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 black defendants from "the injuries of stigmatization and prejudice" associated with discrimination. Id. at 347.

[1694] 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.

[1695] 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.

[1696] 481 U.S. at 297. Discretion is especially important to the role of a capital sentencing jury, which must be allowed to consider any mitigating factor relating to the defendant's background or character, or to the nature of the offense; the Court also cited the "traditionally 'wide discretion'" accorded decisions of prosecutors. Id. at 296.

[1697] 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.

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Housing

Buchanan v. Warley[1698] invalidated an ordinance that prohibited blacks from occupying houses in blocks where the greater number of houses were occupied by whites and that 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.[1699] 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*,[1700] though on somewhat ambiguous grounds, whereas a state constitutional requirement that decisions of local authorities to build low-rent housing projects in an area must first be submitted to referendum, although other similar decisions were not so limited, was found not to violate the Equal Protection Clause.[1701] Private racial discrimination in the sale or rental of housing is subject to two federal laws prohibiting most such discrimination.[1702] Provision of publicly assisted housing, of course, must be on a nondiscriminatory basis.[1703]

Other Areas of Discrimination

Transportation.—The "separate but equal" doctrine won Supreme Court endorsement in the transportation context,[1704] and its passing in the education field did not long predate its demise in transportation as well.[1705] During the interval, the Court held invalid a state statute that permitted carriers to provide sleeping and dining cars for white persons only,[1706] held that a carrier's provision of unequal, or nonexistent, first class accommodations to African-

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[1698] 245 U.S. 60 (1917). *See also* Harmon v. Tyler, 273 U.S. 668 (1927); Richmond v. Deans, 281 U.S. 704 (1930).

[1699] 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).

[1700] 387 U.S. 369 (1967).

[1701] 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.

[1702] 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 (the Fair Housing Act), 82 Stat. 73, 42 U.S.C. §§ 3601 *et seq*.

[1703] *See* Hills v. Gautreaux, 425 U.S. 284 (1976).

[1704] Plessy v. Ferguson, 163 U.S. 537 (1896).

[1705] 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).

[1706] McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914).

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Americans violated the Interstate Commerce Act,[1707] and voided both state-required and privately imposed segregation of the races on interstate carriers as burdens on commerce.[1708] *Boynton v. Virginia* [1709] voided a trespass conviction of an interstate African-American bus passenger who had refused to leave a restaurant that 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.[1710] A municipality could not operate a racially segregated park pursuant to a will that left the property for that purpose and that specified that only whites could use the park,[1711] 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.[1712] 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.[1713]

[1707] Mitchell v. United States, 313 U.S. 80 (1941).

[1708] Morgan v. Virginia, 328 U.S. 373 (1946); Henderson v. United States, 339 U.S. 816 (1950).

[1709] 364 U.S. 454 (1960).

[1710] *E.g.*, Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (city lease of park facilities); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (statute requiring segregated athletic contests); Turner v. City of Memphis, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); Schiro v. Bynum, 375 U.S. 395 (1964) (ordinance requiring segregation in municipal auditorium).

[1711] 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.

[1712] 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.

[1713] Palmer v. Thompson, 403 U.S. 217 (1971). The Court found that there was no official encouragement of discrimination through the act of closing the pools and that inasmuch as both white and black citizens were deprived of the use of the pools there was no unlawful discrimination. Justices White, Brennan, and Marshall dissented, arguing that state action taken solely in opposition to desegregation was impermissible, both in defiance of the lower court order and because it penalized African-Americans for asserting their rights. Id. at 240. Justice Douglas also dissented. Id. at 231.

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Marriage.—Statutes that forbid the contracting of marriage between persons of different races are unconstitutional,[1714] as are statutes that penalize interracial cohabitation.[1715] Nor may a court 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.[1716]

Judicial System.—Segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience[1717] or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible.[1718] 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.[1719]

Public Designation.—It is unconstitutional to designate candidates on the ballot by race[1720] and apparently any sort of designation by race on public records is suspect, although not necessarily unlawful.[1721]

Public Accommodations.—Whether 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 1960s, but it avoided finally deciding one way or the other, generally finding forbidden state action in some aspect of the situation.[1722] Passage of the Civil Rights Act of 1964 obviated any necessity to resolve the issue.[1723]

Elections .—Although, of course, the denial of the franchise on the basis of race or color violates the Fifteenth Amendment and a

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[1714] Loving v. Virginia, 388 U.S. 1 (1967).

[1715] McLaughlin v. Florida, 379 U.S. 184 (1964).

[1716] Palmore v. Sidoti, 466 U.S. 429 (1984).

[1717] Johnson v. Virginia, 373 U.S. 61 (1963).

[1718] 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).

[1719] 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).

[1720] Anderson v. Martin, 375 U.S. 399 (1964).

[1721] 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).

[1722] *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).

[1723] 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).

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series of implementing statutes enacted by Congress,[1724] 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.[1725] 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.[1726]

"Affirmative Action": Remedial Use 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 when formulating and implementing a remedy to overcome the effects of past discrimination. Often the issue is framed in terms of "reverse discrimination," in that the governmental action deliberately favors members of one class and consequently may adversely affect nonmembers of that class.[1727] Although the Court had previously accepted the use of suspect criteria such as race to formulate remedies for specific instances of past discrimination [1728] and had allowed preferences for members of certain non-suspect classes that had been the object of societal discrimination,[1729] it was not until the late 1970s that the Court gave ple-

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[1724] *See* "Federal Remedial Legislation," *infra*.

[1725] *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).

[1726] *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).

[1727] 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).

[1728] *E.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22–25 (1971).

[1729] 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.

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nary review to programs that expressly used race as the primary consideration for awarding a public benefit.[1730]

In *United Jewish Organizations v. Carey*,[1731] New York State had drawn a plan that consciously used racial criteria to create districts with nonwhite populations in order to comply with the Voting Rights Act and to obtain the United States Attorney General's approval for a redistricting law. These districts were drawn large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhites. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts, and members of that community sued, alleging that the value of their votes had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the districting, although the fragmented majority of seven concurred in no majority opinion.

Justice White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took place pursuant to the administration of the Voting Rights Act, Justice White 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. Justice White noted 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.[1732]

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

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[1730] 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 Court did not reach the merits.

[1731] 430 U.S. 144 (1977). Chief Justice Burger dissented, id. at 180, and Justice Marshall did not participate.

[1732] 430 U.S. at 155–65. Joining this part of the opinion were Justices Brennan, Blackmun, and Stevens.

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be represented in the legislature in accordance with their proportion of the population in the jurisdiction.[1733]

It was anticipated that *Regents of the University of California v. Bakke*[1734] would shed further light on the constitutionality of affirmative action. Instead, the Court again fragmented. In *Bakke*, the Davis campus medical school admitted 100 students each year. Of these slots, 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 the 16 positions not 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.[1735]

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, however, 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 a remedial racial classification that stigmatized a group, that singled out those least well represented in the political process to

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[1733] 430 U.S. at 165–68. Joining this part of the opinion were Justices Stevens and Rehnquist. In a separate opinion, Justice Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimulate society's latent race consciousness; (3) they may stigmatize recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many as unjust. The presence of the Voting Rights Act and the Attorney General's supervision made the difference to him in this case. Id. at 168. Justices Stewart and Powell concurred, agreeing with Justice White that there was no showing of a purpose on the legislature's part to discriminate against white voters and that the effect of the plan was insufficient to invalidate it. Id. at 179.

[1734] 438 U.S. 265 (1978).

[1735] Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964, which bars discrimination on the ground of race, color, or national origin by any recipient of federal financial assistance, outlawed the college's program and made unnecessary any consideration of the Constitution. *See* 78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d–7. These Justices would have admitted Bakke and barred the use of race in admissions. 438 U.S. at 408–21 (Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger). 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. 438 U.S. at 284–87 (Justice Powell), 328–55 (Justices Brennan, White, Marshall, and Blackmun). They thus reached the constitutional issue.

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bear the brunt of the program, or that was not justified by an important and articulated purpose.[1736]

Justice Powell, however, argued that all racial classifications are suspect and require strict scrutiny. Because 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.[1737] Justice Powell thus agreed that Bakke should be admitted, but he joined the four justices who sought to allow the college to consider race to some degree in its admissions.[1738]

The Court then began a circuitous route toward disfavoring affirmative action, at least when it occurs outside the education context. At first, the Court seemed inclined to extend the result in *Bakke*. In *Fullilove v. Klutznick*,[1739] the Court, still lacking a majority opinion, upheld a federal statute requiring that at least ten percent of public works funds be set aside for minority business enterprises. A series of opinions by six Justices 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. Chief Judge Burger issued the judgment, which emphasized Congress's preeminent role under the Commerce Clause and the Fourteenth Amendment to determine the existence of past discrimination and its continuing effects and to implement remedies that were race conscious in order to cure those effects. The principal concurring opinion by Justice Marshall applied the Brennan analysis in *Bakke*, using middle-tier scrutiny to hold that the race conscious set-aside was "substan-

[1736] 438 U.S. at 355–79 (Justices Brennan, White, Marshall, and Blackmun). The intermediate standard of review adopted by the four Justices is that formulated for gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" Id. at 359.

[1737] 438 U.S. at 287–320.

[1738] *See* 438 U.S. at 319–20 (Justice Powell).

[1739] 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.

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tially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination." [1740]

Taken together, the opinions established that, although Congress had the power to make the findings that will establish the necessity to use racial classifications in an affirmative way, these findings need not be extensive nor express and may be collected in many ways.[1741] Moreover, although the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to attach no constitutional significance to these limitations, thus leaving open the way for programs of a scope sufficient to remedy all the identified effects of past discrimination.[1742] But the most important part of these opinions rested in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. The Court rejected arguments that minority beneficiaries of such programs are stigmatized, that burdens are placed on innocent third parties, and that the program is overinclusive, so as to benefit some minority members who had suffered no discrimination.[1743]

Despite these developments, the Court remained divided in its response to constitutional challenges to affirmative action plans.[1744] As a general matter, authority to apply racial classifications was found to be at its greatest when Congress was acting pursuant to section 5 of the Fourteenth Amendment or other of its remedial powers, or when a court is acting to remedy proven discrimination. But

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[1740] 448 U.S. at 517.

[1741] 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. 448 U.S. at 473–80. The program was an exercise of Congress's spending power, but the constitutional objections raised had not been previously resolved in that context. The plurality therefore turned to Congress's regulatory powers, which in this case undergirded the spending power, and found the power to lie in the Commerce Clause with respect to private contractors and in section 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.

[1742] 448 U.S. at 484–85, 489 (Chief Justice Burger), 513–15 (Justice Powell).

[1743] 448 U.S. at 484–89 (Chief Justice Burger), 514–515 (Justice Powell), 520–521 (Justice Marshall).

[1744] 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 in original). The constitutionality of the agency's plan was not challenged. *See* id. at 620 n.2.

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a countervailing consideration was the impact of such discrimination on disadvantaged non-minorities. Two cases illustrate the latter point. In *Wygant v. Jackson Board of Education*,[1745] the Court invalidated a provision of a collective bargaining agreement giving minority teachers a preferential protection from layoffs. In *United States v. Paradise*,[1746] 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.[1747] 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*, because the promotion quota would merely delay promotions of those affected, rather than cause the loss of their jobs.[1748]

A clear distinction was then drawn between federal and state power to apply racial classifications. In *City of Richmond v. J.A. Croson Co.*,[1749] 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*[1750] 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

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[1745] 476 U.S. 267 (1986).

[1746] 480 U.S. 149 (1987).

[1747] 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).

[1748] 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).

[1749] 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.

[1750] 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.

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measures" that are "substantially related" to the achievement of an "important" governmental objective of broadcast diversity.[1751]

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." [1752] The overinclusive definition of minorities, including U.S. citizens who are "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts," also "impugn[ed] the city's claim of remedial motivation," there having been "no evidence" of any past discrimination against non-blacks in the Richmond construction industry.[1753] 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.[1754]

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." [1755]

Metro Broadcasting was 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 spend-

[1751] 497 U.S. at 564–65.
[1752] 488 U.S. at 501–02.
[1753] 488 U.S. at 506.
[1754] 488 U.S. at 508.
[1755] 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).

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ing powers.[1756] This meant that the governmental interest furthered by a race-conscious policy need not be remedial, but could be a less focused interest such as broadcast diversity. Secondly, as noted above, the Court eschewed strict scrutiny analysis: the governmental interest need only be "important" rather than "compelling," and the means adopted need only be "substantially related" rather than "narrowly tailored" to furthering the interest.

The distinction between federal and state power to apply racial classifications, however, proved ephemeral. The Court ruled in *Adarand Constructors, Inc. v. Pena* [1757] that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled *Metro Broadcasting* and, to the extent that it applied a review standard less stringent than strict scrutiny, *Fullilove v. Klutznick*. Strict scrutiny is to be applied regardless of the race of those burdened or benefitted by the particular classification; there is no intermediate standard applicable to "benign" racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore, that classifications based on the group characteristic of race "should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection . . . has not been infringed." [1758]

By applying strict scrutiny, the Court was in essence affirming Justice Powell's individual opinion in *Bakke*, which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether Justice Powell's suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the Court essentially reaffirmed Justice Powell's line of reasoning in the cases of *Grutter v. Bollinger*,[1759] and *Gratz v. Bollinger*.[1760]

In *Grutter*, the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in their file (*e.g.*, grade point average, Law School Admissions

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[1756] 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).

[1757] 515 U.S. 200 (1995). This was a 5–4 decision. Justice O'Connor's opinion for Court was joined by Chief Justice Rehnquist, and by Justices Kennedy, Thomas, and—to the extent not inconsistent with his own concurring opinion—Scalia. Justices Stevens, Souter, Ginsburg and Breyer dissented.

[1758] 515 U.S. at 227 (emphasis original).

[1759] 539 U.S. 306 (2003).

[1760] 539 U.S. 244 (2003).

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Test score, personal statement, recommendations) and on "soft" variables (*e.g.*, strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . ." Although, the policy did not limit the seeking of diversity to "ethnic and racial" classifications, it did seek a "critical mass" of minorities so that those students would not feel isolated.[1761]

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who might have otherwise not been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry." [1762] As the university did not rely on quotas, but rather relied on "flexible assessments" of a student's record, the Court found that the university's policy was "narrowly tailored" to achieve the substantial governmental interest of achieving a diverse student body.[1763]

The law school's admission policy in *Grutter*, however, can be contrasted with the university's undergraduate admission policy. In *Gratz*, the Court evaluated the undergraduate program's "selection index," which assigned applicants up to 150 points based on a variety of factors similar to those considered by the law school. Applicants with scores over 100 were generally admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was that an applicant would be entitled to 20 points based solely upon his or her membership in an underrepresented racial or ethnic minority group. The policy also included the "flag-

[1761] 539 U.S. at 316.

[1762] 539 U.S. at 330, 332.

[1763] 539 U.S. at 315. While an educational institution will receive deference in its judgment as to whether diversity is essential to its education mission, the courts must closely scrutinize the means by which this goal is achieved. Thus, the institution will receive no deference regarding the question of the necessity of the means chosen, and will bear the burden of demonstrating that "each applicant is evaluated as an individual and not in a way that an applicant's race or ethnicity is the defining feature of his or her application." Fisher v. University of Texas at Austin, 570 U.S. ___, No. 11–345, slip op. at 10 (2013) (citation omitted).

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ging" of certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[1764]

The Court in *Gratz* struck down this admissions policy, relying again on Justice Powell's decision in *Bakke*. Although Justice Powell had thought it permissible that "race or ethnic background . . . be deemed a 'plus' in a particular applicant's file,"[1765] the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz*, the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing 20 points to every applicant from an "underrepresented minority" group, the policy effectively admitted every qualified minority applicant. Although it acknowledged that the volume of applications could make individualized assessments an "administrative challenge," the Court found that the policy was not narrowly tailored to achieve respondents' asserted compelling interest in diversity.[1766]

While institutions of higher education were striving to increase racial diversity in their student populations, state and local governments were engaged in a similar effort with respect to elementary and secondary schools. Whether this goal could be constitutionally achieved after *Grutter* and *Gratz*, however, remained unclear, especially as the type of individualized admission considerations found in higher education are less likely to have useful analogies in the context of public school assignments. Thus, for instance, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[1767] the Court rejected plans in both Seattle, Washington and Jefferson County, Kentucky, that, in order reduce what the Court found to be *de facto* racial imbalance in the schools, used "racial tiebreakers" to determine school assignments.[1768] As in *Bakke*, numerous opinions by a fractured Court led to an uncertain resolution of the issue.

[1764] 539 U.S. at 272–73.

[1765] 438 U.S. at 317.

[1766] 438 U.S. at 284–85.

[1767] 551 U.S. 701 (2007). Another case involving racial diversity in public schools, *Meredith v. Jefferson County Board of Education*, was argued separately before the Court on the same day, but the two cases were subsequently consolidated and both were addressed in the cited opinion.

[1768] In Seattle, students could choose among 10 high schools in the school district, but, if an oversubscribed school was not within 10 percentage points of the district's overall white/nonwhite racial balance, the district would assign students whose race would serve to bring the school closer to the desired racial balance. 127 S. Ct. at 2747. In Jefferson County, assignments and transfers were limited when such action would cause a school's black enrollment to fall below 15 percent or exceed 50 percent. Id. at 2749.

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In an opinion by Chief Justice Roberts, a majority of the Court in *Parents Involved in Community Schools* agreed that the plans before the Court did not include the kind of individualized considerations that had been at issue in the university admissions process in *Grutter*, but rather focused primarily on racial considerations.[1769] Although a majority of the Court found the plans unconstitutional, only four Justices (including the Chief Justice) concluded that alleviating *de facto* racial imbalance in elementary and secondary schools could never be a compelling governmental interest. Justice Kennedy, while finding that the school plans at issue were unconstitutional because they were not narrowly tailored,[1770] suggested in a separate concurrence that relieving "racial isolation" could be a compelling governmental interest. The Justice even envisioned the use of plans based on individual racial classifications "as a last resort" if other means failed.[1771] As Justice Kennedy's concurrence appears to represent a narrower basis for the judgment of the Court than does Justice Roberts' opinion, it appears to be, for the moment, the controlling opinion for the lower courts.[1772]

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

[1769] 127 S. Ct. at 2753–54. The Court also noted that, in *Grutter*, the Court had relied upon "considerations unique to institutions of higher education." Id. at 2574 (finding that, as stated in *Grutter*, 539 U.S. at 329, because of the "expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition").

[1770] In his analysis of whether the plans were narrowly tailored to the governmental interest in question, Justice Kennedy focused on a lack of clarity in the administration and application of Kentucky's plan and the use of the "crude racial categories" of "white" and "non-white" (which failed to distinguish among racial minorities) in the Seattle plan. 127 S. Ct. at 2790–91.

[1771] 127 S. Ct. at 2760–61. Some other means suggested by Justice Kennedy (which by implication could be constitutionally used to address racial imbalance in schools) included strategic site selection for new schools, the redrawing of attendance zones, the allocation of resources for special programs, the targeted recruiting of students and faculty, and the tracking of enrollments, performance, and other statistics by race.

[1772] Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .'").

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laws of the State in which they reside."[1773] Thus, one of the earliest equal protection decisions struck down the administration of a facially lawful licensing ordinance that was being applied to discriminate against Chinese.[1774] In many subsequent cases, however, the Court recognized a permissible state interest in distinguishing between its citizens and aliens by restricting enjoyment of resources and public employment to its own citizens.[1775] But, in *Hirabayashi v. United States*,[1776] the Court announced that "[d]istinctions between citizens solely because of their ancestry" were "odious to a free people whose institutions are founded upon the doctrine of equality." And, in *Korematsu v. United States*,[1777] 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 that appeared to call into question the rationale of the "particular interest" doctrine under which earlier discrimination had been justified. In the 1948 decision, the Court held void a statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship," which in effect meant resident alien Japanese.[1778]

[1773] 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 that would fail if attempted by the states have been sustained because Congress has made them. Id. at 78–84; Fiallo v. Bell, 430 U.S. 787 (1977). Additionally, state discrimination against aliens may fail because it imposes burdens not permitted or contemplated by Congress in its regulations of admission and conditions of admission. Hines v. Davidowitz, 312 U.S. 52 (1941); Toll v. Moreno, 458 U.S. 1 (1982). Such state discrimination may also violate treaty obligations and be void under the Supremacy Clause, Askura v. City of Seattle, 265 U.S. 332 (1924), and some federal civil rights statutes, such as 42 U.S.C. § 1981, protect resident aliens as well as citizens. Graham v. Richardson, 403 U.S. at 376–80.

[1774] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[1775] 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).

[1776] 320 U.S. 81, 100 (1943).

[1777] 323 U.S. 214, 216 (1944).

[1778] Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

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"The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws." Justice Black said for the Court that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[1779]

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.[1780] 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*,[1781] 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,[1782] 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."[1783] 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 classification the state must employ means that are precisely drawn in light of the valid purpose.[1784]

[1779] 334 U.S. at 420. The decision was preceded by Oyama v. California, 332 U.S. 633 (1948), which was also susceptible of being read as questioning the premise of the earlier cases.

[1780] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[1781] 413 U.S. 634 (1973).

[1782] 413 U.S. at 647–49. *See also* Foley v. Connelie, 435 U.S. 291, 296 (1978). Aliens can be excluded from voting, Skatfe v. Rorex, 553 P.2d 830 (Colo. 1976), appeal dismissed for lack of substantial federal question, 430 U.S. 961 (1977), and can be excluded from service on juries. Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974) (3-judge court), aff'd, 426 U.S. 913 (1976).

[1783] 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.

[1784] Justice Rehnquist dissented. 413 U.S. at 649. In the course of the opinion, the Court held inapplicable the doctrine of "special public interest," the idea that a State's concern with the restriction of the resources of the State to the advancement and profit of its citizens is a valid basis for discrimination against out-of-state citi-

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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.[1785] 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.[1786]

In *Nyquist v. Mauclet*,[1787] the Court seemed to expand the doctrine. The statute that was challenged 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, because 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." [1788] Two proffered justifications were held insufficient to meet the high burden imposed by the strict scrutiny doctrine.

In the following Term, however, 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,

zens 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).

[1785] *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*).

[1786] Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976). Because 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, as the same result would be achieved in either case. The quoted expression is from Truax v. Raich, 239 U.S. 33, 41 (1915).

[1787] 432 U.S. 1 (1977).

[1788] 432 U.S. at 9. Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented. Id. at 12, 15, 17. Justice Rehnquist's dissent argued that the nature of the disqualification precluded it from being considered suspect.

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and thus deprecate the historic values of citizenship.'"[1789] 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.'"[1790] Discrimination by a state against aliens is not subject to strict scrutiny, but need meet only the rational basis test. It is therefore permissible to reserve to citizens offices having the "most important policy responsibilities," a principle drawn from *Sugarman*, but the critical factor in this case is its 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.' . . . "[1791]

Continuing to enlarge the exception, the Court in *Ambach v. Norwick*[1792] upheld a bar to qualifying as a public school teacher for resident aliens who have not manifested an intention to apply for citizenship. The "governmental function" test took on added significance, the Court saying that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is funda-

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[1789] 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.

[1790] 435 U.S. at 295–96. Formally following Sugarman v. Dougall, *supra*, the opinion considerably enlarged the exception noted in that case; *see also* Nyquist v. Mauclet, 432 U.S. 1, 11 (1977) (emphasizing the "narrowness of the exception"). Concurring in *Foley*, 435 U.S. at 300, Justice Stewart observed that "it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case." On the other hand, Justice Blackmun, who had written several of the past decisions, including *Mauclet*, concurred also, finding the case consistent. Id.

[1791] 35 U.S. at 296, 297, 298. 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.

[1792] 411 U.S. 68 (1979). The opinion, by Justice Powell, was joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. The disqualification standard was of course, that held invalid as a disqualification for receipt of educational assistance in Nyquist v. Mauclet, 432 U.S. 1 (1977).

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mental to the definition and government of a State."[1793] Thus, "governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens."[1794] 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."[1795] 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*,[1796] the Court, by a 5-to-4 vote, 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."[1797] 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."[1798]

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 generally and to eligibility for public benefits, its classifications with an adverse impact on aliens will be strictly scrutinized and usually fail. Third, when government acts in its sovereign capacity—when it acts within its constitutional prerogatives and responsibilities to establish and operate its own government—its decisions with respect to the citizenship qualifications of an appropriately designated class of public office holders will be subject only to traditional rational basis

[1793] Ambach v. Norwick, 441 U.S. 68, 75 (1979).
[1794] 441 U.S. at 75.
[1795] 441 U.S. at 75–80. The quotation, id. at 76, is from Sugarman v. Dougall, 413 U.S. 634, 647 (1973).
[1796] 454 U.S. 432 (1982).
[1797] 454 U.S. at 442.
[1798] 454 U.S. at 445.

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scrutiny.[1799] However, the "political function" standard is elastic, and so long as disqualifications are attached to specific occupations [1800] 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.[1801] Because it was clear that the undocumented status of the children was relevant to valid government goals, and because the Court had previously held that access to education was not a "fundamental interest" that triggered strict scrutiny of governmental distinctions relating to education,[1802] 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 children would stamp them with an "enduring disability" that would harm both them and the state all their lives.[1803] The Court evaluated each of the state's attempted justifications and found none of them satisfying the level of review demanded.[1804] It seems evident that *Plyler v. Doe* is a unique case

[1799] 454 U.S. at 438–39.

[1800] 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.

[1801] 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.

[1802] 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.

[1803] 457 U.S. at 223–24.

[1804] Rejected state interests included preserving limited resources for its lawful residents, deterring an influx of illegal aliens, avoiding the special burden caused by these children, and serving children who were more likely to remain in the state and contribute to its welfare. 457 U.S. at 227–30.

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and that, whatever it may stand for doctrinally, a sufficiently similar factual situation calling for application of its standards is unlikely to arise.

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 that 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."[1805] On the same premise, a statute restricting the franchise to men was sustained.[1806]

The greater number of cases have involved legislation aimed to protect women from oppressive working conditions, as by prescribing maximum hours[1807] or minimum wages[1808] or by restricting some of the things women could be required to do.[1809] A 1961 decision upheld a state law that required jury service of men but that gave women the option of serving or not. "We cannot say that it is constitutionally impermissible for a State acting in pursuit of the gen-

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[1805] 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).

[1806] Minor v. Happersett, 88 U.S. (21 Wall) 162 (1875) (privileges and immunities).

[1807] Muller v. Oregon, 208 U.S. 412 (1908); Dominion Hotel v. Arizona, 249 U.S. 265 (1919).

[1808] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[1809] *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.

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eral 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."[1810] 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.[1811] In a highly controversial ruling, the Court sustained a state law that 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.[1812]

A wide variety of sex discrimination by governmental and private parties, including sex discrimination in employment and even the protective labor legislation previously sustained, is now proscribed by federal law. In addition, federal law requires equal pay for equal work.[1813] Some states have followed suit.[1814] While the proposed Equal Rights Amendment was before the states and ultimately failed to be ratified,[1815] 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 tenden-

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[1810] Hoyt v. Florida, 368 U.S. 57, 62 (1961).

[1811] Cronin v. Adams, 192 U.S. 108 (1904).

[1812] Goesaert v. Cleary, 335 U.S. 464 (1948).

[1813] 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).

[1814] *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).

[1815] On the Equal Rights Amendment, *see* discussion of "Ratification," *supra*.

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cies among the Justices both to lessen and to increase the burden of governmental justification of sex classifications.

In *Reed v. Reed*,[1816] the Court held invalid a state probate law that 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.[1817]

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." [1818] Thus, after several years in which sex distinctions were more often voided than sustained without a clear statement of the standard of review,[1819] a majority of the Court has ar-

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[1816] 404 U.S. 71 (1971).

[1817] 404 U.S. at 75–77. *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972). A statute similar to that in *Reed* was before the Court in Kirchberg v. Feenstra, 450 U.S. 455 (1981) (invalidating statute giving husband unilateral right to dispose of jointly owned community property without wife's consent).

[1818] Craig v. Boren, 429 U.S. 190, 197 (1976); Califano v. Goldfarb, 430 U.S. 199, 210–11 (1977) (plurality opinion); Califano v. Webster, 430 U.S. 313, 316–317 (1977); Orr v. Orr, 440 U.S. 268, 279 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979); Califano v. Westcott, 443 U.S. 76, 85 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982). *But see* Michael M. v. Superior Court, 450 U.S. 464, 468–69 (1981) (plurality opinion); id. at 483 (Justice Blackmun concurring); Rostker v. Goldberg, 453 U.S. 57, 69–72 (1981). The test is the same whether women or men are disadvantaged by the classification, Orr v. Orr, 440 U.S. at 279; Caban v. Mohammed, 441 U.S. at 394; Mississippi Univ. for Women v. Hogan, 458 U.S. at 724, although Justice Rehnquist and Chief Justice Burger strongly argued that when males are disadvantaged only the rational basis test is appropriate. Craig v. Boren, 429 U.S. at 217, 218–21; Califano v. Goldfarb, 430 U.S. at 224. That adoption of a standard has not eliminated difficulty in deciding such cases should be evident by perusal of the cases following.

[1819] 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

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rived at the intermediate standard that many had thought it was applying in any event.[1820] 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.[1821]

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.[1822] Similarly, a state jury system that in effect excluded almost all women was deemed

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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.

[1820] Although their concurrences in Craig v. Boren, 429 U.S. 190, 210, 211 (1976), indicate some reticence about express reliance on intermediate scrutiny, Justices Powell and Stevens have since joined or written opinions stating the test and applying it. *E.g.*, Caban v. Mohammed, 441 U.S. 380, 388 (1979) (Justice Powell writing the opinion of the Court); Parham v. Hughes, 441 U.S. 347, 359 (1979) (Justice Powell concurring); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (Justice Stevens concurring); Caban v. Mohammed, 441 U.S. at 401 (Justice Stevens dissenting). Chief Justice Burger and Justice Rehnquist have not clearly stated a test, although their deference to legislative judgment approaches the traditional scrutiny test. *But see* Califano v. Westcott, 443 U.S. at 93 (joining Court on substantive decision). *And cf.* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 734–35 (1982) (Justice Blackmun dissenting).

[1821] The test is thus the same as is applied to illegitimacy classifications, although with apparently more rigor when sex is involved.

[1822] Stanton v. Stanton, 421 U.S. 7 (1975). *See also* Stanton v. Stanton, 429 U.S. 501 (1977). Assumptions about the traditional roles of the sexes afford no basis for support of classifications under the intermediate scrutiny standard. *E.g.*, Orr v. Orr, 440 U.S. 268, 279–80 (1979); Parham v. Hughes, 441 U.S. 347, 355 (1979); Kirchberg v. Feenstra, 450 U.S. 455 (1981). Justice Stevens in particular has been concerned whether legislative classifications by sex simply reflect traditional ways of thinking or are the result of a reasoned attempt to reach some neutral goal, *e.g.*, Califano v. Goldfarb, 430 U.S. 199, 222–23 (1978) (concurring), and he will sustain some otherwise impermissible distinctions if he finds the legislative reasoning to approximate the latter approach. Caban v. Mohammed, 441 U.S. 380, 401 (1979) (dissenting).

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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.[1823]

Even when the negative "stereotype" that is evoked is that of a stereotypical male, the Court has evaluated this as potential gender discrimination. In *J. E. B. v. Alabama ex rel. T. B.*,[1824] the Court addressed a paternity suit where men had been intentionally excluded from a jury through peremptory strikes. The Court rejected as unfounded the argument that men, as a class, would be more sympathetic to the defendant, the putative father. The Court also determined that gender-based exclusion of jurors would undermine the litigants' interest by tainting the proceedings, and in addition would harm the wrongfully excluded juror.

Assumptions about the relative positions of the sexes, however, are not without some basis in fact, and sex may sometimes be a reliable proxy for the characteristic, such as need, with which it is the legislature's actual intention to deal. But heightened scrutiny requires evidence of the existence of the distinguishing fact and its close correspondence with the condition for which sex stands as proxy. Thus, in the case that 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.[1825] 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.[1826]

Invalidating an Alabama law imposing alimony obligations upon males but not upon females, the Court in *Orr v. Orr* acknowledged that assisting needy spouses was a legitimate and important governmental objective. Ordinarily, therefore, the Court would have considered whether sex was a sufficiently accurate proxy for dependency, and, if it found that it was, then it would have concluded

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[1823] 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.

[1824] 511 U.S. 127 (1994).

[1825] Craig v. Boren, 429 U.S. 190 (1976).

[1826] 429 U.S. at 198, 199–200, 201–04.

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that the classification based on sex had "a fair and substantial relation to the object of the legislation."[1827] However, the Court observed that the state already conducted individualized hearings with respect to the need of the wife, so that with little if any additional burden needy males could be identified and helped. The use of the sex standard as a proxy, therefore, was not justified because it needlessly burdened needy men and advantaged financially secure women whose husbands were in need.[1828]

Various forms of discrimination between unwed mothers and unwed fathers received different treatments based on the Court's perception of the justifications and presumptions underlying each. A New York law permitted the unwed mother but not the unwed father of an illegitimate child to block his adoption by withholding consent. Acting in the instance of one who acknowledged his parenthood and who had maintained a close relationship with his child over the years, the Court could discern no substantial relationship between the classification and some important state interest. Promotion of adoption of illegitimates and their consequent legitimation was important, but the assumption that all unwed fathers either stood in a different relationship to their children than did the unwed mother or that the difficulty of finding the fathers would unreasonably burden the adoption process was overbroad, as the facts of the case revealed. No barrier existed to the state dispensing with consent when the father or his location is unknown, but disqualification of all unwed fathers may not be used as a shorthand for that step.[1829]

On the other hand, the Court sustained a Georgia statute that permitted the mother of an illegitimate child to sue for the wrong-

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[1827] 440 U.S. 268, 281 (1979).

[1828] 440 U.S. at 281–83. An administrative convenience justification was not available, therefore. Id. at 281 & n.12. Although such an argument has been accepted as a sufficient justification in at least some illegitimacy cases, Mathews v. Lucas, 427 U.S. 495, 509 (1976), it has neither wholly been ruled out nor accepted in sex cases. In *Lucas*, 427 U.S. at 509–10, the Court interpreted Frontiero v. Richardson, 411 U.S. 677 (1973), as having required a showing at least that for every dollar lost to a recipient not meeting the general purpose qualification a dollar is saved in administrative expense. In Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 152 (1980), the Court said that "[i]t may be that there are levels of administrative 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).

[1829] 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).

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ful death of the child but that allowed the father to sue only if he had legitimated the child and there is no mother.[1830] Similarly, the Court let stand, under the Fifth Amendment, a federal statute that required that, in order for an illegitimate child born overseas to gain citizenship, a citizen father, unlike a citizen mother, must acknowledge or legitimate the child before the child's 18th birthday.[1831] The Court emphasized the ready availability of proof of a child's maternity as opposed to paternity, but the dissent questioned whether such a distinction was truly justified under strict scrutiny considering the ability of modern techniques of DNA paternity testing to settle concerns about legitimacy.

As in the instance of illegitimacy classifications, the issue of sex qualifications for the receipt of governmental financial benefits has divided the Court and occasioned close distinctions. A statutory scheme under which a serviceman could claim his spouse as a "dependent" for allowances while a servicewoman's spouse was not considered a "dependent" unless he was shown in fact to be dependent upon her for more than one half of his support was held an invalid dissimilar treatment of similarly situated men and women, not justified by the administrative convenience rationale.[1832] In *Weinberger v. Wiesenfeld*,[1833] 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 rest-

[1830] Parham v. Hughes, 441 U.S. 347, 361 (1979). There was no opinion of the Court, but both opinions making up the result emphasized that the objective of the state—to avoid difficulties in proving paternity—was an important one and was advanced by the classification. The plurality opinion determined that the statute did not invidiously discriminate against men as a class; it was no overbroad generalization but proceeded from the fact that only men could legitimate children by unilateral action. The sexes were not similarly situated, therefore, and the classification recognized that. As a result, all that was required was that the means be a rational way of dealing with the problem of proving paternity. Id. at 353–58. Justice Powell found the statute valid because the sex-based classification was substantially related to the objective of avoiding problems of proof in proving paternity. He also emphasized that the father had it within his power to remove the bar by legitimating the child. Id. at 359. Justices White, Brennan, Marshall, and Blackmun, who had been in the majority in *Caban*, dissented.

[1831] Nguyen v. INS, 533 U.S. 53 (2001). *See also* Miller v. Albright, 523 U.S. 420 (1998) (opinion by Justice Stevens, joined by Justice Rehnquist) (equal protection not violated where paternity of a child of a citizen mother is established at birth, but child of citizen father must establish paternity by age 18).

[1832] Frontiero v. Richardson, 411 U.S. 677 (1973).

[1833] 420 U.S. 636 (1975).

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ing upon the generalization that a woman would stay home and take care of the children while a man would not. Because 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*,[1834] 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 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 that 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.[1835] 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

[1834] 430 U.S. 199 (1977). The dissent argued that whatever the classification used, 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.

[1835] 430 U.S. at 204–09, 212–17 (Justices Brennan, White, Marshall, and Powell). Congress responded by eliminating the dependency requirement but by adding a pension offset provision reducing spousal benefits by the amount of various other pensions received. Continuation in this context of the *Goldfarb* gender-based dependency classification for a five-year "grace period" was upheld in Heckler v. Mathews, 465 U.S. 728 (1984), as directly and substantially related to the important governmental interest in protecting against the effects of the pension offset the retirement plans of individuals who had based their plans on unreduced pre-*Goldfarb* payment levels.

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against female spouses could justify use of a sex classification, neither purpose was served by the sex classification actually used in this statute.[1836]

Again, the Court divided closely when it *sustained* two instances of classifications claimed to constitute sex discrimination. In *Rostker v. Goldberg*,[1837] 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 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.[1838]

In *Michael M. v. Superior Court*,[1839] the Court expressly adopted 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.

[1836] 430 U.S. at 217. Justice Stevens adhered to this view in Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 154 (1980). Note the unanimity of the Court on the substantive issue, although it was divided on remedy, in voiding in Califano v. Westcott, 443 U.S. 76 (1979), a Social Security provision giving benefits to families with dependent children who have been deprived of parental support because of the unemployment of the father but giving no benefits when the mother is unemployed.

[1837] 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.

[1838] 453 U.S. at 69–72, 78–83. The dissent argued that registered persons would fill noncombat positions as well as combat ones and that drafting women would add to women volunteers providing support for combat personnel and would free up men in other positions for combat duty. Both dissents assumed without deciding that exclusion of women from combat served important governmental interests. Id. at 83, 93. The majority's reliance on an administrative convenience argument, it should be noted, id. at 81, was contrary to recent precedent. *See* discussion of *Orr v. Orr*, *supra*.

[1839] 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.

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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, although the law was founded on a clear sex distinction, it was justified because it served 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.[1840]

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, 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*[1841] 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."[1842] And, in *Schlesinger v. Ballard*,[1843] 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

[1840] 450 U.S. at 470–74, 481. The dissents questioned both whether the pregnancy deterrence rationale was the purpose underlying the distinction and whether, if it was, the classification was substantially related to achievement of the goal. Id. at 488, 496.

[1841] 416 U.S. 351 (1974).

[1842] 416 U.S. at 355.

[1843] 419 U.S. 498 (1975).

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purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[1844] 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 serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective.[1845]

Many of these lines of cases converged in *Mississippi University for Women v. Hogan*,[1846] in which the Court stiffened and applied its standards for evaluating claimed benign distinctions benefitting 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 that 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 benefitted by the classification actually suffer a disadvantage related to the classification."[1847] 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 estab-

[1844] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977); Orr v. Orr, 440 U.S. 268, 280–82 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150–52 (1980). In light of the stiffened standard, Justice Stevens has called for overruling *Kahn*, Califano v. Goldfarb, 430 U.S. at 223–24, but Justice Blackmun would preserve that case. Orr v. Orr, 440 U.S. at 284. *Cf.* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 302–03 (1978) (Justice Powell; less stringent standard of review for benign sex classifications).

[1845] 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.

[1846] 458 U.S. 718 (1982).

[1847] 458 U.S. at 728.

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lish that the alleged objective is the actual purpose underlying the discriminatory classification." [1848] 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.[1849]

In a 1996 case, the Court required that a state demonstrate "exceedingly persuasive justification" for gender discrimination. When a female applicant challenged the exclusion of women from the historically male-only Virginia Military Institute (VMI), the State of Virginia defended the exclusion of females as essential to the nature of training at the military school.[1850] The state argued that the VMI program, which included rigorous physical training, deprivation of personal privacy, and an "adversative model" that featured minute regulation of behavior, would need to be unacceptably modified to facilitate the admission of women. While recognizing that women's admission would require accommodation such as different housing assignments and physical training programs, the Court found that the reasons set forth by the state were not "exceedingly persuasive," and thus the state did not meet its burden of justification. The Court also rejected the argument that a parallel program established by the state at a private women's college served as an adequate substitute, finding that the program lacked the military-style structure found at VMI, and that it did not equal VMI in faculty, facilities, prestige or alumni network.

Another area presenting some difficulty is that of the relationship of pregnancy classifications to gender discrimination. In *Cleve-*

[1848] 458 U.S. at 730. In addition to obligating the state to show that in fact there was existing discrimination or effects from past discrimination, the Court also appeared to take the substantial step of requiring the state "to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination." Id. at 730 n.16. A requirement that the proffered purpose be the actual one and that it must be shown that the legislature actually had that purpose in mind would be a notable stiffening of equal protection standards.

[1849] 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 colleges offer "distinctive benefits" to society. Id. at 735, 740 (emphasis by Justice), 743. The Court noted that, because the state maintained no other single-sex public university or college, the case did not present "the question of whether States can provide 'separate but equal' undergraduate institutions for males and females," id. at 720 n.1, although Justice Powell thought the decision did preclude such institutions. Id. at 742–44. *See* Vorchheimer v. School Dist. of Philadelphia, 532 F. 2d 880 (3d Cir. 1976) (finding no equal protection violation in maintenance of two single-sex high schools of equal educational offerings, one for males, one for females), aff'd by an equally divided Court, 430 U.S. 703 (1977) (Justice Rehnquist not participating).

[1850] United States v. Virginia, 518 U.S. 515 (1996).

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land Board of Education v. LaFleur,[1851] which was 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.[1852] 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.[1853] Although "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations," the analogy is "not sufficient to require 'our most exacting scrutiny.'" The scrutiny to which it is entitled is intermediate, "not a toothless [scrutiny]," but somewhere between that accorded race and that accorded ordinary economic classifications. Basically, the standard requires a determination of a legitimate legislative aim

[1851] 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).

[1852] Geduldig v. Aiello, 417 U.S. 484 (1974). The Court denied that the classification was based upon "gender as such." Classification was on the basis of pregnancy, and while only women can become pregnant, that fact alone was not determinative. "The program divides potential recipients into two groups—pregnant woman and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Id. at 496 n.20. For a rejection of a similar attempted distinction, *see* Nyquist v. Mauclet, 432 U.S. 1, 9 (1977); and Trimble v. Gordon, 430 U.S. 762, 774 (1977). *See also* Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), now extends protection to pregnant women.

[1853] 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 that precluded wrongful death actions in cases involving the child or the mother when the child was illegitimate, in which scrutiny was strict, *with* Labine v. Vincent, 401 U.S. 532 (1971), involving intestate succession, in which scrutiny was rational basis, *and* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), involving a workers' compensation statute distinguishing between legitimates and illegitimates, in which scrutiny was intermediate.

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and a careful review of how well the classification serves, or "fits," the aim.[1854] The common rationale of all the illegitimacy cases is not clear, is in many respects not wholly consistent,[1855] 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.[1856]

Intestate succession rights for illegitimates has divided the Court over the entire period. At first adverting to the broad power of the states over descent of real property, the Court employed relaxed scrutiny to sustain a law denying illegitimates the right to share equally with legitimates in the estate of their common father, who had acknowledged the illegitimates but who had died intestate.[1857] *Labine* was strongly disapproved, however, and virtually overruled in *Trimble*

[1854] Mathews v. Lucas, 427 U.S. 495, 503–06 (1976); Trimble v. Gordon, 430 U.S. 762, 766–67 (1977); Lalli v. Lalli, 439 U.S. 259, 265 (1978). Scrutiny in previous cases had ranged from negligible, Labine v. Vincent, 401 U.S. 532 (1971), to something approaching strictness, Jiminez v. Weinberger, 417 U.S. 628, 631–632 (1974). *Mathews* itself illustrates the uncertainty of statement, suggesting at one point that the *Labine* standard may be appropriate, 401 U.S. at 506, and at another that the standard appropriate to sex classifications is to be used, id. at 510, while observing a few pages earlier that illegitimacy is entitled to less exacting scrutiny than either race *or* sex. Id. at 506. *Trimble* settles on intermediate scrutiny but does not assess the relationship between its standard and the sex classification standard. *See* Parham v. Hughes, 441 U.S. 347 (1979), and Caban v. Mohammed, 441 U.S. 380 (1979) (both cases involving classifications reflecting both sex and illegitimacy interests).

[1855] The major inconsistency arises from three 5-to-4 decisions. Labine v. Vincent, 401 U.S. 532 (1971), was largely overruled by Trimble v. Gordon, 430 U.S. 762 (1977), which itself was substantially limited by Lalli v. Lalli, 439 U.S. 259 (1978). Justice Powell was the swing vote for different disposition of the latter two cases. Thus, while four Justices argued for stricter scrutiny and usually invalidation of such classifications, Lalli v. Lalli, 439 U.S. at 277 (Justices Brennan, White, Marshall, and Stevens dissenting), and four favor relaxed scrutiny and usually sustaining the classifications, Trimble v. Gordon, 430 U.S. at 776, 777 (Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissenting), Justice Powell applied his own intermediate scrutiny and selectively voided and sustained. *See* Lalli v. Lalli, *supra* (plurality opinion by Justice Powell).

[1856] 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).

[1857] 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.

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v. Gordon,[1858] 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.[1859] 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.[1860] 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.[1861] Fourth, the statute did address a substantial problem, a permissible state interest, presented by the difficulties of proving paternity and avoiding spurious claims. However, the court thought the means adopted, total exclusion, did not approach the "fit" necessary between means and ends to survive the scrutiny appropriate to this classification. The state court was criticized for failing "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some signifi-

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[1858] 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.

[1859] 430 U.S. at 768–70. Although 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).

[1860] 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.

[1861] 430 U.S. at 773–74. This justification had been prominent in Labine v. Vincent, 401 U.S. 532, 539 (1971), and its absence had been deemed critical in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170–71 (1972). The *Trimble* Court thought this approach "somewhat of an analytical anomaly" and disapproved it. However, the degree to which one could conform to the statute's requirements and the reasonableness of those requirements in relation to a legitimate purpose are prominent in Justice Powell's reasoning in subsequent cases. Lalli v. Lalli, 439 U.S. 259, 266–74 (1978); Parham v. Hughes, 441 U.S. 347, 359 (1979) (concurring). *See also* Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982) (sex); *and compare* id. at 736 (Justice Powell dissenting).

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cant 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." [1862] 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*,[1863] concerning a statute that permitted legitimate children to inherit automatically from both their parents, while illegitimates could inherit automatically only from their mothers, and could inherit from their intestate fathers only if a court of competent jurisdiction had, during the father's lifetime, entered an order declaring paternity. The child tendered evidence of paternity, including a notarized document in which the putative father, in consenting to his marriage, referred to him as "my son" and several affidavits by persons who stated that the elder Lalli had openly and frequently acknowledged that the younger Lalli was his child. In the prevailing view, the single requirement of entry of a court order during the father's lifetime declaring the child as his met the "middle ground" requirement of *Trimble*; it was addressed closely and precisely to the substantial state interest of seeing to the orderly disposition of property at death by establishing proof of paternity of illegitimate children and avoiding spurious claims against intestate estates. To be sure, some illegitimates who were unquestionably established as children of the decreased would be disqualified because of failure of compliance, but individual fairness is not the test. The test rather is whether the requirement is closely enough related to the interests served to meet the standard of rationality imposed. Also, although the state's interest could no doubt have been served by permitting other kinds of proof, 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 differ-

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[1862] 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).

[1863] 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.

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ent results on closely related fact patterns, making predictability quite difficult but perhaps manageable.[1864]

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." [1865]

Similarly, the Court struck down a federal Social Security provision that made eligible for benefits, because of an insured parent's disability, all legitimate children as well as those illegitimate children capable of inheriting personal property under state intestacy law and those children who were illegitimate only because of a nonobvious defect in their parents' marriage, regardless of whether they were born after the onset of the disability, but that made all

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[1864] 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.

[1865] Gomez v. Perez, 409 U.S. 535, 538 (1978) (emphasis added). 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. Although 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.

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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 illegitimates was necessary to avoid fraud.[1866]

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.[1867]

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 Constitu-

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[1866] 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).

[1867] 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).

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tion condemns."[1868] 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.[1869] 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[1870] 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."[1871]

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."[1872] "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citi-

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[1868] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–51 (1959).

[1869] Article I, § 2, cl. 1 (House of Representatives); Seventeenth Amendment (Senators); Article II, § 1, cl. 2 (presidential electors); Article I, § 4, cl. 1 (times, places, and manner of holding elections).

[1870] Fourteenth Amendment, § 2. Justice Harlan argued that the inclusion of this provision impliedly permitted the states to discriminate with only the prescribed penalty in consequence and that therefore the equal protection clause was wholly inapplicable to state election laws. Reynolds v. Sims, 377 U.S. 533, 589 (1964) (dissenting); Carrington v. Rash, 380 U.S. 89, 97 (1965) (dissenting); Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (concurring and dissenting). Justice Brennan undertook a rebuttal of this position in Oregon v. Mitchell, 400 U.S. at 229, 250 (concurring and dissenting). *But see* Richardson v. Ramirez, 418 U.S. 24 (1974), where § 2 was relevant in precluding an equal protection challenge.

[1871] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

[1872] Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

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zenship 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."[1873] 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.[1874]

Voter Qualifications.—States may require residency as a qualification to vote, but "durational residence laws . . . are unconstitutional unless the State can demonstrate that such laws are *necessary* to promote a *compelling* governmental interest."[1875] The Court applies "[t]his exacting test" because the right to vote is "a fundamental political right, . . . preservative of all rights," and because a "durational residence requirement directly impinges on the exer-

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[1873] 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).

[1874] 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. Nonetheless, 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).

[1875] Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (internal quotation marks omitted, emphasis added by the Court) (striking down a Tennessee statute that imposed a requirement of one year in the state and three months in the county). The Court did not indicate what, if any, shorter duration it would permit, although it noted that, in the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. § 1973aa–1, "Congress outlawed State durational residence requirements for presidential and vice-presidential elections, and prohibited the States from closing registration more than 30 days before Congress prescribed a thirty-day period for purposes of voting in presidential elections." Id. at 344. 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).

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cise of a second fundamental personal right, the right to travel."[1876] The Court indicated that the states have "a legitimate and compelling interest" in preventing fraud by voters, but that "it is impossible to view durational residence requirements as necessary to achieve that state interest."[1877]

However, a 50-day durational residence 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.[1878]

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.[1879] A statute that 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 nonmilitary persons enjoyed of showing that he had established residence.[1880] 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.[1881] 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 chil-

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[1876] 405 U.S. at 336, 338. *See also* Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam) (vacating an injunction against "requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day," but expressing no opinion on the constitutionality of the requirement).

[1877] 405 U.S. at 345. Other asserted state interests—knowledgeability of voters, common interests, intelligent voting—were said either not to be served by the requirements or to be impermissible interests.

[1878] 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 the 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.

[1879] Evans v. Cornman, 398 U.S. 419 (1970).

[1880] Carrington v. Rash, 380 U.S. 89 (1965).

[1881] 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).

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dren in school,[1882] and denied states the right to restrict the vote to property owners in elections on the issuance of revenue bonds [1883] or general obligation bonds.[1884] By contrast, the Court upheld a statute that required voters to present a government-issued photo identification in order to vote, as the state had not "required voters to pay a tax or a fee to obtain a new photo identification." The Court added that, although obtaining a government-issued photo identification is an "inconvenience" to voters, it "surely does not qualify as a substantial burden." [1885]

The Court has also 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.[1886] Adverting to the reservation in prior local governmental unit election cases [1887] 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.[1888] 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

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[1882] 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.

[1883] Cipriano v. City of Houma, 395 U.S. 701 (1969). Justices Black, Harlan, and Stewart concurred specially. Id. at 707.

[1884] 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.

[1885] Crawford v. Marion County Election Board, 128 S. Ct. 1610, 1621 (2008) (plurality). See Fourteenth Amendment, "Voting and Ballot Access," *infra*.

[1886] 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.

[1887] 410 U.S. at 727–28.

[1888] 410 U.S. at 730, 732. Thus, the Court posited reasons that might have moved the legislature to adopt the exclusions.

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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*,[1889] a 5-to-4 decision that 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 that stores and delivers water to 236,000 acres of land in the state and subsidizes its water operations by selling electricity to hundreds of thousands of consumers in a nearby metropolitan area. The entity's board of directors was elected through a system in which the eligibility to vote was as described above. The Court thought the entity was a specialized and limited form to which its general franchise rulings did not apply.[1890]

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.[1891] But a law that prohibited a person from voting in the primary election of a political party if he had voted in the primary election of any other party within the preceding 23 months was subjected to strict scrutiny and was voided, because 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.[1892] A less restrictive "closed primary" system was also invalidated, the Court find-

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[1889] 451 U.S. 355 (1981).

[1890] 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, as its recommendations "affect[ ] all citizens . . . regardless of land ownership."

[1891] Rosario v. Rockefeller, 410 U.S. 752 (1973). Justices Powell, Douglas, Brennan, and Marshall dissented. Id. at 763.

[1892] Kusper v. Pontikes, 414 U.S. 51 (1973). Justices Blackmun and Rehnquist dissented. Id. at 61, 65.

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ing insufficient justification for a state's preventing a political party from allowing independents to vote in its primary.[1893]

It must not be forgotten, however, that it is only when a state extends the franchise to some and denies it to others that a "right to vote" arises and is protected by the Equal Protection Clause. If a state chooses to fill an office by means other than through an election, neither the Equal Protection Clause nor any other constitutional provision prevents it from doing so. Thus, in *Rodriguez v. Popular Democratic Party*,[1894] the Court unanimously sustained a Puerto Rico statute that 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.[1895] 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.[1896]

[1893] 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.

[1894] 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).

[1895] 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).

[1896] O'Brien v. Skinner, 414 U.S. 524 (1974). *See* American Party of Texas v. White, 415 U.S. 767, 794–95 (1974).

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Access to the Ballot.—The Equal Protection Clause applies to state specification of qualifications for elective and appointive office. Although one may "have no right" to be elected or appointed to an office, all persons "do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees."[1897] In *Bullock v. Carter*,[1898] the Court used a somewhat modified form of the strict test in passing upon a filing fee system for primary election candidates that imposed the cost of the election wholly on the candidates and that 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.[1899]

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."[1900] In the absence of

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[1897] 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).

[1898] 405 U.S. 134, 142–44 (1972).

[1899] 405 U.S. at 144–49.

[1900] Lubin v. Panish, 415 U.S. 709, 716 (1974).

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reasonable alternative means of ballot access, the Court held, a state may not disqualify an indigent candidate unable to pay filing fees.[1901]

In *Clements v. Fashing*,[1902] the Court sustained two provisions of state law, one that barred certain officeholders from seeking election to the legislature during the term of office for which they had been elected or appointed, but that did not reach other officeholders whose terms of office expired with the legislators' terms and did not bar legislators from seeking other offices during their terms, and the other that automatically terminated the terms of certain officeholders who announced for election to other offices, but that did not apply to other officeholders who could run for another office while continuing to serve. The Court was splintered in 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*,[1903] a complex statutory structure that 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

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[1901] Concurring, Justices Blackmun and Rehnquist suggested that a reasonable alternative would be to permit indigents to seek write-in votes without paying a filing fee, 415 U.S. at 722, but the Court indicated this would be inadequate. Id. at 719 n.5.

[1902] 457 U.S. 957 (1982). A plurality of four contended that save in two circumstances—ballot access classifications based on wealth and ballot access classifications imposing burdens on new or small political parties or independent candidates—limitations on candidate access to the ballot merit only traditional rational basis scrutiny, because candidacy is not a fundamental right. The plurality found both classifications met the standard. Id. at 962–73 (Justices Rehnquist, Powell, O'Connor, and Chief Justice Burger). Justice Stevens concurred, rejecting the plurality's standard, but finding that inasmuch as the disparate treatment was based solely on the state's classification of the different offices involved, and not on the characteristics of the persons who occupy them or seek them, the action did not violate the Equal Protection Clause. Id. at 973. The dissent primarily focused on the First Amendment but asserted that the classifications failed even a rational basis test. Id. at 976 (Justices Brennan, White, Marshall, and Blackmun).

[1903] 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, and Justices Stewart and White and Chief Justice Warren dissented. Id. at 48, 61, 63.

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the registered voters lived in the 49 most populous counties.[1904] 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, because the state placed no barriers of any sort in the way of obtaining signatures and because write-in votes were also freely permitted.[1905]

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.[1906] "[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."[1907] 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.'"[1908]

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

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[1904] Moore v. Ogilvie, 394 U.S. 814 (1969) (overruling MacDougall v. Green, 335 U.S. 281 (1948)).

[1905] Jenness v. Fortson, 403 U.S. 431 (1971).

[1906] 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). *See also* 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).

[1907] Storer v. Brown, 415 U.S. 724, 746 (1974).

[1908] 415 U.S. at 730 (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)).

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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 totaled 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 excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot," but the Court thought that one percent, or 22,000 signatures in 1972, "falls within the outer boundaries of support the State may require." [1909] Similarly, independent candidates can be required to obtain a certain number of signatures as a condition to obtain ballot space.[1910] 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.[1911] 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.[1912] 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.[1913] 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.[1914] Also invalidated was a

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[1909] 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).

[1910] 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.

[1911] 415 U.S. at 785–87.

[1912] 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.

[1913] Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

[1914] 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

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requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot.[1915]

Apportionment and Districting.—Prior to 1962, attacks in federal courts on the drawing of boundaries for congressional[1916] and legislative election districts or the apportionment of seats to previously existing units ran afoul of the "political question" doctrine.[1917] *Baker v. Carr*,[1918] however, reinterpreted the doctrine to a considerable degree and opened the federal courts to voter complaints founded on unequally populated voting districts. *Wesberry v. Sanders*[1919] found that Article I, § 2, of the Constitution required 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.[1920]

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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).

[1915] 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.

[1916] This subject is also discussed under Article I, Section 2, Congressional Districting.

[1917] *See* discussion, supra. Applicability of the doctrine to cases of this nature was left unresolved in Smiley v. Holm, 285 U.S. 355 (1932), and Wood v. Broom, 287 U.S. 1 (1932), was supported by only a plurality in Colegrove v. Green, 328 U.S. 549 (1946), but became the position of the Court in subsequent cases. Cook v. Fortson, 329 U.S. 675 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947); MacDougall v. Green, 335 U.S. 281 (1948); South v. Peters, 339 U.S. 276 (1950); Hartsfield v. Sloan, 357 U.S. 916 (1958).

[1918] 369 U.S. 186 (1962).

[1919] 376 U.S. 1 (1964). Striking down a county unit system of electing a governor, the Court, in an opinion by Justice Douglas, had already coined a variant 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).

[1920] 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. In Reynolds v. Sims, 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

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"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." [1921] What was required was that each state "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." [1922]

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 a 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 that exercised only administrative powers rather than legislative powers, was not subject to the principle of the apportionment ruling.[1923] *Avery v. Midland County* [1924] 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*,[1925] the Court abandoned much of the limitation that 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

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attitude on the part of the Court. 377 U.S. at 589. Justices Stewart and Clark dissented in two and concurred in four cases on the basis of their view that the Equal Protection Clause was satisfied by a plan that was rational and that did not systematically frustrate the majority will. 377 U.S. at 741, 744.

[1921] Reynolds v. Sims, 377 U.S. 533, 568 (1964).

[1922] 377 U.S. at 577.

[1923] Sailors v. Board of Education, 387 U.S. 105 (1967).

[1924] 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.

[1925] 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.

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"legislative" or "administrative" or necessarily important or unimportant; it is the fact that members of the body are elected from districts that triggers the application.[1926]

The second issue has been largely but not precisely resolved. In *Swann v. Adams*,[1927] 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 districting cases were disposed of on the basis of *Swann*,[1928] but, although 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,"[1929] it did not apply this strict standard to state legislative redistricting.[1930] And, in *Abate v. Mundt*,[1931] the Court approved a plan for apportioning a county governing body that 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 that might in other

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[1926] 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 . . . ." 397 U.S. 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).

[1927] 385 U.S. 440, 443–44 (1967). *See also* Kilgarlin v. Hill, 386 U.S. 120 (1967).

[1928] Kirkpatrick v. Preisler, 385 U.S. 450 (1967); Duddleston v. Grills, 385 U.S. 455 (1967).

[1929] Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969). The Court has continued to adhere to this strict standard for congressional districting, voiding a plan in which the maximum deviation between largest and smallest district was 0.7%, or 3,674 persons. Karcher v. Daggett, 462 U.S. 725 (1983) (rejecting assertion that deviations less than estimated census error are necessarily permissible).

[1930] 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."

[1931] 403 U.S. 182 (1971).

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circumstances invalidate a plan.[1932] The total population deviation allowed in *Abate* was 11.9%; the Court refused, however, to extend *Abate* to approve a total deviation of 78% resulting from an apportionment plan providing for representation of each of New York City's five boroughs on the New York City Board of Estimate.[1933]

Nine years after *Reynolds v. Sims*, the Court reexamined the population equality requirement of the apportionment cases. Relying upon language in prior decisions that distinguished state legislative apportionment from congressional districting as possibly justifying different standards of permissible deviations from equality, the Court held that more flexibility is constitutionally permissible with respect to the former than to the latter.[1934] 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.[1935] Second, just as the first case "demonstrates, population deviations among districts may be sufficiently

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[1932] Although the Court has used total population figures for purposes of computing variations between districts, in Burns v. Richardson, 384 U.S. 73 (1966), it approved 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).

[1933] 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.

[1934] Mahan v. Howell, 410 U.S. 315, 320–25 (1973).

[1935] 410 U.S. at 325–30. The Court indicated that a 16.4% deviation "may well approach tolerable limits." Id. at 329. Dissenting, Justices Brennan, Douglas, and Marshall would have voided the plan; additionally, they thought the deviation was actually 23.6% and that the plan discriminated geographically against one section of the state, an issue not addressed by the Court. In Chapman v. Meier, 420 U.S. 1, 21–26 (1975), holding that a 20% variation in a court-developed plan was not justified, the Court indicated that such a deviation in a legislatively-produced plan would be quite difficult to justify. *See also* Summers v. Cenarrusa, 413 U.S. 906 (1973) (vacating and remanding for further consideration the approval of a 19.4% deviation). *But see* Voinovich v. Quilter, 507 U.S. 146 (1993) (vacating and remanding for fur-

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large to require justification but nonetheless be justifiable and legally sustainable. It is now time to recognize . . . that minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State."[1936] 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 by enabling them 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.[1937] 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.[1938]

Gerrymandering and the permissible use of multimember districts present examples of the third major issue. It is clear that ra-

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ther consideration the rejection of a deviation in excess of 10% intended to preserve political subdivision boundaries). In Brown v. Thomson, 462 U.S. 835 (1983), the Court held that a consistent state policy assuring each county at least one representative can justify substantial deviation from population equality when only the marginal impact of representation for the state's least populous county was challenged (the effect on plaintiffs, voters in larger districts, was that they would elect 28 of 64 members rather than 28 of 63), but there was indication in Justice O'Connor's concurring opinion that a broader-based challenge to the plan, which contained a 16% average deviation and an 89% maximum deviation, could have succeeded.

[1936] 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 justification . . . ." 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]."

[1937] 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).

[1938] Chapman v. Meier, 420 U.S. 1, 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).

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cially based gerrymandering is unconstitutional under the Fifteenth Amendment, at least when it is accomplished through the manipulation of district lines.[1939] Even if racial gerrymandering is intended to benefit minority voting populations, it is subject to strict scrutiny under the Equal Protection Clause if racial considerations are the dominant and controlling rationale in drawing district lines.[1940] Showing that a district's "bizarre" shape departs from traditional districting principles such as compactness, contiguity, and respect for political subdivision lines may serve to reinforce such a claim,[1941] although a plurality of the Justices would not preclude the creation of "reasonably compact" majority-minority districts in order to remedy past discrimination or to comply with the requirements of the Voting Rights Act of 1965.[1942] On the other hand, the Court appears to have more recently weakened a challenger's ability to establish equal protection claims by showing both a strong deference to a legislature's articulation of legitimate political explanations for districting decisions, and by allowing for a strong correlation between race and political affiliation.[1943]

Partisan or "political" gerrymandering raises more difficult issues. Several lower courts ruled that the issue was beyond judicial cognizance,[1944] and the Supreme Court itself, upholding an apportionment plan frankly admitted to have been drawn with the intent to achieve a rough approximation of the statewide political strengths of the two parties, recognized the goal as legitimate and observed that, while the manipulation of apportionment and districting is not wholly immune from judicial scrutiny, "we have not ven-

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[1939] Gomillion v. Lightfoot, 364 U.S. 339 (1960); Wright v. Rockefeller, 376 U.S. 52 (1964); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court). Hunt v. Cromartie, 526 U.S. 541 (1999).

[1940] Miller v. Johnson, 515 U.S. 900 (1995) (drawing congressional district lines in order to comply with § 5 of the Voting Rights Act as interpreted by the Department of Justice not a compelling governmental interest).

[1941] Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993). *See also* Shaw v. Hunt, 517 U.S. 899 (1996) (creating an unconventionally-shaped majority-minority congressional district in one portion of state in order to alleviate effect of fragmenting geographically compact minority population in another portion of state does not remedy a violation of § 2 of Voting Rights Act, and is thus not a compelling governmental interest).

[1942] Bush v. Vera, 517 U.S. 952, 979 (1996) (opinion of Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy) (also involving congressional districts).

[1943] Easley v. Cromartie, 532 U.S. 234 (2001).

[1944] *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).

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tured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States."[1945]

In 1986, however, in a decision of potentially major import reminiscent of *Baker v. Carr*, the Court in *Davis v. Bandemer*[1946] 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.[1947] Thus, although courthouse doors were now ajar for claims of partisan gerrymandering, it was unclear what it would 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"[1948] 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.[1949] Although a majority of Justices agreed that discriminatory effect as well as discriminatory intent must be shown, there was significant disagreement as to what constitutes discriminatory effect.

[1945] Gaffney v. Cummings, 412 U.S. 735, 751, 754 (1973).

[1946] 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 three of the majority Justices, who just two 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").

[1947] 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.

[1948] 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.

[1949] The quotation is from the Baker v. Carr measure for existence of a political question, 369 U.S. 186, 217 (1962).

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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."[1950] Moreover, continued frustration of the chance to influence the political process cannot 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.[1951]

In the following years, however, litigants seeking to apply *Davis* against alleged partisan gerrymandering were generally unsuccessful. Then, when the Supreme Court revisited the issue in 2004, it all but closed the door on such challenges. In *Vieth v. Jubelirer,*[1952] a four-Justice plurality would have overturned *Davis v. Bandemer*'s holding that challenges to political gerrymandering are justiciable, but five Justices disagreed. The plurality argued that partisan considerations are an intrinsic part of establishing districts,[1953] that no judicially discernable or manageable standards exist to evaluate unlawful partisan gerrymandering,[1954] and that the power to address the issue of political gerrymandering resides in Congress.[1955]

Of the five Justices who believed that challenges to political gerrymandering are justiciable, four dissented, but Justice Kennedy concurred with the four-Justice plurality's holding, thereby upholding Pennsylvania's congressional redistricting plan against a political gerrymandering challenge. Justice Kennedy agreed that the lack "of any agreed upon model of fair and effective representation" or "substantive principles of fairness in districting" left the Court with "no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan clas-

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[1950] 478 U.S. at 133. Joining in this part of the opinion were Justices Brennan, Marshall, and Blackmun.

[1951] 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).

[1952] 541 U.S. 267 (2004).

[1953] 541 U.S. at 285–86.

[1954] 541 U.S. at 281–90 .

[1955] 541 U.S. at 271 (noting that Article I, § 4 provides that Congress may alter state laws regarding the manner of holding elections for Senators and Representatives).

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sification imposes on representational rights."[1956] But, though he concurred in the holding, Justice Kennedy held out hope that judicial relief from political gerrymandering may be possible "if some limited and precise rationale were found" to evaluate partisan redistricting. *Davis v. Bandemer* was thus preserved.[1957]

In *League of United Latin American Citizens v. Perry*, a widely splintered Supreme Court plurality largely upheld a Texas congressional redistricting plan that the state legislature had drawn mid-decade, seemingly with the sole purpose of achieving a Republican congressional majority.[1958] The plurality did not revisit the justiciability question, but examined "whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[1959] The plurality was "skeptical . . . of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted." For one thing, although "[t]he legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, . . . partisan aims did not guide every line it drew."[1960] Apart from that, the "sole-motivation theory" fails to show what is necessary to identify an unconstitutional act of partisan gerrymandering: "a burden, as measured by a reliable standard, on the complainants' representational rights."[1961] Moreover, "[t]he sole-intent standard . . . is no more compelling when it is linked to . . . mid-decennial legislation. . . . [T]here is nothing inherently suspect about a legislature's decision to replace a mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders."[1962] The plurality also found "that mid-decade redistricting for exclusively partisan purposes" did not in this case "violate[ ] the one-person, one-vote requirement."[1963] Because ordinary mid-decade districting plans do not necessarily violate the one-person,

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[1956] 541 U.S. at 307–08 (Justice Kennedy, concurring).

[1957] 541 U.S. at 306 (Justice Kennedy, concurring). Although Justice Kennedy admitted that no workable model had been proposed either to evaluate the burden partisan districting imposed on representational rights or to confine judicial intervention once a violation has been established, he held out the possibility that such a standard may emerge, based on either equal protection or First Amendment principles.

[1958] 548 U.S. 399, 417 (2006). The design of one congressional district was held to violate the Voting Rights Act because it diluted the voting power of Latinos. Id. at 423–443.

[1959] 548 U.S. at 414.

[1960] 548 U.S. at 418, 417.

[1961] 548 U.S. at 418.

[1962] 548 U.S. at 419.

[1963] 548 U.S. at 420–21.

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one-vote requirement, the only thing out of the ordinary with respect to the Texas plan was that it was motivated solely by partisan considerations, and the plurality had already rejected the sole-motivation theory.[1964] *League of United Latin American Citizens v. Perry* thus left earlier Court precedent essentially unchanged. Claims of unconstitutional partisan gerrymandering are justiciable, but a reliable measure of what constitutes unconstitutional partisan gerrymandering remains to be found.

It had been thought that the use of multimember districts to submerge racial, ethnic, and political minorities might be treated differently,[1965] but in *Whitcomb v. Chavis* [1966] 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 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 that 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* [1967] affirmed a district court invalidation of the use of multimember districts in two Texas counties on the ground that,

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[1964] 548 U.S. at 422.

[1965] 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).

[1966] 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.

[1967] 412 U.S. 755, 765–70 (1973).

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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.[1968]

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*.[1969] 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.[1970] Second, the plurality read *White v. Regester* as being consistent with this principle and the various factors developed in that case to demonstrate the existence of unconstitutional discrimination to be in fact indicia of intent; however, the plurality seemingly disregarded the totality of circumstances test used in *Regester* and evaluated instead whether each factor alone was sufficient proof of intent.[1971]

Again switching course, the Court in *Rogers v. Lodge*[1972] 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 that it held could combine to show a discriminatory motive,

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[1968] "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 765–66.

[1969] 446 U.S. 55 (1980).

[1970] 446 U.S. at 65–68 (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger). On intent versus impact analysis, *see* discussion, supra. Justices Blackmun and Stevens concurred on other grounds, id. at 80, 83, and Justices White, Brennan, and Marshall dissented. Id. at 94, 103. Justice White agreed that purposeful discrimination must be found, id. at 101, while finding it to have been shown, Justice Blackmun assumed that intent was required, and Justices Stevens, Brennan, and Marshall would not so hold.

[1971] 446 U.S. at 68–74. Four Justices rejected this view of the plurality, while Justice Stevens also appeared to do so but followed a mode of analysis significantly different from that of any other Justice.

[1972] 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.

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and largely overturned the limitations that 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.[1973] In *Thornburg v. Gingles*,[1974] 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, 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,[1975] although that power is bounded by the constitutional violations found, so that courts do not have *carte blanche*, and they should ordinarily respect the structural decisions made by state legislatures and the state constitutions.[1976]

[1973] On the legislation, *see* "Congressional Definition of Fourteenth Amendment Rights," *infra*.

[1974] 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 179–80, Justices Powell and Stevens), and three Justices thought political gerrymandering claims to be nonjusticiable.

[1975] *E.g.*, Reynolds v. Sims, 377 U.S. 533, 586–87 (1964); Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 195–200 (1972); White v. Weiser, 412 U.S. 783, 794–95 (1973); Upham v. Seamon, 456 U.S. 37, 41–42 (1982). When courts draw their own plans, the court is held to tighter standards than is a legislature and has to observe smaller population deviations and use single-member districts more than multi-member 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).

[1976] *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).

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Counting and Weighing of Votes.—In *Bush v. Gore*,[1977] a case of dramatic result but of perhaps limited significance for equal protection, the Supreme Court ended a ballot dispute that arose during the year 2000 presidential election. The Florida Supreme Court had ordered a partial manual recount of the Florida vote for Presidential Electors, requiring that all ballots that contained a "clear indication of the intent of the voter" be counted, but allowing the relevant counties to determine what physical characteristics of a ballot would satisfy this test. The Court held that the Equal Protection Clause would be violated by allowing arbitrary and disparate methods of discerning voter intent in the recounting of ballots. The decision was surprising to many, as a lack of uniformity in voting standards and procedures is inherent in the American system of decentralized voting administration. The Court, however, limited its holding to "the present circumstances," where "a state court with the power to assure uniformity" fails to provide "minimal procedural safeguards."[1978] Citing the "many complexities" of application of equal protection "in election processes generally," the Court distinguished the many situations where disparate treatment of votes results from different standards being applied by different local jurisdictions.

In cases where votes are given more or less weight by operation of law, it is not the weighing of votes itself that may violate the 14th Amendment, but the manner in which it is done. *Gray v. Sanders*,[1979] for instance, struck down the Georgia county unit system under which each county was allocated either two, four, or six votes in statewide elections and the candidate carrying the county received those votes. Because 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*[1980] 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—and the provision at issue in this case was neither directed to nor affected any identifiable class.

[1977] 531 U.S. 98 (2000).
[1978] 531 U.S. at 109.
[1979] 372 U.S. 368 (1963).
[1980] 403 U.S. 1 (1971).

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The Right to Travel

The doctrine of the "right to travel" actually encompasses three separate rights, of which two have been notable for the uncertainty of their textual support. The first is the right of a citizen to move freely between states, a right venerable for its longevity, but still lacking a clear doctrinal basis.[1981] The second, expressly addressed by the first sentence of Article IV, provides a citizen of one state who is temporarily visiting another state the "Privileges and Immunities" of a citizen of the latter state.[1982] The third is the right of a new arrival to a state, who establishes citizenship in that state, to enjoy the same rights and benefits as other state citizens. This right is most often invoked in challenges to durational residency requirements, which require that persons reside in a state for a specified period of time before taking advantage of the benefits of that state's citizenship.

Durational Residency Requirements.—Challenges to durational residency requirements have traditionally been made under the Equal Protection Clause of the Fourteenth Amendment. In 1999, however, the Court approved a doctrinal shift, so that state laws that distinguished between their own citizens, based on how long they had been in the state, would be evaluated instead under the Privileges or Immunities Clause of the Fourteenth Amendment.[1983] The Court did not, however, question the continuing efficacy of the earlier cases.

A durational residency requirement creates two classes of persons: those who have been within the state for the prescribed period and those who have not.[1984] But persons who have moved recently, at least from state to state,[1985] have exercised a right protected by the Constitution, and the durational residency classification ei-

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[1981] Saenz v. Roe, 526 U.S. 489 (1999). "For the purposes of this case, we need not identify the source of [the right to travel] in the text of the Constitution. The right of 'free ingress and regress to and from' neighboring states which was expressly mentioned in the text of the Article of Confederation, may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" Id. at 501 (citations omitted).

[1982] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) ("without some provision . . . removing from citizens of each State the disabilities of alienage in other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.").

[1983] Saenz v. Roe, 526 U.S. 489, 502–03 (1999).

[1984] Dunn v. Blumstein, 405 U.S. 330, 334 (1972). Because 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.

[1985] 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),

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ther deters the exercise of that right or penalizes those who have exercised it.[1986] Any such classification is invalid "unless shown to be necessary to promote a *compelling* governmental interest."[1987] The constitutional right to travel has long been recognized,[1988] but it is only relatively recently that the strict standard of equal protection review has been applied to nullify durational residency requirements.

Thus, in *Shapiro v. Thompson*,[1989] durational residency requirements conditioning eligibility for welfare assistance on one year's residence in the state[1990] 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.[1991] 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—then the requirements were rationally related to the purpose but they were not *compelling* enough to justify a classification

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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).

[1986] 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).

[1987] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis by Court); Graham v. Richardson, 403 U.S. 365, 375–76 (1971).

[1988] 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).

[1989] 394 U.S. 618 (1969).

[1990] The durational residency provision established by Congress for the District of Columbia was also voided. 394 U.S. at 641–42.

[1991] 394 U.S. at 627–33. Gaddis v. Wyman, 304 F. Supp. 717 (N.D.N.Y. 1969), *aff'd sub nom.* Wyman v. Bowens, 397 U.S. 49 (1970), struck down a provision construed so as to bar only persons who came into the state solely to obtain welfare assistance.

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that infringed a fundamental interest.[1992] In *Dunn v. Blumstein*,[1993] where the durational residency requirements denied the franchise to newcomers, such administrative justifications were found constitutionally insufficient to justify the classification.[1994] The Privileges or Immunities Clause of the Fourteenth Amendment was the basis for striking down a California law that limited welfare benefits for California citizens who had resided in the state for less than a year to the level of benefits that they would have received in the state of their prior residence.[1995]

However, a state one-year durational residency requirement for the initiation of a divorce proceeding was sustained in *Sosna v. Iowa*.[1996] Although 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.[1997] 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.[1998]

[1992] 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).

[1993] 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).

[1994] For additional discussion of durational residence as a qualification to vote, see Voter Qualifications, supra.

[1995] Saenz v. Roe, 526 U.S. 489, 505 (1999).

[1996] 419 U.S. 393 (1975). Justices Marshall and Brennan dissented on the merits. Id. at 418.

[1997] 419 U.S. at 409. But the Court also indicated that the plaintiff was not absolutely barred from the state courts, but merely required to wait for access (which was true in the prior cases as well and there held immaterial), and that possibly the state interests in marriage and divorce were more exclusive and thus more immune from federal constitutional attack than were the matters at issue in the previous cases. The Court also did not indicate whether it was using strict or traditional scrutiny.

[1998] 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.

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More recently, the Court has attempted to clarify these cases by distinguishing situations where a state citizen is likely to "consume" benefits within a state's borders (such as the provision of welfare) from those where citizens of other states are likely to establish residency just long enough to acquire some portable benefit, and then return to their original domicile to enjoy them (such as obtaining a divorce decree or paying the in-state tuition rate for a college education).[1999]

A state scheme for returning to its residents a portion of the income earned from the vast oil deposits discovered within Alaska foundered upon the formula for allocating the dividends; that is, each adult resident received one unit of return for each year of residency subsequent to 1959, the first year of Alaska's statehood. The law thus created fixed, permanent distinctions between an ever-increasing number of classes of bona fide residents based on how long they had been in the state. The differences between the durational residency cases previously decided did not alter the bearing of the 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.[2000]

Still unresolved are issues such as durational residency requirements for occupational licenses and other purposes.[2001] But this line of cases does not apply to state residency requirements themselves, as distinguished from durational provisions,[2002] and the cases do not inhibit the states when, having reasons for doing so, they bar travel by certain persons.[2003]

[1999] Saenz v. Roe, 526 U.S. at 505.

[2000] 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).

[2001] 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.

[2002] *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).

[2003] 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).

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Marriage and Familial Relations

In *Zablocki v. Redhail*,[2004] 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 that "interfere directly and substantially" with the right.[2005] The Court struck down a statute that prohibited any resident under an obligation to support minor children from marrying without a court order; such order could only be obtained upon a showing that the support obligation had been and was being complied with and that the children were not and were not likely to become public charges. The plaintiff was an indigent wishing to marry but prevented from doing so because he was not complying with a court order to pay support to an illegitimate child he had fathered, and because the child was receiving public assistance. Applying "critical examination," the Court observed that the statutory prohibition could not be sustained unless it was justified by sufficiently important state interests and was closely tailored to effectuate only those interests.[2006] 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 deci-

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[2004] 434 U.S. 374 (1978).

[2005] Although the Court's due process decisions have broadly defined a protected liberty interest in marriage and family, no previous case had held marriage to be a fundamental right occasioning strict scrutiny. 434 U.S. at 396–397 (Justice Powell concurring).

[2006] 434 U.S. at 388. Although the passage is not phrased in the usual compelling interest terms, the concurrence and the dissent so viewed it without evoking disagreement from the Court. Id. at 396 (Justice Powell), 403 (Justice Stevens), 407 (Justice Rehnquist). Justices Powell and Stevens would have applied intermediate scrutiny to void the statute, both for its effect on the ability to marry and for its impact upon indigents. Id. at 400, 406 n.10.

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sion.[2007] For example, in *Califano v. Jobst*,[2008] a unanimous Court sustained a Social Security provision that revoked disabled dependents' benefits of any person who married, except when the person married someone who was also entitled to receive disabled dependents' benefits. Plaintiff, a recipient of such benefits, married someone who was also disabled but not qualified for the benefits, and his benefits were terminated. He sued, alleging that distinguishing between classes of persons who married eligible persons and who married ineligible persons infringed upon his right to marry. The Court rejected the argument, finding that benefit entitlement was not based upon need but rather upon actual dependency upon the insured wage earner; marriage, Congress could have assumed, generally terminates the dependency upon a parent-wage earner. Therefore, it was permissible as an administrative convenience to make marriage the terminating point but to make an exception when both marriage partners were receiving benefits, as a means of lessening hardship and recognizing that dependency was 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." [2009]

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.[2010]

Sexual Orientation

In *Romer v. Evans*,[2011] the Supreme Court struck down a state constitutional amendment that both overturned local ordinances pro-

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[2007] 434 U.S. at 386–87. Chief Justice Burger thought the interference here was "intentional and substantial," whereas the provision in *Jobst* was neither. Id. at 391 (concurring).

[2008] 434 U.S. 47 (1977).

[2009] 434 U.S. at 54. *See also* Mathews v. De Castro, 429 U.S. 181 (1976) (provision giving benefits to a married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying them to a divorced woman under 62 with dependents represents a rational judgment by Congress with respect to likely dependency of married but not divorced women and does not deny equal protection); Califano v. Boles, 443 U.S. 282 (1979) (limitation of certain Social Security benefits to widows and divorced wives of wage earners does not deprive mother of illegitimate child who was never married to wage earner of equal protection).

[2010] *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).

[2011] 517 U.S. 620 (1996).

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hibiting discrimination against homosexuals, lesbians or bisexuals, and prohibited any state or local governmental action to either remedy discrimination or grant preferences based on sexual orientation. However, the Court declined to follow the lead of the Supreme Court of Colorado, which had held that the amendment infringed on gays' and lesbians' fundamental right to participate in the political process.[2012] The Court also rejected the application of the heightened standard reserved for suspect classes, and sought only to establish whether the legislative classification had a rational relation to a legitimate end.

The Court found that the amendment failed even this restrained review. Animus against a class of persons was not considered by the Court as a legitimate goal of government: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[2013] The Court then rejected arguments that the amendment protected the freedom of association rights of landlords and employers, or that it would conserve resources in fighting discrimination against other groups. The Court found that the scope of the law was unnecessarily broad to achieve these stated purposes, and that no other legitimate rationale existed for such a restriction.

In *United States v. Windsor*,[2014] the Court struck down section 3 of the Defense of Marriage Act (DOMA),[2015] which provided that for purposes of any federal act, ruling, regulation, or interpretation, the word "spouse" would mean a person of the opposite sex who is a husband or a wife. In *Windsor*, the petitioner had been married to her same-sex partner in Canada and she lived in New York where the marriage was recognized, so she had sought to claim a federal estate tax exemption for surviving spouses.[2016] The majority opinion by Justice Kennedy[2017] noted that while over 1,000 federal statutes were affected by DOMA, "by history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."[2018] The opinion, however, de-emphasized the federalism implications of the

[2012] Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

[2013] 517 U.S. at 634, *quoting* Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

[2014] 570 U.S. ___, No. 12–307, slip op. (2013).

[2015] 110 Stat. 2419, 1 U.S.C. § 7.

[2016] Section 3 also provided that "marriage" would mean only a legal union between one man and one woman.

[2017] The opinion was joined by Justices Ginsburg, Breyer, Sotomayor and Kagan.

[2018] 570 U.S. ___, No. 12–307, slip op. at 14,16.

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states' role in defining marriage, instead focusing on state approval of same-sex marriages as conferring a "dignity and status of immense import."[2019]

The Court in *Windsor* found that section 3 of DOMA was motivated by improper animus or purpose, concluding that "no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[2020] "When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community." DOMA, on the other hand "[sought] to injure the very class [the state] seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government."[2021] The opinion, however, failed to address whether future decisions regarding differential treatment based on sexual orientation would continue to be resolved under traditional rational basis scrutiny, or whether a more probing standard would be utilized.

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,[2022] 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*,[2023] surely one of the most seminal cases in modern constitutional law. There, the state

[2019] 570 U.S. ___, No. 12–307, slip op. at 18.

[2020] 570 U.S. ___, No. 12–307, slip op. at 25–26.

[2021] 570 U.S. ___, No. 12–307, slip op. at 18. Because the case was decided under the due process clause of the Fifth Amendment, which comprehends both substantive due process and equal protection principles (as incorporated through the Fourteenth Amendment), this statement leaves unclear precisely how each of these doctrines bears on the presented issue. Justice Scalia, in dissent, points to the majority's assertion that although the "equal protection guarantee of the Fourteenth Amendment makes [the] Fifth Amendment [due process] right all the more specific and all the better understood and preserved . . . the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does." Id. at 25. (ellipses added). According to Justice Scalia, this would indicate that the Equal Protection Clause as incorporated in the Due Process Clause is not the basis for the majority's holding. Id. at 16 (Scalia, J., dissenting).

[2022] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[2023] 351 U.S. 12 (1956).

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conditioned full direct appellate review—review to which all convicted defendants were entitled—on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. "In criminal trials," Justice Black wrote in the plurality opinion, "a State can no more discriminate on account of poverty than on account of religion, race, or color." Although 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 from 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." [2024]

The principle of *Griffin* was extended in *Douglas v. California*,[2025] 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 marshaling 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." [2026]

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 discrimi-

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[2024] 351 U.S. at 17, 18, 19. Although Justice Black was not explicit, it seems clear that the system was found to violate both the Due Process and 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.

[2025] 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 also dissented. Id. at 360.

[2026] 372 U.S. at 357–58.

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nate between the 'rich' and the 'poor' in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. . . . All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." A fee system neutral on its face was not a classification forbidden by the Equal Protection Clause. "[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against 'indigents' by name would be unconstitutional."[2027] 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."[2028]

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 that 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 that denied due process.[2029]

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."[2030]

Criminal Procedure.—Criminal appeals" [I]t is now fundamental that, once established, . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open

[2027] Griffin v. Illinois, 351 U.S. 12, 34, 35 (1956).
[2028] Douglas v. California, 372 U.S. 353, 361 (1963).
[2029] 372 U.S. at 363–67.
[2030] 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).

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and equal access to the courts."[2031] "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. . . ."[2032] No state may condition the right to appeal[2033] or the right to file a petition for *habeas corpus*[2034] 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 excerpted 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.[2035] 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.[2036] A defendant's right to counsel is to be protected as well as the similar right of the defendant

[2031] Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

[2032] Draper v. Washington, 372 U.S. 487, 496 (1963).

[2033] Burns v. Ohio, 360 U.S. 252 (1959); Douglas v. Green, 363 U.S. 192 (1960).

[2034] Smith v. Bennett, 365 U.S. 708 (1961).

[2035] Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington Prison Bd., 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).

[2036] Williams v. Oklahoma City, 395 U.S. 458 (1969); Mayer v. City of Chicago, 404 U.S. 189 (1971).

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with funds.[2037] The right to counsel on appeal necessarily means the right to *effective* assistance of counsel.[2038]

But, deciding a point left unresolved in *Douglas*, the Court held that neither the Due Process nor the Equal Protection Clause requires 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 does not require that, after an appeal has been provided, the state must always provide counsel to indigents at every stage. "Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty." That essentially equal protection issue was decided against the defendant in the context of an appellate system in which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.[2039] Not even death row inmates have a constitutional right to an attorney to prepare a petition for collateral relief in state court.[2040]

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 pub-

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[2037] Douglas v. California, 372 U.S. 353 (1963); Swenson v. Bosler, 386 U.S. 258 (1967); Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967). A rule requiring a court-appointed appellate counsel to file a brief explaining reasons why he concludes that a client's appeal is frivolous does not violate the client's right to assistance of counsel on appeal. McCoy v. Court of Appeals, 486 U.S. 429 (1988). The right is violated if the court allows counsel to withdraw by merely certifying that the appeal is "meritless" without also filing an *Anders* brief supporting the certification. Penson v. Ohio, 488 U.S. 75 (1988). *But see* Smith v. Robbins, 528 U.S. 259 (2000) (upholding California law providing that appellate counsel may limit his or her role to filing a brief summarizing the case and record and requesting the court to examine record for non-frivolous issues). On the other hand, since there is no constitutional right to counsel for indigent prisoners seeking postconviction collateral relief, there is no requirement that withdrawal be justified in an *Anders* brief if a state has provided counsel for postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987) (counsel advised the court that there were no arguable bases for collateral relief).

[2038] Evitts v. Lucey, 469 U.S. 387 (1985).

[2039] 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).

[2040] 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).

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lic defender system, a state may not deny prisoners legal assistance of another inmate[2041] and it must make available certain minimal legal materials.[2042]

The Criminal Sentence.—A convicted defendant may not be imprisoned solely because of his indigency. *Williams v. Illinois*[2043] 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 that was also levied upon conviction. And *Tate v. Short*[2044] held that, in situations in which no term of confinement is prescribed for an offense but only a fine, the court may not jail persons who cannot pay the fine, unless it is impossible to develop an alternative, such as installment payments or fines scaled to ability to pay. Willful refusal to pay may, however, be punished by confinement.

Voting and Ballot Access.—Treatment of indigency in a civil type of "fundamental interest" analysis came in *Harper v. Virginia Bd. of Elections*,[2045] 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."[2046]

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*[2047] in which the setting of high filing fees for certain offices was struck down under a standard that was stricter than the traditional equal protection standard but apparently less strict than the compelling state interest standard. The

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[2041] Johnson v. Avery, 393 U.S. 483 (1969).

[2042] Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1977).

[2043] 399 U.S. 235 (1970).

[2044] 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.

[2045] 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.

[2046] 383 U.S. at 668. The Court observed that "the right to vote is too precious, too fundamental to be so burdened or conditioned." Id. at 670.

[2047] 405 U.S. 134 (1972).

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Court held that the high filing fees were not rationally related to the state's interest in allowing only serious candidates on the ballot because some serious candidates could not pay the fees whereas 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 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.[2048] 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.[2049]

In *Crawford v. Marion County Election Board*,[2050] however, a Court plurality held that a state may require citizens to present a government-issued photo identification in order to vote. Although Justice Stevens' plurality opinion acknowledged "the burden imposed on voters who cannot afford . . . a birth certificate" (but added that it was "not possible to quantify . . . the magnitude of the burden on this narrow class of voters"), it noted that the state had not "required voters to pay a tax or a fee to obtain a new photo identification," and that "the photo-identification cards issued by Indiana's BMV are also free."[2051] Justice Stevens also noted that a burden on voting rights, "[h]owever slight . . . must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation,'"[2052] and he found three state interests that were sufficiently weighty: election modernization (*i.e.*, complying with federal statutes that require or permit the use of state motor vehicle driver's license applications to serve various purposes connected with voter registration), deterring and detecting voter fraud, and safeguarding voter confidence. Justice Stevens' opinion, therefore, rejected a facial challenge to the statute,[2053] finding that, even though it was "fair to infer that partisan considerations may have played

[2048] 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.

[2049] Bearden v. Georgia, 461 U.S. 660 (1983).

[2050] 128 S. Ct. 1610 (2008). Justice Stevens' plurality opinion was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia wrote a concurring opinion that was joined by Justices Thomas and Alito, and Justices Souter, Ginsberg, and Breyer dissented.

[2051] 128 S. Ct. at 1622, 1621.

[2052] 128 S. Ct. at 1616.

[2053] "A facial challenge must fail where the statute has a plainly legitimate sweep." 128 S. Ct. at 1623 (internal quotation marks omitted).

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a significant role in the decision to enact" the statute, the statute was "supported by valid neutral justifications."[2054] Justice Scalia, in his concurring opinion, would not only have upheld the statute on its face, but would have ruled out as-applied challenges as well, on the ground that "[t]he Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation," and, "without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional."[2055] Justice Souter, in his dissenting opinion, found the statute unconstitutional because "a State may not burden the right to vote merely by invoking abstract interests, be they legitimate or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. . . . The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old."[2056]

Access to Courts.—In *Boddie v. Connecticut*,[2057] Justice Harlan carried a majority of the Court with him in using a due process analysis to evaluate the constitutionality of a state's filing fees in divorce actions that 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 that kept some persons from using that avenue. Justice Harlan's opinion averred that a facially neutral law or policy that 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

[2054] 128 S. Ct. at 1624. "[A]ll of the Republicans in the [Indiana] General Assembly voted in favor of [the statute] and the Democrats were unanimous in opposing it." Id. at 1623.

[2055] 128 S. Ct. at 1625, 1626.

[2056] 128 S. Ct. 1627, 1643 (citations omitted).

[2057] 401 U.S. 371 (1971).

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United States v. Kras,[2058] the Court held that the imposition of filing fees that 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.[2059]

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.[2060]

The continuing vitality of *Griffin v. Illinois*, however, is seen in *M.L.B. v. S.L.J.*,[2061] where the Court considered whether a state seeking to terminate the parental rights of an indigent must pay for the preparation of the transcript required for pursuing an appeal. Unlike in *Boddie*, the state, Mississippi, had afforded the plaintiff a trial on the merits, and thus the "monopolization" of the av-

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[2058] 409 U.S. 434 (1973).

[2059] 409 U.S. at 443–46. The equal protection argument was rejected by using the traditional standard of review, bankruptcy legislation being placed in the area of economics and social welfare, and the use of fees to create a self-sustaining bankruptcy system being considered to be a rational basis. Dissenting, Justice Stewart argued that *Boddie* required a different result, denied that absolute preclusion of alternatives was necessary, and would have evaluated the importance of an interest asserted rather than providing that it need be fundamental. Id. at 451. Justice Marshall's dissent was premised on an asserted constitutional right to be heard in court, a constitutional right of access regardless of the interest involved. Id. at 458. Justices Douglas and Brennan concurred in Justice Stewart's dissent, as indeed did Justice Marshall.

[2060] 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 indigent parent to appointed counsel when state seeks to terminate parental status, but using balancing test to determine that right was not present in this case).

[2061] 519 U.S. 102 (1996).

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enues of relief alleged in *Boddie* was not at issue. As in *Boddie*, however, the Court focused on the substantive due process implications of the state's limiting "[c]hoices about marriage, family life, and the upbringing of children,"[2062] while also referencing cases establishing a right of equal access to criminal appellate review. Noting that even a petty offender had a right to have the state pay for the transcript needed for an effective appeal,[2063] and that the forced dissolution of parental rights was "more substantial than mere loss of money,"[2064] the Court ordered Mississippi to provide the plaintiff the court records necessary to pursue her appeal.

Educational Opportunity.—Making even clearer its approach in *de facto* wealth classification cases, the Court in *San Antonio School District v. Rodriguez*[2065] 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.[2066]

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the Court noted that plaintiffs had not identified the "class of disadvantaged 'poor'" in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however defined, did not correlate with property-tax-poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did

[2062] 519 U.S. at 106. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

[2063] Mayer v. Chicago, 404 U.S. 189 (1971).

[2064] 519 U.S. at 121 (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)).

[2065] 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.

[2066] 411 U.S. at 44–55. Applying the rational justification test, Justice White would have found that the system did not use means rationally related to the end sought to be achieved. Id. at 63.

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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."[2067] 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.[2068]

Rodriguez clearly promised judicial restraint in evaluating challenges to the provision of governmental benefits when the effect is relatively different because of the wealth of some of the recipients or potential recipients and when the results, what is obtained, vary in relative degrees. Wealth or indigency is not a *per se* suspect classification but it must be related to some interest that is fundamental, and *Rodriguez* doctrinally imposed a considerable barrier to the discovery or creation of additional fundamental interests. As the decisions reviewed earlier with respect to marriage and the family reveal, that barrier has not held entirely firm, but within a range of

[2067] 411 U.S. at 20. *But see* id. at 70, 117–24 (Justices Marshall and Douglas dissenting).

[2068] 411 U.S. at 29–39. *But see* id. at 62 (Justice Brennan dissenting), 70, 110–17 (Justices Marshall and Douglas dissenting).

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interests, such as education,[2069] the case remains strongly viable. Relying on *Rodriguez* and distinguishing *Plyler*, the Court in *Kadrmas v. Dickinson Public Schools*[2070] 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.[2071]

Abortion.—*Rodriguez* furnished the principal analytical basis for the Court's subsequent decision in *Maher v. Roe*,[2072] 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*, the Court held that the indigent are not a suspect class.[2073] Again, as in *Rodriguez* and in *Kras*, the Court 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.[2074] Expansion of this area of the law of equal protection seems especially limited.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the

[2069] *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.

[2070] 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.

[2071] 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.

[2072] 432 U.S. 464 (1977).

[2073] 432 U.S. at 470–71.

[2074] 432 U.S. at 471–74. *See also* Harris v. McRae, 448 U.S. 297, 322–23 (1980). Total deprivation was the theme of *Boddie* and was the basis of concurrences by Justices Stewart and Powell in Zablocki v. Redhail, 434 U.S. 374, 391, 396 (1978), in that the State imposed a condition indigents could not meet and made no exception for them. The case also emphasized that Dandridge v. Williams, 397 U.S. 471 (1970), imposed a rational basis standard in equal protection challenges to social welfare cases. *But see* Califano v. Goldfarb, 430 U.S. 199 (1977), where the majority rejected the dissent's argument that this should always be the same.

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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, African-Americans, who formerly counted as three-fifths of a person, would be fully counted in the apportionment of seats in the House of Representatives, increasing as well the electoral vote, and there appeared the prospect that the readmitted Southern states would gain a political advantage in Congress when combined with Democrats from the North. Because 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 African-Americans 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 that discriminated against males in the franchise.[2075]

No serious effort was ever made in Congress to effectuate § 2, and the only judicial attempt was rebuffed.[2076] With subsequent constitutional amendments adopted and the use of federal coercive powers to enfranchise persons, the section is little more than an historical curiosity.[2077]

[2075] *See generally* J. James, The Framing of the Fourteenth Amendment (1956).

[2076] Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

[2077] 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 dissent-

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However, in *Richardson v. Ramirez*,[2078] the Court relied upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state interests involved and to evaluate the necessity of the rule, holding rather that because of § 2 the Equal Protection Clause was simply inapplicable.

SECTIONS 3 AND 4. No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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ing), *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).

[2078] 418 U.S. 24 (1974). Justices Marshall, Douglas, and Brennan dissented. Id. at 56, 86.

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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.[2079] 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."[2080] Twenty-six years later, Congress enacted that "the disability imposed by section 3 . . . incurred heretofore, is hereby removed."[2081]

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.[2082]

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ENFORCEMENT

Generally

In the aftermath of the Civil War, Congress, in addition to proposing to the states the Thirteenth, Fourteenth, and Fifteenth Amendments, enacted seven statutes designed in a variety of ways to implement the provisions of these Amendments.[2083] Several of these laws

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[2079] *E.g.*, and notably, the Private Act of December 14, 1869, ch.1, 16 Stat. 607.

[2080] Ch. 193, 17 Stat. 142.

[2081] 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).

[2082] 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).

[2083] 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

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were general civil rights statutes that 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.[2084] In the end, Reconstruction was abandoned and with rare exceptions no cases were brought under the remaining statutes until fairly recently.[2085] Beginning with the Civil Rights Act of 1957, however, Congress generally acted pursuant to its powers under the Commerce Clause[2086] until Supreme Court decisions indicated an expansive concept of congressional power under the Civil War amendments,[2087] which culminated in broad provisions against private interference with civil rights in the 1968 legislation.[2088] The story of these years is largely an account of the "state action" doctrine in terms of its limitation on congressional powers;[2089] 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 has the discretion to adopt remedial measures, such as authorizing persons being denied their civil rights in state courts to remove their cases to fed-

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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 Kidnaping 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.

[2084] *See generally* R. Carr, Federal Protection of Civil Rights: Quest for a Sword (1947).

[2085] 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).

[2086] 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.

[2087] United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966). The development of congressional enforcement powers in these cases was paralleled by a similar expansion of the enforcement powers of Congress with regard to the Thirteenth Amendment, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[2088] 82 Stat. 73, 18 U.S.C. § 245.

[2089] On the "state action" doctrine in the context of the direct application of § 1 of the Fourteenth Amendment, *see* discussion, supra.

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eral courts,[2090] and to provide criminal[2091] and civil[2092] liability for state officials and agents[2093] or persons associated with them[2094] who violate protected rights. These statutory measures designed to eliminate discrimination "under color of law"[2095] present no problems of constitutional foundation, although there may well be other problems of application.[2096] 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[2097] 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*[2098] found this enactment to be beyond Congress's power to enforce the Fourteenth Amendment. The Court observed that § 1 prohibited only state action and did not reach private conduct. Therefore, Congress's power under § 5 to enforce § 1 by appropriate legislation was held to be similarly limited. "It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamen-

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[2090] 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).

[2091] 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).

[2092] 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).

[2093] *Ex parte* Virginia, 100 U.S. 339 (1880).

[2094] United States v. Price, 383 U.S. 787 (1966).

[2095] 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).

[2096] *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).

[2097] 18 Stat. 335, §§ 1, 2.

[2098] 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).

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tal rights specified in the amendment."[2099] The holding in this case had already been preceded by *United States v. Cruikshank*[2100] and by *United States v. Harris*[2101] 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.[2102]

Cruikshank did, however, recognize a small category of federal rights that Congress could protect against private deprivation, rights that the Court viewed as deriving particularly from one's status as a citizen of the United States and that Congress had a general police power to protect.[2103] These rights included the right to vote in federal elections, general and primary,[2104] the right to federal protection while in the custody of federal officers,[2105] and the right to inform federal officials of violations of federal law.[2106] The right of interstate travel is a basic right derived from the Federal Constitution, which Congress may protect.[2107] In *United States v. Williams*,[2108] in the context of state action, the Court divided four-to-four over whether the predecessor of 18 U.S.C. § 241 in its reference to a "right or privilege secured . . . by the Constitution or laws of the United States" encompassed rights guaranteed by the Fourteenth Amendment, or was restricted to those rights "which Congress can beyond doubt constitutionally secure against interference by private individuals." This issue was again reached in *United States*

[2099] 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 that satisfied the state action requirement in any event. Id. at 46–48, 56–57.

[2100] 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.

[2101] 106 U.S. 629 (1883). The case held unconstitutional a provision of § 2 of the 1871 Act, ch. 22, 17 Stat. 13.

[2102] *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).

[2103] United States v. Cruikshank, 92 U.S. 542, 552–53, 556 (1876). The rights that 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.

[2104] *Ex parte* Yarbrough , 110 U.S. 651 (1884); United States v. Classic, 313 U.S. 299 (1941).

[2105] Logan v. United States, 144 U.S. 263 (1892).

[2106] *In re* Quarles and Butler, 158 U.S. 532 (1895). *See also* United States v. Waddell, 112 U.S. 76 (1884) (right to homestead).

[2107] United States v. Guest, 383 U.S. 745 (1966); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[2108] 341 U.S. 70 (1951).

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v. Price[2109] and *United States v. Guest*,[2110] 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.

Because the Court found that both *Price* and *Guest* concerned sufficient state action, it did not then have to reach the question of § 241's constitutionality when applied to private action that interfered with rights not the subject of a general police power. But Justice Brennan, responding to what he apparently intepreted as language in the Court's opinion construing Congress's 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's power was broader.[2111] "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."[2112] The Justice throughout the opinion refers to "Fourteenth Amendment rights," by which he meant rights that, in the words of 18 U.S.C. § 241, are "secured . . . by the Constitution," *i.e.*, by the Fourteenth Amendment through prohibitory words addressed only to governmental officers. Thus, the Equal Protection Clause commands that all "public facilities owned or operated by or on behalf of the State," be available equally to all persons; that access is a right granted by the Constitution, and § 5 is viewed "as a positive grant of legislative power, authorizing Con-

[2109] 383 U.S. 787 (1966) (due process clause).

[2110] 383 U.S. 745 (1966) (Equal Protection Clause).

[2111] Justice Brennan's opinion, 383 U.S. at 774, was joined by Chief Justice Warren and Justice Douglas. His statement that "[a] majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy," id. at 782 (emphasis by the Justice), was based upon the language of Justice Clark, joined by Justices Black and Fortas, id. at 761, that, because Justice Brennan had 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's power under § 5. Id. at 755.

[2112] 383 U.S. at 782.

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gress 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.[2113]

The Court, however, ultimately rejected this expansion of the powers of Congress in *United States v. Morrison*.[2114] In *Morrison*, the Court invalidated a provision of the Violence Against Women Act [2115] that established a federal civil remedy for victims of gender-motivated violence. The case involved a university student who brought a civil action against other students who allegedly raped her. The argument was made that there was a pervasive bias against victims of gender-motivated violence in state justice systems, and that the federal remedy would offset and deter this bias. The Court first reaffirmed the state action requirement for legislation passed under the Fourteenth Amendment,[2116] dismissing the *dicta* in *Guest*, and reaffirming the precedents of the *Civil Rights Cases* and *United States v. Harris*. The Court also rejected the assertion that the legislation was "corrective" of bias in the courts, as the suits are not directed at the state or any state actor, but rather at the individuals committing the criminal acts.[2117]

[2113] 383 U.S. at 777–79, 784.

[2114] 529 U.S. 598 (2000).

[2115] Pub. L. 103–322, § 40302, 108 Stat. 1941, 42 U.S.C. § 13981.

[2116] 529 U.S. at 621 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948), for the proposition that the Amendment "erects no shield against merely private conduct, however discriminatory or wrongful").

[2117] This holding may have broader significance for federal civil rights law. For instance, 42 U.S.C. § 1985(3) (a civil statute paralleling the criminal statute held unconstitutional in United States v. Harris) lacks a "color of law" requirement. Although the requirement was read into it in Collins v. Hardyman, 341 U.S. 651 (1951), to avoid constitutional problems, it was read out again in Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (although it might be "difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State"). What the unanimous Court held in *Griffin* was that an "intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. at 102. As so construed, the statute was held constitutional as applied in the complaint before the Court on the basis of the Thirteenth Amendment and the right to travel; there was no necessity therefore, to consider Congress's powers under § 5 of the 14th Amendment. Id. at 107.

The lower courts have been quite divided with respect to what constitutes a non-racial, class-based animus, and what constitutional protections must be threatened before a private conspiracy can be reached under § 1985(3). *See, e.g.*, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Great American Fed. S. & L. Ass'n v. Novotny, 584 F.2d 1235 (3d Cir.

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Congressional Definition of Fourteenth Amendment Rights

The Supreme Court's view of congressional authority to address racial or ethnic discrimination under the Equal Protection Clause has varied significantly over the years. In the *Civil Rights Cases*,[2118] the Court held that the enforcement authority of the Fourteenth Amendment was only intended to allow Congress to overrule those state laws that the Court already considered violative of the Amendment. Under this line of reasoning, the courts would determine if a state law was impermissible and only then would Congress have the authority to implement that decision.[2119] The Court was quite clear that, under its responsibilities of judicial review, it was the body that would determine that a state law was impermissible and that a federal law passed pursuant to § 5 was necessary and proper to enforce § 1.[2120]

But, in the 1960's case of *United States v. Guest*,[2121] Justice Brennan argued 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." Then, in *Katzenbach v. Morgan*,[2122] Justice Brennan, this time speaking for the Court, in effect overrode the limiting view and and posited a doctrine by which Congress may define the substance of what legislation could be enacted pursuant to § 5.[2123] In *Katzenbach*, the Court upheld the constitutionality of a provision of the Voting Rights Act of 1965 [2124] barring the application of English literacy requirements to a certain class of voters, despite having previously held that such requirements did not violate equal protection.[2125]

According to Justice Brennan, Congress had the authority to question the justifications put forward by the state in defense of its law and conclude that the requirements were unrelated to those justifi-

1978) (en banc), *rev'd*, 442 U.S. 366 (1979); Scott v. Moore, 680 F.2d 979 (5th Cir. 1982) (en banc). The Court's decision in *Morrison*, however, appears to preclude the use of § 1985(3) in relation to Fourteenth Amendment rights absent some state action.

[2118] 109 U.S. 3 (1883).

[2119] 109 U.S.at 13–14 (1883) ("[T]he legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation.").

[2120] *Cf.* Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[2121] 383 U.S. 745, 783 and n.7 (1966) (concurring and dissenting).

[2122] 384 U.S. 641 (1966).

[2123] 384 U.S. at 648 (rejecting the 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").

[2124] 79 Stat. 439, 42 U.S.C. § 1973b(e).

[2125] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

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cations and were thus discriminatory in intent and effect. The Court determined that it would not then reevaluate the competing considerations that might have led Congress to its conclusion. Instead, the Justice wrote that Congress "brought a specially informed legislative competence" to an appraisal of voting requirements and "it was Congress's prerogative to weigh" the considerations. The Court's role in that case was to sustain the conclusion if "we perceive a basis upon which Congress might predicate a judgment" that the requirements constituted invidious discrimination.[2126] This highly deferential standard meant that the Court would uphold Congressional legislation under § 5 if there was a "rational basis" to do so.[2127]

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."[2128] Justice Brennan rejected this reasoning: "We emphasize that Congress's 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."[2129]

Congress, however, has not always heeded this admonontion. On the one hand, it relied on *Morgan* in the 1968 Civil Rights Act to expand federal powers to deal with private violence that is racially motivated, and to some degree in outlawing most private housing discrimination.[2130] On the other hand, it expressly invoked *Morgan* when enacting provisions of law purporting to overrule the Court's expansion of the self-incrimination and right-to-counsel clauses of the Bill of Rights.[2131] Movements have also been initiated in Congress by opponents of certain of the other Court decisions, notably

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[2126] Katzenbach v. Morgan, 384 U.S. 641, 653–56 (1966).

[2127] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–441 (1968)

[2128] 384 U.S. at 668. Justice Stewart joined this dissent.

[2129] 384 U.S. at 651 n.10. Justice O'Connor for the Court quoted and reiterated Justice Brennan's language in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731–33 (1982).

[2130] 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.*

[2131] *See* Title II, Omnibus Safe Streets and Crime Control Act, 82 Stat. 210, 18 U.S.C. §§ 3501, 3502; S. Rep. No. 1097, 90th Congress, 2d Sess. 53–63 (1968). The cases that were purported to be overuled were were Miranda v. Arizona, 384 U.S. 436 (1966), and United States v. Wade, 388 U.S. 218 (1967).

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the abortion rulings, to use § 5 powers to curtail the rights the Court has derived from the Due Process Clause and other provisions of the Constitution.[2132]

Congress's power under *Morgan* returned to the Court's consideration when several states challenged congressional legislation[2133] 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 that many observers had previously seen.[2134] Four Justices accepted *Morgan* in full,[2135] while one Justice rejected it totally[2136] and another would have limited it to racial cases.[2137]

The other three Justices seemingly restricted *Morgan* to an alternate rationale found in that case. In *Morgan*, in addition to the theory that Congress has special competience to adudge discrimination, Justice Brennan had asserted that Congress may override state law not because the law itself violated the Equal Protection Clause but because being without the vote meant a class of persons were being subjected to discriminatory state and local treatment. Giving these people the ballot would afford a means of correcting that situation, making the statute an appropriate means to enforce the Equal Protection Clause under "necessary and proper" standards.[2138] This rationale served as the basis for upholding the age reduction provision, while the manner in which these Justices dealt with the residency and absentee voting provision was to afford Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.[2139]

[2132] *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).

[2133] Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. §§ 1973aa–1, 1973bb.

[2134] Oregon v. Mitchell, 400 U.S. 112 (1970).

[2135] 400 U.S. at 229, 278–81 (Justices Brennan, White, and Marshall), id. at 135, 141–44 (Justice Douglas).

[2136] 400 U.S. at 152, 204–09 (Justice Harlan).

[2137] 400 U.S. at 119, 126–31 (Justice Black).

[2138] 384 U.S. at 652–52. A similar "necessary and proper" approach underlay South Carolina v. Katzenbach, 383 U.S. 301 (1966), under the Fifteenth Amendment's enforcement clause

[2139] 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 substan-

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Still, the Court continued to afford Congress signficant discretion in alleviating racial discrimination, as more recent decisions read broadly Congress's power to make determinations that appear to define the substantive content of constitutional violations.[2140] For instance, acting under both the Fourteenth and Fifteenth Amendments, Congress has sought to reach state electoral practices that "result" in diluting the voting power of minorities. In these cases, however, the Court apparently requires that it be shown that electoral procedures were created or maintained with a discriminatory animus before they may be invalidated under the two Amendments.[2141]

As noted previously, the standard for review of expansion of constitutional rights in the context of racial and ethnic discrimination was established in *Morgan* as a deferential "rational basis" review. Where remdial legislation regarding suspect classes are not at issue, however, the Court seems to have taken a less deferential approach. In *City of Boerne v. Flores*,[2142] the Court held that the Religious Freedom Restoration Act,[2143] which expressly overturned the Court's narrowing of religious protections under *Employment Division v. Smith*,[2144] exceeded congressional power under § 5 of the Fourteenth Amendment. Although the Court allowed that Congress's power to legislate to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional, the Court also held that there must be "a congruence and proportionality" between the means adopted and the injury to be remedied.[2145] Unlike the pervasive suppression of the African-American vote in

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tive constitutional law what situations fall within the ambit of the clause, and what state interests are 'compelling.'" 400 U.S. at 296 (Justices Stewart and Blackmun and Chief Justice Burger). In their view, Congress did not have that power and *Morgan* did not confer it. But in voting to uphold the residency and absentee provision, the Justices concluded that "Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the 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.

[2140] *See* discussion of City of Rome v. United States, 446 U.S. 156, 173–83 (1980), under the Fifteenth Amendment, *infra*. *See also* Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980) (plurality opinion by Chief Justice Burger), and id. at 500–02 (Justice Powell concurring).

[2141] 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, thereby avoiding a possible constitutional conflict.

[2142] 521 U.S. 507 (1997).

[2143] Pub. L. 103–141, 107 Stat. 1488, 42 U.S.C. §§ 2000bb *et seq.*

[2144] 494 U.S. 872 (1990).

[2145] 521 U.S. at 533.

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the South that led to the passage of the Voting Rights Act, there was no similar history of religious persecution constituting an "egregious predicate" for the far-reaching provision of the Religious Freedom Restoration Act.[2146]

A reinvigorated Eleventh Amendment jurisprudence has led to a spate of decisions applying the principles the Court set forth in *Boerne*, as litigants precluded from arguing that a state's sovereign immunity has been abrogated under Article I congressional powers[2147] seek alternative legislative authority in § 5. For instance, in *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*,[2148] a bank that had patented a financial method designed to guarantee investors sufficient funds to cover the costs of college tuition sued the State of Florida for administering a similar program, arguing that the state's sovereign immunity had been abrogated by Congress in exercise of its Fourteenth Amendment enforcement power. The Court, however, held that application of the federal patent law to the states was not properly tailored to remedy or prevent due process violations. The Court noted that Congress had identified no pattern of patent infringement by the states, nor a systematic denial of state remedy for such violations such as would constitute a deprivation of property without due process.[2149]

A similar result was reached regarding the application of the Age Discrimination in Employment Act to state agencies in *Kimel v. Florida Bd. of Regents*.[2150] In determining that the Act did not meet the "congruence and proportionality" test, the Court focused not just on whether state agencies had engaged in age discrimination, but on whether states had engaged in unconstitutional age dis-

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[2146] Also, unlike the Voting Rights Act, the Religious Freedom Restoration Act contained no geographic restrictions or termination dates. 521 U.S. at 532–33. The Court found that the Religious Freedom Restoration Act was "so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Id.

[2147] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (Article I powers may not be used to abrogate a state's Eleventh Amendment immunity, but Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), holding that Congress may abrogate Eleventh Amendment immunity in exercise of Fourteenth Amendment enforcement power, remains good law). See discussion pp. 1533–37.

[2148] 527 U.S. 627 (1999).

[2149] 527 U.S. at 639–46. *See also* College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., , 527 U.S. 666 (1999) (Trademark Remedy Clarification Act amendment to Lanham Act subjecting states to suits for false advertising is not a valid exercise of Fourteenth Amendment power; neither the right to be free from a business competitor's false advertising nor a more generalized right to be secure in one's business interests qualifies as a "property" right protected by the Due Process Clause).

[2150] 528 U.S. 62 (2000). Again, the issue of the Congress's power under § 5 of the Fourteenth Amendment arose because sovereign immunity prevents private actions against states from being authorized under Article I powers such as the commerce clause.

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crimination. This was a particularly difficult test to meet, as the Court has generally rejected constitutional challenges to age discrimination by states, finding that there is a rational basis for states to use age as a proxy for other qualities, abilities and characteristics.[2151] Noting the lack of a sufficient legislative record establishing broad and unconstitutional state discrimination based on age, the Court found that the ADEA, as applied to the states, was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to or designed to prevent unconstitutional behavior."[2152]

Despite what was considered by many to be a better developed legislative record, the Court in *Board of Trustees of Univ. of Ala. v. Garrett*[2153] also rejected the recovery of money damages against states, this time under of the Americans with Disabilities Act of 1990 (ADA).[2154] Title I of the ADA prohibits employers, including states, from "discriminating against a qualified individual with a disability"[2155] and requires employers to "make reasonable accommodations [for] . . . physical or mental limitations . . . . unless [to do so] . . . would impose an undue hardship on the . . . business."[2156] Although the Court had previously overturned discriminatory legislative classifications based on disability in *City of Cleburne v. Cleburne Living Center*,[2157] the Court had held that determinations of when states had violated the Equal Protection Clause in such cases were to be made under the relatively deferential standard of rational basis review. Thus, failure of an employer to provide the kind "reasonable accommodations" required under the ADA would not generally rise to the level of a violation of the Fourteenth Amendment, and instances of such failures did not qualify as a "history and pattern of unconstitutional employment discrimination."[2158] According the Court, not only did the legislative history developed by the Congress not establish a pattern of unconstitutional discrimination against the disabled by states,[2159] but the requirements of the ADA would be out of proportion to the alleged offenses.

[2151] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (applying rational basis test to uphold mandatory retirement age of 70 for state judges).

[2152] 528 U.S. at 86, quoting *City of Boerne*, 521 U.S. at 532.

[2153] 531 U.S. 356 (2001).

[2154] 42 U.S.C. §§ 12111–12117.

[2155] 42 U.S.C. § 12112(a).

[2156] 42 U.S.C. § 12112(b)(5)(A).

[2157] 473 U.S. 432 (1985).

[2158] 531 U.S. at 368.

[2159] As Justice Breyer pointed out in the dissent, however, the Court seemed determined to accord Congress a degree of deference more commensurate with review of an agency action, discounting portions of the legislative history as based on secondary source materials, unsupported by evidence and not relevant to the inquiry at hand.

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The abilty of Congress to show a history and pattern of unconstitutional discriminiation would appear to increase along with the the level of protection afforded to an effected class. Consequently, when the Court consider legslation designed to alleviate gender discrimination, it de-emphasized the need for a substantial legislative record. In *Nevada Department of Human Resources v. Hibbs*,[2160] the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees may take up to twelve weeks of unpaid "family care" leave to care for a close relative with a serious health condition. Noting that § 5 could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than were men.

Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel*, which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test . . . it was easier for Congress to show a pattern of state constitutional violations."[2161] Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a congruent and proportional response to the "state-sanctioned" gender stereotypes.

Nine years after *Hibbs*, the Court returned to the Family and Medical Leave Act, this time to consider the Act's "self care" (personal medical) leave provisions. There, in *Coleman v. Court of Appeals of Maryland*, a four-Justice plurality, joined by concurring Justice Scalia, found the self care provisions too attenuated from the gender protective roots of the family care provisions to merit heightened consideration.[2162] According to the plurality, the self care provisions were intended to ameliorate discrimination based on ill-

[2160] 538 U.S. 721 (2003).

[2161] 538 U.S. at 736. Statutory classifications that distinguish between males and females are subject to heightened scrutiny, Craig v. Boren, 429 U.S. 190, 197–199 (1976), so they must be substantially related to the achievement of important governmental objectives, United States v. Virginia, 518 U.S. 515, 533 (1996).

[2162] 566 U.S. ___, No. 10–1016, slip op. (2012) (male state employee denied unpaid sick leave).

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ness, not sex. The plurality observed that paid sick leave and disability protection were almost universally available to state employees without intended or incidental gender bias. The addition of unpaid self care leave to this state benefit might help some women suffering pregnancy related illness, but the establishment of a broad self care leave program under the FMLA was not a proportional or congruent remedy to protect any constitutionally based right under the circumstances.[2163]

The Court in *Tennessee v. Lane*[2164] held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act provides that no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,[2165] but since disability is not a suspect class, the application of Title II against states would seem questionable under the reasoning of *Garrett*.[2166] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be a fundamental right subject to heightened scrutiny under the Due Process Clause.[2167]

Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a congruent and proportional response to a Congressional finding of "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[2168] However, as Justice Rehnquist pointed out in dissent, the deprivations the majority relied on were not limited to instances of imposing unconstitutional deprivations of court access to disabled persons.[2169] Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of

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[2163] Justice Ginsburg, writing for herself and three others, extensively reviewed the historical and legislative record and concluded that the family care and the self care provisions were of the same cloth. Both provisions grew out of concern for discrimination against pregnant workers, and, the FMLA's leave provisions were not, in the dissent's opinion, susceptible to being rent into separate pieces for analytical purposes.

[2164] 541 U.S. 509 (2004).

[2165] 42 USCS § 12132.

[2166] 531 U.S. 356 (2001).

[2167] *See, e.g.,* Faretta v. California, 422 U.S. 806, 819, n.15 (1975) (a criminal defendant has a right to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings).

[2168] 541 U.S. at 524.

[2169] 541 U.S. at 541–42 (Rehnquist, J., dissenting).

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the disabled in areas such as marriage or voting, and on limitations of access to public services beyond the use of courts.[2170]

Congress's authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity is strongest when a state's conduct at issue in a case is alleged to have actually violated a constitutional right. In *United States v. Georgia*,[2171] a disabled state prison inmate who used a wheelchair for mobility alleged that his treatment by the State of Georgia and the conditions of his confinement violated, among other things, Title II of the ADA and the Eighth Amendment (as incorporated by the Fourteenth Amendment). A unanimous Court found that, to the extent that the prisoner's claims under Title II for money damages were based on conduct that independently violated the provisions of the Fourteenth Amendment, they could be applied against the state. In doing so, the Court declined to apply the congruent and proportional response test, distinguishing the cases applying that standard (discussed above) as not generally involving allegations of direct constitutional violations.[2172]

[2170] 541 U.S. at 524–25. Justice Rehnquist, in dissent, disputed the reliance of the Congress on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. Id. at 542–43. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977), and that the action of non-state actors had previously been considered in such pre-*Boerne* cases as South Carolina v. Katzenbach, 383 U.S. 301, 312–15 (1966).

[2171] 546 U.S. 151 (2006).

[2172] "While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." 546 U.S. at 158 (citations omitted).

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