Individual Rights and Liberties Under the U.S. Constitution

The Case Law of
the U.S. Supreme Court

Ioannis G. Dimitrakopoulos

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ABOUT THE AUTHOR

Ioannis G. Dimitrakopoulos was born in 1971 in Athens, Greece. In 1993, he received his Law degree (with Honors) from Athens Law School. In 1994, he obtained his Masters degree, in the field of Internal Public Law, from the University Panthéon—Assas (Paris II). In 1998, he graduated at the top of his class from the National School for the Judiciary and was appointed Junior Judge to the Council of State, the Supreme Administrative Court of Greece, which deals mainly with cases involving questions of constitutional, administrative, or European Community law.

During the academic year 2003–2004, he was a Senior Visiting Fellow in the University of California, Berkeley (Earl Warren Legal Institute). In 2005, he was promoted to Associate Judge of the Council of State. He is currently detached to the European Union, serving as a Principal Legal Adviser of the European Ombudsman. His previous publications include the following books (in Greek): *Case Law of the Court of Justice of the European Communities and Essential Community Legislation Concerning Environment* and *European Community Law on Public Procurement.*

PREFACE—ACKNOWLEDGEMENTS

This is a treatise on individual rights and liberties, under the U.S. Constitution, as interpreted by the federal Supreme Court. It contains references to more than 2,500 opinions of the Court, and covers, in a comprehensive way, ten major decisional areas:

- general issues of constitutional rights (e.g., rightholders, state action, affirmative obligations of government, substantive due process, waiver of rights);
- procedural rights (including fundamental rights in criminal procedure);
- personal inviolability and liberty;
- substantive guarantees against criminal or civil penalties;
- personal or family privacy and autonomy;
- searches and seizures;
- freedoms of conscience, thought, belief, and religion (including the Establishment Clause);
- freedoms of speech, press, assembly, and association;
- substantive protection of property rights and economic interests;
- equal protection.

It also includes an introductory chapter on the Supreme Court, its organization, jurisdiction, and procedures and the exercise of judicial review. The cut-off date is January 1, 2006.

The book has been based on an exhaustive research of the relevant materials, conducted mostly through computer databases. In the interest of accuracy, the text stays close to, and often reproduces, the actual language of the Court's opinions. In many cases, the presentation and analysis are based on the Court's own analysis and understanding of its prior decisions.

This book was written, in great part, while I was a Senior Visiting Scholar (for the 2003–2004 academic year) in the Earl Warren Legal Institute (renamed as "Institute for Legal Research"), at the University of California, Berkeley. I cannot thank enough Professor Harry Scheiber, Director of the Institute, Riesenfeld Professor of Law and History, and former President of the American Society of Legal History, for his friendship, valuable guidance, and multiple efforts to make my visit to Boalt Hall, School of Law, as profitable as possible. I also wish to express my thanks to all the others Faculty Members of Boalt Hall who offered me their support, especially to Jesse Choper, Earl Warren Professor of Public Law and to Laurent Mayali, Lloyd M. Robbins Professor of Law.

Ioannis G. Dimitrakopoulos
Strasbourg, November 2006

CHAPTER 1

THE U.S. SUPREME COURT—AN OVERVIEW

A. THE COURT AS AN INSTITUTION

[A1] Article III, Section 1, of the U.S. Constitution states that the "judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish." The federal judiciary constitutes one of the three co-equal branches of federal government and is independent from the executive and the legislature. Article III, Section 1, "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by the other branches of government."[1] The Supreme Court of the United States is at the top of the country's judicial branch.

[A2] The Court consists of nine members, the Chief Justice of the United States and eight Associate Justices. Justices of the Supreme Court are appointed for life by the President of the United States and must be confirmed by a majority vote in the Senate. All of them have been lawyers, although the Constitution does not so require. During the last decades, most of them have been selected among law professors and judges of state or lower federal courts. Usually they are appointed in their 50s and retire (voluntarily) after age 80. They may be removed from office only by first being impeached by a majority vote of the U.S. House of Representatives and then convicted by a two-thirds vote of the Senate. Every Justice is aided by four law clerks, usually recent top graduates of law schools.

B. THE COURT'S JURISDICTION

1. In General [2]

[A3] A federal court lacks jurisdiction over the subject matter if the cause does not "arise under" the federal Constitution, laws, or treaties[3] (or falls within one of the other enumerated categories of Article III), or if it is not a "case or controversy" within the meaning of that phrase in Article III, or if the cause is not one described by any jurisdictional statute.[4] Only in a few cases, such as actions between states or disputes between

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1 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848, 850 (1986).

2 *See also* para. B89 (*Eleventh Amendment*).

3 "Dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of th[e] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *See* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 (1998).

4 Baker v. Carr, 369 U.S. 186, 198 (1962).

a state and the federal government, does the Supreme Court have original jurisdiction. For the most part, the Court adjudicates appeals on decisions of lower federal courts and state supreme courts.[5]

2. The "Case or Controversy" Requirement

a. Introduction

[A4] The "case or controversy" limitation serves two complementary purposes. It "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it "define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[6] The several doctrines that have grown up to elaborate that requirement—not only standing but mootness, ripeness, political question, and the like—are "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[7]

b. Advisory Opinions—Administrative Duties—Rulemaking

[A5] The judicial power to decide cases and controversies does not include the provision of purely advisory opinions to the executive.[8] Indeed, as a general rule, "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution."[9] The purpose of this limitation is "to

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In *Steel Co. v. Citizens For Better Environment*, 523 U.S. 83 (1998), the Court declined to endorse the "doctrine of hypothetical jurisdiction," under which a federal court may proceed immediately to the merits question despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. The Court concluded that "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. . . . The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Id.* at 101–02.

5 *Interpretation of state law:* Where the Court is dealing with a state statute on direct review of a state court decision that has construed the statute, such a construction is binding on the Court. *See* New York v. Ferber, 458 U.S. 747, 769, n.24 (1982).

Since "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States" (*see, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500, n.9 (1985)), the Court normally follows lower federal court interpretations of state law (*see* McMillian v. Monroe County, 520 U.S. 781, 786 (1997)).

6 Flast v. Cohen, 392 U.S. 83, 95 (1968).

7 Allen v. Wright, 468 U.S. 737, 750 (1984), *quoting* Warth v. Seldin, 422 U.S. 490, 498 (1975).

8 Clinton v. Jones, 520 U.S. 681, 700 (1997).

9 Morrison v. Olson, 487 U.S. 654, 677 (1988), *quoting* Buckley v. Valeo, 424 U.S. 1, 123 (1976).

help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches."[10]

[A6] Nevertheless, the Court has recognized certain exceptions to this principle. "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary."[11] For example, Congress may confer upon the judiciary the power to promulgate federal rules of civil procedure[12] or to make "all necessary orders for the effective and expeditious administration of the business of the courts."[13] In addition, it may assign to courts or auxiliary bodies within the judicial branch "administrative or rulemaking duties that . . . are necessary and proper for carrying into execution all the judgments which the judicial department has power to pronounce."[14] The Court also has upheld a federal law authorizing appointment of an independent counsel (exercising investigative and prosecutorial authority) by a three-judge panel.[15]

c. Ripeness[16]

[A7] The ripeness requirement is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[17] In deciding whether an agency's decision is, or is not, ripe for judicial review, the Court examines "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[18] As to the "fitness of the issues," the Court takes into account that interpretation "of legislation in advance of its immediate adverse effect in the context of a concrete case may involve too remote and abstract an inquiry for the proper exercise of the judicial function,"[19] that the courts "would benefit from further factual development of the issues presented,"[20] and that "postponing consideration of the questions presented until a more concrete controversy arises may also have the advantage of permitting the state courts further opportunity to construe the provisions."[21] Moreover, the Court considers whether "judicial intervention would inappropriately interfere with further administrative action."[22]

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10 Morrison v. Olson, 487 U.S. 654, 678 (1988).

11 Mistretta v. United States, 488 U.S. 361, 388 (1989).

12 Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941).

13 Chandler v. Judicial Council, 398 U.S. 74, 86, n.7 (1970).

14 Mistretta v. United States, 488 U.S. 361, 389–90 (1989) (upholding delegation of authority to Sentencing Commission, an independent body in the judicial branch, to promulgate Sentencing Guidelines).

15 Morrison v. Olson, 487 U.S. 654, 677–96 (1988).

16 *See also* paras. J24–J27 (*regulatory takings of property*).

17 Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967).

18 *Id.* at 149.

19 Texas v. United States, 523 U.S. 296, 301 (1998), *quoting* Longshoremen v. Boyd, 347 U.S. 222, 224 (1954).

20 Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).

21 Texas v. United States, 523 U.S. 296, 301 (1998).

22 Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).

d. Standing

i. Constitutional Requirements

[A8] The doctrine of standing is an essential part of the case-or-controversy require-

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The doctrine of "exhaustion of administrative remedies." As analyzed in *McCarthy v. Madigan*, 503 U.S. 140, 144–49 (1992),

> The Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts. . . . Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.
>
> As to the first of these purposes, the exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise. . . . The exhaustion doctrine also acknowledges the common sense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court. Correlatively, exhaustion principles apply with special force when frequent and deliberate flouting of administrative processes could weaken an agency's effectiveness by encouraging disregard of its procedures. . . . As to the second of the purposes, exhaustion promotes judicial efficiency in at least two ways. When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. . . . And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context. . . .
>
> Notwithstanding these substantial institutional interests, federal courts are vested with a virtually unflagging obligation to exercise the jurisdiction given them. . . . Accordingly, the Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion. . . . *Administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.* (emphasis added) . . . Application of this balancing principle is "intensely practical," . . . because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided.
>
> The Court's precedents have recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. First, requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action. Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action. *See* Gibson v. Berryhill, 411 U.S. 564, 575, n.14 (1973) (administrative remedy deemed inadequate "[m]ost often . . . because of delay by the agency"). *See also* Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 587 (1989) ("Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); Walker v. S. R. Co., 385

ment of Article III,[23] which remains open to review at all stages of the litigation.[24] The standing inquiry focuses on the party seeking to get his complaint before a federal

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U.S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary); Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 591–92 (1926) (claimant "is not required indefinitely to await a decision of the ratemaking tribunal before applying to a federal court for equitable relief"). Even where the administrative decision making schedule is otherwise reasonable and definite, a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim. Bowen v. City of New York, 476 U.S. 467, 483 (1986) (disability benefit claimants "would be irreparably injured were the exhaustion requirement now enforced against them"); Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 773 (1947) ("impending irreparable injury flowing from delay incident to following the prescribed procedure" may contribute to finding that exhaustion is not required). By the same token, exhaustion principles apply with less force when an individual's failure to exhaust may preclude a defense to criminal liability. Moore v. E. Cleveland, 431 U.S. 494, 497, n.5 (1977) (plurality opinion); McKart v. United States, 395 U.S. 185, 197 (1969).

Second, an administrative remedy may be inadequate "because of some doubt as to whether the agency was empowered to grant effective relief." Gibson v. Berryhill, 411 U.S. 564, 575 (1973). For example, an agency, as a preliminary matter, may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute. *See, e.g.*, Moore v. E. Cleveland, 431 U.S. 494, 497, n.5 (1977); Mathews v. Diaz, 426 U.S. 67, 76 (1976). In a similar vein, exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that "the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit." Barry v. Barchi, 443 U.S. 55, 63, n.10 (1979), *quoting* Gibson v. Berryhill, 411 U.S. 564, 575 (1973). Alternatively, an agency may be competent to adjudicate the issue presented, but still lack authority to grant the type of relief requested. McNeese v. Bd. of Educ., 373 U.S. 668, 675 (1963) (students seeking to integrate public school need not file complaint with school superintendent because the "Superintendent himself apparently has no power to order corrective action" except to request the Attorney General to bring suit); Montana Bank v. Yellowstone County, 276 U.S. 499, 505 (1928) (taxpayer seeking refund not required to exhaust where "any such application [would have been] utterly futile, since the county board of equalization was powerless to grant any appropriate relief" in face of prior controlling court decision).

Third, an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it. Gibson v. Berryhill, 411 U.S. at 575, n.14; Houghton v. Shafer, 392 U.S. 639, 640 (1968) (in view of Attorney General's submission that the challenged rules of the prison were "validly and correctly applied to petitioner," requiring administrative review through a process culminating with the Attorney General "would be to demand a futile act"); Association of National Advertisers, Inc. v. FTC, 201 U.S. App.D.C. 165, 170–171, 627 F.2d 1151, 1156–1157 (1979) (bias of Federal Trade Commission chairman), cert. denied, 447 U.S. 921 (1980). *See also* Patsy v. Florida International University, 634 F.2d 900, 912–913 (CA5 1981) (en banc) (administrative procedures must "not be used to harass or otherwise discourage those with legitimate claims"), *rev'd on other grounds*, Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982).

[23] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[24] *See, e.g.*, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 546–47 (1986).

court,[25] although that inquiry "often turns on the nature and source of the claim asserted."[26] The standing question, in its Article III aspect, is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[27]

[A9] It has been established by a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things:

> (1) injury in fact, by which the Court means an invasion of a legally protected interest that is
>
> (a) concrete and particularized, and
>
> (b) actual or imminent, not conjectural or hypothetical;
>
> (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and
>
> (3) a likelihood that the injury will be redressed by a favorable decision, by which it is meant that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.[28]

These elements—injury in fact, causation, and redressability—are the "irreducible minimum" required by the Constitution,[29] and the party invoking federal jurisdiction bears the burden of establishing their existence.[30]

[A10] The "injury in fact" requirement "helps assure that courts will not pass upon abstract, intellectual problems, but adjudicate concrete, living contests between adversaries."[31] "The complainant must allege an injury to himself that is "distinct and palpa-

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[25] Flast v. Cohen, 392 U.S. 83, 99 (1968).

[26] Warth v. Seldin, 422 U.S. 490, 500 (1975).

[27] *Id.* at 498–99. The question of standing is not subject to waiver. *See* United States v. Hays, 515 U.S. 737, 742 (1995). The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines. Hence, the Court is required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before the Court. *See* FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230–31 (1990).

[28] Ne. Florida Chapter, Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 663–64 (1993).

[29] Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

[30] *See* FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990) ("It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, . . . but rather must affirmatively appear in the record. . . . And it is the burden of the party who seeks the exercise of jurisdiction in his favor, . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute."). *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("Since they are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation.").

[31] Fed. Election Comm'n v. Akins, 524 U.S. 11, 20 (1998).

ble, . . . as opposed to merely abstract, . . . and the alleged harm must be actual or imminent, not conjectural or hypothetical."[32] The alleged "injury must be legally and judicially cognizable;" the plaintiff must establish that he has suffered an invasion of a legally protected interest that is concrete and particularized.[33] "Particularized" means that "the injury must affect the plaintiff in a personal and individual way."[34]

[A11] The Court has consistently held that a plaintiff "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."[35] In *Frothingham* a taxpayer brought suit challenging the constitutionality of the Maternity Act of 1921, which provided federal funding to the states for the purpose of improving maternal and infant health. The injury she alleged consisted of the burden of taxation in support of an unconstitutional regime, which she characterized as a deprivation of property without due process. The Court concluded that the only "injury" was the fact that officials of the executive department of the government were executing and would execute an Act of Congress asserted to be unconstitutional. Any tangible effect of the challenged statute on the plaintiff's tax burden was "remote, fluctuating and uncertain." In rejecting this as a cognizable injury sufficient to establish standing, the Court pointed out that "[t]he party who invokes the power [of judicial review] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[36]

[A12] The taxpayer plaintiffs in *Flast* sought to enjoin the expenditure of federal funds under the Elementary and Secondary Education Act of 1965, which they alleged were being used to support religious schools in violation of the Establishment Clause. The Court developed a two-part test to determine whether the plaintiffs had standing to sue. First, because a taxpayer alleges injury only by virtue of his liability for taxes, the Court held that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." Second, the Court required the taxpayer to "show that the chal-

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[32] Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

[33] Raines v. Byrd, 521 U.S. 811, 819 (1997).

[34] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, n.1 (1992).

While Congress lacks the constitutional power to abrogate the "injury in fact" requirement, Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. See Linda R. S. v. Richard D., 410 U.S. 614, 617, n.3 (1973). Congress may thus elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law. *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208–12 (1972) (injury to an individual's personal interest in living in a racially integrated community); Hardin v. Kentucky Utils. Co., 390 U.S. 1, 6 (1968) (injury to a company's interest in marketing its product free from competition)]. As the Court has pointed out, "[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992), *quoting* Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

[35] Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992).

[36] Frothingham v. Mellon, 262 U.S. 447, 487–88 (1923).

lenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power, and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." The plaintiffs in *Flast* satisfied this test because "[t]heir constitutional challenge [wa]s made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare," and because the Establishment Clause, on which plaintiffs' complaint rested, "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." The Court distinguished *Frothingham* on the ground that Mrs. Frothingham "had relied not on a specific limitation on the power to tax and spend, but on a more general claim based on the Due Process Clause."[37] Thus, the Court reaffirmed that the "case or controversy" aspect of standing is unsatisfied "where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System."[38]

[A13] *Richardson* dismissed for lack of standing a taxpayer suit challenging the government's failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Article I, Section 9, clause 7, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The Court held that such a suit rested upon an impermissible generalized grievance and was inconsistent with the framework of Article III, because the impact on the plaintiff was "plainly undifferentiated and common to all members of the public."[39] In *Schlesinger*, the Court dismissed, for the same reasons, a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause (Article I, Section 6, clause 2) for Members of Congress to hold commissions in the military reserves. It said that the challenged action, standing alone, would adversely "affect only the generalized interest of all citizens in constitutional governance."[40]

[A14] In *Valley Forge*, the Court rejected a claim of standing to challenge a government conveyance of property to a religious institution. The plaintiffs were without standing to sue as taxpayers, because the source of their complaint was not a congressional action but a decision by the Secretary of Health, Education, and Welfare to transfer a parcel of federal property, and because the conveyance in question was not an exercise of Congress' authority conferred by the Taxing and Spending Clause (Article I, Section 8), but by the Property Clause (Article IV, Section 3, clause 2). Insofar as the plaintiffs relied simply on "their shared individuated right" to a government that made no law respecting an establishment of religion, the Court held that plaintiffs had not alleged a judicially cognizable injury, noting that "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."[41]

[A15] *Whitmore* held that a third party has no standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right of

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[37] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479 (1982), *discussing Flast.*

[38] Flast v. Cohen, 392 U.S. 83, 102–06 (1968).

[39] United States v. Richardson, 418 U.S. 166, 176–77 (1974).

[40] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974).

[41] Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 483 (1982).

appeal to the state supreme court. In reaching this conclusion, the Court rejected the notion that Article III permits a citizen-suit to prevent a condemned criminal's execution on the basis of "the public interest protections of the Eighth Amendment."[42]

[A16] "The rule against generalized grievances applies with as much force in the equal protection context as in any other."[43] *Allen v. Wright* made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct."[44] And *Hays* recognized that a plaintiff who resides in a district that is the subject of a racial gerrymander claim, has standing to challenge the legislation that created that district, but a plaintiff from outside that district lacks standing absent specific evidence that he personally has been subjected to a racial classification, even though the racial composition of his own district might have been different had the legislature drawn the adjacent majority-minority district another way.[45] In the context of apportionment, the Court has held that voters have standing to challenge an apportionment statute, because they assert "a plain, direct and adequate interest in maintaining the effectiveness of their votes."[46]

[A17] "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and, where a harm is concrete, though widely shared, the Court has found 'injury in fact.' . . . Thus, the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact.'"[47] That is the case, for example, where large numbers of voters suffer interference with voting rights conferred by law. In *Akins*, the Federal Election Commission had determined that the American Israel Public Affairs Committee (AIPAC) was not a "political committee" as defined by the Federal Election Campaign Act of 1971 (FECA), and, for that reason, the Commission had refused to require AIPAC to make disclosures regarding its membership, contributions, and expenditures that FECA would otherwise require. The Court held that respondents, a group of voters, had standing to challenge the Commission's determination in court, concluding that "the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."[48]

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42 Whitmore v. Arkansas, 495 U.S. 149, 160 (1990).

43 United States v. Hays, 515 U.S. 737, 743 (1995).

44 Allen v. Wright, 468 U.S. 737, 755 (1984) (black school children's parents who claimed a "stigmatizing injury" due to Internal Revenue Service decision to grant tax-exempt status to racially discriminatory private schools had not been personally denied equal treatment, and thus had not been injured). *See also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 489–90, n.26 (1982) (disapproving the proposition that every citizen has "standing to challenge every affirmative action program on the basis of a personal right to a government that does not deny equal protection of the laws").

45 United States v. Hays, 515 U.S. 737, 744–46 (1995).

46 Baker v. Carr, 369 U.S. 186, 208 (1962).

47 Federal Election Comm'n v. Akins, 524 U.S. 11, 24 (1998).

48 *Id.* at 24–25.

[A18] The alleged harm must be actual or imminent. "Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending."[49] For example, in *O'Shea*, the Court held there was no case or controversy where residents of an Illinois town sought injunctive relief against a magistrate and a circuit court judge whom the plaintiffs claimed were engaged in a pattern and practice of illegal bond-setting, sentencing, and jury-fee practices in criminal cases. The allegation of plaintiffs in that case amounted to a claim that if they "proceed to violate an unchallenged law and if they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed." The Court observed that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." Past wrongs were evidence bearing on "whether there is a real and immediate threat of repeated injury." But the prospect of future injury rested "on the likelihood that [plaintiffs] will again be arrested for and charged with violations of the criminal law, and will again be subjected to bond proceedings, trial, or sentencing before petitioners." The Court concluded that the threat to the plaintiffs was not "sufficiently real and immediate to show an existing controversy simply because they anticipate[d] violating lawful criminal statutes and being tried for their offenses."[50] Similarly, *Lyons* held that a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy, because he could not credibly allege that he faced a realistic threat from the policy.[51]

[A19] In *Adarand Constructors*, petitioner claimed that the federal government's practice of giving general contractors on government projects a financial incentive to hire sub-contractors controlled by "socially and economically disadvantaged individuals," and, in particular, the government's use of race-based presumptions in identifying such individuals, violated the equal protection component of the Fifth Amendment's Due Process Clause. The Court held that Adarand did not have to demonstrate that it had been, or would be, the low bidder on a government contract: "the injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on an equal footing."[52] Because the evidence in the record of the case indicated that the Department of Transportation was likely to let contracts involving guardrail work containing a sub-contractor compensation clause at least once per year in Colorado, that Adarand was very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, the Court found that

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49 Lujan v. Defenders of Wildlife, 504 U.S. 555, 565, n.2 (1992).

50 O'Shea v. Littleton, 414 U.S. 488, 495–97 (1974).

51 Los Angeles v. Lyons, 461 U.S. 95, 107, n.7 (1983). The Court noted that "[t]he reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct," and his "subjective apprehensions" that such a recurrence would even take place were not enough to support standing. *Id.* at 108, n.8. The Court has likewise thought inadequate allegations of future injury contingent on the prospective future candidacy of a former congressman (*see* Golden v. Zwickler, 394 U.S. 103, 109 (1969)), and on police using deadly force against a person fleeing from an as yet uneffected arrest (*see* Ashcroft v. Mattis, 431 U.S. 171, 172, n.2 (1977)).

52 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 91995).

Adarand had standing to seek declaratory and injunctive relief against any future use of sub-contractor compensation clauses.[53]

[A20] In *Allen*, parents of black public school children alleged that, even though it was the policy of the Internal Revenue Service (IRS) to deny tax-exempt status to racially discriminatory schools, the IRS had not adopted sufficient standards and procedures to enforce this policy. The parents alleged that the lax enforcement caused white students to attend discriminatory private schools and, therefore, interfered with their children's opportunity to attend desegregated public schools. The Court held that the chain of causation between the challenged action and the alleged injury was too attenuated to confer standing: "It is, first, uncertain how many racially discriminatory private schools are in fact receiving tax exemptions. Moreover, it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. . . . It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools."[54]

[A21] In *Simon*, the respondents challenged an IRS revenue ruling that granted favorable tax treatment to non-profit hospitals that offered only emergency-room services to the poor. The respondents argued that the revenue ruling encouraged hospitals to deny services to indigents. As in *Allen*, the Court held that the chain of causation was too attenuated: "It is purely speculative whether the denials of service . . . fairly can be traced to [the IRS's] 'encouragement,' or instead result from decisions made by the hospitals without regard to the tax implications. It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services."[55] The respondents, thus, failed to carry their burden of showing that their injury was the consequence of the revenue ruling or that prospective relief would remove the harm.

[A22] Similarly, *Warth* held that low-income persons seeking the invalidation of a town's restrictive zoning ordinance lacked standing, because they failed to show that the alleged injury, inability to obtain adequate housing within their means, was fairly attributable to the challenged ordinance instead of to other factors. The Court noted that plaintiffs relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had defendants acted otherwise, and might improve were the court to afford relief."[56]

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[53] *Id.* at 212.

[54] Allen v. Wright, 468 U.S. 737, 752–53, 758 (1984).

[55] Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 42–43 (1976).

[56] Warth v. Seldin, 422 U.S. 490, 507 (1975).

Probably the most attenuated injury conferring Article III standing was that asserted by the respondents in *United States v. SCRAP*, 412 U.S. 669 (1973). There, an environmental group challenged the Interstate Commerce Commission's (ICC) approval of a surcharge on railroad

[A23] In *Linda R. S.*, the mother of an illegitimate child brought an action in U.S. district court to enjoin "discriminatory application" of a Texas Penal Code provision that imposed criminal sanctions on a parent who willfully deserted, neglected, or refused to provide child support. The Texas courts had held that the statute applied only to the parents of legitimate children and did not apply to the parents of illegitimate children. The Court held that the appellant in *Linda R. S.* did not have standing to challenge the statute, because she had failed to allege a sufficient nexus between her injury and the government's failure to prosecute fathers of illegitimate children. Even "if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution [would], at least in the future, result in payment of support [could] at best, be termed only speculative."[57]

[A24] *Steel Co. v. Citizens for Better Environment* [58] involved a private enforcement action under the citizen suit provision of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA). Respondent, an association of individuals interested in environmental protection, sued petitioner, a small manufacturing company in Chicago, alleging that petitioner had violated EPCRA by failing to file timely toxic and hazardous chemical storage and emission reports for past years. The complaint asked for

(1) a declaratory judgment that petitioner violated EPCRA;

(2) authorization to inspect periodically petitioner's facility and records (with costs borne by petitioner);

(3) an order requiring petitioner to provide respondent copies of all compliance reports submitted to the Environmental Protection Agency (EPA);

(4) an award of all respondent's costs in connection with the investigation and prosecution of this matter, including reasonable attorney and expert witness fees;

(5) an order requiring petitioner to pay civil penalties of $25,000 per day for each violation.

The Court held that respondent lacked standing to sue. Even assuming that petitioner's failure to report EPCRA information in a timely manner, and the lingering effects of that failure, constituted a concrete injury in fact to respondent and its members that

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freight rates, claiming that the adverse environmental impact of the ICC's action on the Washington metropolitan area would cause the group's members to suffer "economic, recreational and aesthetic harm." *Id.* at 678. The SCRAP group alleged that "a general rate increase would . . . cause increased use of non-recyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area." *Id.* at 688. The Court held that those pleadings alleged a specific and perceptible harm sufficient to survive a motion to dismiss for lack of standing, but also indicated that the United States could have been entitled to summary judgment on the standing issue if it showed that "the allegations were sham and raised no genuine issue of fact." *Id.* at 689, and n.15. In *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990), the Court observed that "the analysis of the standing question in *SCRAP* . . . surely went to the very outer limit of the law."

[57] Linda R. S. v. Richard D., 410 U.S. 614, 618 (1973). The Court also stressed that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Id.* at 619.

[58] Steel Co. v. Citizens for Better Env't, 523 U.S. 83 (1998).

satisfied Article III, the complaint nevertheless failed the redressability test of standing. As to the first item, there being no controversy over whether petitioner had failed to file reports, or over whether such a failure constituted a violation, the declaratory judgment was not only worthless to respondent but also to everybody else. The second or third relief sought by respondent could not conceivably remedy any past wrong but was aimed at deterring petitioner from violating EPCRA in the future; however, respondent had not alleged a continuing violation or the imminence of a future violation. With regard to the fourth item, it is obvious that a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. Finally, as the Court explained in *Friends of the Earth, Steel Co.* established that "citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit."[59] By contrast, "for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a [civil penalty] that effectively abates that conduct and prevents its recurrence provides a form of redress."[60]

ii. Non-Constitutional Prudential Considerations

[A25] In addition to the immutable requirements of Article III, the Court has also adopted several prudential principles that bear on the question of standing, such as the general prohibition on a litigant's raising another person's legal rights and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.[61] "Like their constitutional counterparts, these judicially self-imposed limits on the exercise of federal jurisdiction . . . are founded in concern about the proper role of the courts in a democratic society, . . . but, unlike their constitutional counterparts, they can be modified or abrogated by Congress."[62]

[A26] "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."[63] However, this fundamental restriction on judicial authority admits to certain, limited exceptions. A "litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests."[64] When "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the

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59 Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 187–88 (2000).

60 *Id.* at 185–86.

61 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984).

62 Bennett v. Spear, 520 U.S. 154, 162 (1997).

63 Powers v. Ohio, 499 U.S. 400, 410 (1991).

64 Edmondson v. Leesville Concrete Co., 500 U.S. 614, 629 (1991). In *Powers v. Ohio*, 499 U.S. 400 (1991), the Court held that a white defendant has standing to challenge racial discrimination against black persons in the use of peremptory challenges. The Court concluded that (1) a defendant suffers a serious injury in fact because discrimination at the *voir dire* stage "casts doubt on the integrity of the judicial process . . . and places the fairness of a criminal proceeding in doubt;" (2) the excluded juror and criminal defendant have a close relationship—they share a common interest in eliminating discrimination; and (3) given the economic burdens of litigation and the small financial reward available, "a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Id.* at 411–15. In *Edmondson, supra*, the Court applied the same analysis in deciding that civil litigants have standing to raise the equal protection rights of jurors excluded on the basis of their race.

litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement, . . . third-party standing has been held to exist."[65] And "next friend" standing has been an accepted basis for jurisdiction in certain circumstances.[66]

[A27] The "zone of interests" formulation was first employed in *Data Processing*. Section10(a) of the Administrative Procedure Act (APA) provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The Court interpreted Section 10(a) of the APA to impose a prudential standing requirement in addition to the requirement, imposed by Article III of the Constitution, that a plaintiff have suffered a sufficient injury in fact. For a plaintiff to have prudential standing under the APA, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question."[67] Although the "zone of interests" test "denies a right of review if the plaintiff's interests are marginally related to, or inconsistent with, the purposes implicit in the statute, that it cannot reasonably be assumed that Congress intended to permit the suit[,] [t]he test

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In *Barrows v. Jackson*, 346 U.S. 249, 257 (1953), a covenantor who breached a racially restrictive covenant by selling to blacks was permitted to set up the buyers' rights to equal protection in defense against a damages action by the covenantees. The Court considered that the general rule outweighed "the need to protect [these] fundamental rights" in a situation "in which it would be difficult if not impossible for the person whose rights are asserted to present their grievance before any court."

65 *See* United States Dep't of Labor v. Triplett, 494 U.S. 715, 720 (1990) (attorney may challenge an attorney's fees restriction by asserting the due process rights of the client), *citing* Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 954–58 (1984) (professional fundraiser given third-party standing to challenge statute limiting its commission to 25 percent as violation of clients' First Amendment right to hire him for a higher fee).

66 "A 'next friend' does not himself become a party to the action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest. . . . [A] 'next friend' must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action, . . . [and] must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate." *See* Whitmore v. Arkansas, 495 U.S. 149, 163 (1990). Most frequently, "next friends" appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves. *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13, n.3 (1955) (prisoner's sister brought habeas corpus proceeding while he was being held in Korea). *See also* paras. G63–G66 (*Fourth Amendment rights*); paras. I32 *et seq.* (*freedom of speech and the "overbreadth" doctrine*).

67 Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152–53 (1970). There, the Office of the Comptroller of the Currency (the Comptroller) had interpreted the National Bank Act's incidental powers clause to permit national banks to perform data processing services for other banks and bank customers. The plaintiffs, a data processing corporation and its trade association, alleged that this interpretation was impermissible, because providing data processing services was not, as was required by the statute, an incidental power necessary to carry on the business of banking. The court of appeals had held that the banks' data processing competitors were without standing to challenge the alleged violation of the Act. In reversing, the Court noted that although the relevant federal statutes did not "in terms protect a specified group[,] . . . their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable." As competitors of national banks, which were engaging in data processing services, the plaintiffs were within that class of "aggrieved persons" entitled to judicial review of the Comptroller's interpretation. *Id.* at 157.

is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."[68]

iii. Particular Questions of Standing[69]

[A28] *Equal Protection Claims.*[70] "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."[71] To establish standing, therefore, a party challenging a municipal program according preferential treatment to certain minority-owned businesses in the award of city contracts "need only demonstrate that it is able and ready to bid on contracts and that the discriminatory policy prevents it from doing so on an equal basis."[72]

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[68] Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 399–400 (1987). *See also* Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 491–92 (1998). In *Clarke*, a securities dealers trade association sued the Comptroller, this time for authorizing two national banks to offer discount brokerage services both at their branch offices and at other locations inside and outside their home states. The plaintiff contended that the Comptroller's action violated the McFadden Act, which permitted national banks to carry on the business of banking only at authorized branches and to open new branches only in their home states and only to the extent that state-chartered banks in that state could do so under state law. The Court again held that the plaintiff had standing under the APA. By limiting the ability of national banks to do business outside their home states, "Congress ha[d] shown a concern to keep national banks from gaining a monopoly control over credit and money." The interest of the securities dealers in preventing national banks from expanding into the securities markets directly implicated this concern, because offering discount brokerage services would allow national banks "access to more money, in the form of credit balances, and enhanced opportunities to lend money, viz., for margin purchases." *Id.* at 403.

Other cases have applied the "zone of interests" test also in suits not involving review of federal administrative action. *See* Dennis v. Higgins, 498 U.S. 439, 449 (1991); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 320–21, n.3 (1977). The Court has made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the "generous review provisions" of the APA may not do so for other purposes. *See* Bennett v. Spear, 520 U.S. 154, 163 (1997), *citing* Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 400, n.16 (1987).

[69] *See also* paras. G63–G66 (*Fourth Amendment rights*); paras. J80–J82 (*taking of property*).

[70] *See also* paras. A16, A19–A23.

[71] Ne. Florida Chapter, Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993). *See also* Gratz v. Bollinger, 539 U.S. 244, 262 (2003) (since petitioner had applied to the University as a freshman applicant, and had been denied admission even though an underrepresented minority applicant with his qualifications would have been admitted, he demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions; he therefore had standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions, even though he had not actually applied for admission as a transfer student).

[72] Ne. Florida Chapter, Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993).

[A29] "The right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against. Rather, . . . discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior,' and therefore less worthy participants in the political community, . . . can cause serious noneconomic injuries to those persons who are denied equal treatment solely because of their membership in a disfavored group."[73] "In every equal protection attack upon a statute challenged as under-inclusive, the Government may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties (e.g., by repealing the statute as a whole)."[74] If a severability clause would forbid only the latter and not the former, kind of relief in a case where the plaintiff has been denied monetary benefits allegedly on a discriminatory basis, the injury caused by the unequal treatment allegedly suffered by him may be redressed by a favorable decision, and he therefore has standing to prosecute such an action.[75]

[A30] *Abortion Laws.* In *Roe v. Wade*, the Court held that a woman who was not pregnant at the time the suit was filed did not have standing to challenge the constitutionality of the Texas abortion laws. Her alleged injury rested on "possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health." However, any one or more of these several possibilities might not take place, and all might not combine. And as to her estimation that these possibilities might have some impact upon her marital happiness, the Court was not prepared to say that "the bare allegation of so indirect an injury is sufficient to present an actual case or controversy."[76]

[A31] A physician has standing to challenge an abortion law that poses for him a threat of criminal prosecution.[77] By contrast, a pediatrician has no standing to litigate the standards of medical practice that ought to be applied to the performance of abortions, for he "has an interest, but no direct stake, in the abortion process."[78] One's claim of conscientious objection to abortion does not provide a judicially cognizable interest; and one cannot assert any constitutional right of the unborn fetus, since "[o]nly the State may invoke regulatory measures to protect that interest [or] the power of the courts when those measures are subject to challenge."[79]

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73 Heckler v. Mathews, 465 U.S. 728, 739–40 (1984).

74 Orr v. Orr, 440 U.S. 268, 272 (1979).

75 Heckler v. Mathews, 465 U.S. 728, 740 (1984).

76 Roe v. Wade, 410 U.S. 113, 128 (1973).

77 Doe v. Bolton, 410 U.S. 179, 188 (1973). As noted by the Court, "[t]he physician is the one against whom [the Missouri Act] directly operate[s] in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

In *Diamond v. Charles*, 476 U.S. 54, 66 (1986), the Court rejected a pediatrician's attempt to defend a state law restricting abortions, because his complaint that fewer abortions would lead to more paying patients was "unadorned speculation" insufficient to invoke the federal judicial power.

78 Diamond v. Charles, 476 U.S. 54, 67 (1986)

79 *Id.* at 67.

[A32] *Environmental Harm.*[80] The relevant showing for Article III standing is not injury to the environment, but injury to the plaintiff.[81] Environmental plaintiffs adequately allege injury in fact when "they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity."[82]

[A33] *Commerce Clause Challenges.*[83] Cognizable injury from unconstitutional discrimination against inter-state commerce does not stop at members of the class against whom a state ultimately discriminates. "[C]ustomers of that class may also be injured, . . . where the customer is liable for payment of the tax, and, as a result, presumably pays more for the goods it gets from out-of-state producers and marketers. Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III."[84]

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[80] *See also* paras. A22, A24.

[81] Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000).

[82] *Id.* at 183, *citing* Sierra Club v. Morton, 405 U.S. 727, 735 (1972). A plaintiff claiming injury from environmental damage must use the area affected by the challenged activity, and not an area roughly "in the vicinity" of it. *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 887–89 (1990). The Court thus has rejected the proposition that "any person who uses any part of a 'contiguous ecosystem' adversely affected by a funded activity has standing even if the activity is located a great distance away." *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 565–66 (1992).

In the latter case, the Court held that "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the "some day" would be—to visit endangered species halfway around the world did not support a finding of "actual or imminent" injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992). The Court added: "It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist, *see* Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 231, n.4 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection." Lujan v. Defenders of Wildlife, 504 U.S. 555, 566–67 (1992).

In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), an environmental organization assailed the Bureau of Land Management's "land withdrawal review program," a program covering millions of acres, alleging that the program illegally opened up public lands to mining activities. The defendants moved for summary judgment, challenging the plaintiff organization's standing to initiate the action under the Administrative Procedure Act, 5 U.S.C. § 702. The Court held that the plaintiff could not survive the summary judgment motion merely by offering "averments which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990).

[83] *See also* paras. A36, A37.

[84] Gen. Motors Corp. v. Tracy, 519 U.S. 278, 286 (1997). There, the Court found that petitioner had standing to challenge an Ohio statute that imposed a general sales and use taxes on natural gas purchases from all sellers, whether in-state or out-of-state, except regulated public utilities meeting Ohio's statutory definition of a "natural gas company." Similarly, in *Bacchus*

[A34] *Legislators. Coleman* upheld standing for state legislators claiming an institutional injury. In that case, 20 of Kansas' 40 state senators voted not to ratify the proposed "Child Labor Amendment" to the federal Constitution. With the vote deadlocked 20–20, the amendment ordinarily would not have been ratified. However, the state's lieutenant governor, the presiding officer of the state Senate, cast a deciding vote in favor of the amendment, and it was deemed ratified (after the state House of Representatives voted to ratify it). The 20 state senators who had voted against the amendment, joined by a 21st state senator and three state House members, filed an action in the Kansas supreme court seeking a writ of mandamus that would compel the appropriate state officials to recognize that the legislature had not in fact ratified the amendment. That court held that the members of the legislature had standing to bring their mandamus action, but ruled against them on the merits. The Court affirmed. By a vote of five-to-four, it held that the members of the legislature had standing, for they had "a plain, direct, and adequate interest in maintaining the effectiveness of their votes, [which] would have been sufficient to defeat ratification."[85] By contrast, in *Raines*, the Court held that members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act, which gave the President the authority to cancel certain spending and tax benefit measures after having signed them into law, finding that there "is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here."[86]

[A35] *Federal Agencies.* Federal "[a]gencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes."[87] The Court has held, for example, that the Director of the Office of Workers' Compensation Programs in the U.S. Department of Labor is not "adversely affected or aggrieved," within the meaning of Section 21(c) of the Longshore and Harbor Workers' Compensation Act, by decisions made by the benefits review board that deny claimants compensation to which they are allegedly entitled. In so concluding, the Court noted, *inter alia*, that the Director failed to establish "such a clear and distinctive responsibility for employee compensation as to overcome the universal assumption that 'person adversely affected or aggrieved' leaves private interests (even those favored by public policy) to be litigated by private parties."[88]

Importers, Ltd. v. Dias, 468 U.S. 263, 267 (1984), the Court held that in-state liquor wholesalers had standing to raise a Commerce Clause challenge to a Hawaiian tax regime exempting certain alcohols produced in-state from liquor taxes. Although the wholesalers were not among the class of out-of-state liquor producers allegedly burdened by Hawaii's law, the Court reasoned that the wholesalers suffered economic injury both because they were directly liable for the tax and because the tax raised the price of their imported goods relative to the exempted in-state beverages. *See* Gen. Motors Corp. v. Tracy, *supra*, at 287, *discussing Bacchus.*

See also Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) (in-state stockholder challenged tax regime imposing higher taxes on stock from issuers with out-of-state operations than on stock from purely in-state issuers); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (in-state milk dealers challenged tax and subsidy scheme discriminating against out-of-state milk producers).

85 Coleman v. Miller, 307 U.S. 433, 438 (1939).

86 Raines v. Byrd, 521 U.S. 811, 826 (1997). In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court held the cancellation procedures set forth in the Line Item Veto Act violated the Presentment Clause (U.S. Const. art. I, § 7, cl. 2).

87 Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 132 (1995).

88 *Id.* The United States has *standing to sue on behalf of Indians*, in light of the government's status as guardian. *See* Heckman v. United States, 224 U.S. 413, 437 (1912). *Cf.* Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 474, n.13 (1976).

[A36] *States.* A state may sue in vindication of its sovereign interests[89] or its proprietary interests. Moreover, a state may bring suit in its capacity as *parens patriae*, if it asserts an injury to what has been characterized as a "quasi-sovereign" interest. Although the articulation of these quasi-sovereign interests is a matter for case-by-case development, certain characteristics of such interests emerge from the Court's cases.

> These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and wellbeing—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.
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> The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population. One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.
>
> Distinct from but related to the general wellbeing of its residents, the State has an interest in securing observance of the terms under which it participates in the federal system. In the context of *parens patriae* actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system. Thus, the State need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce. . . . Similarly, federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents.[90]

[A37] *Representational or Associational Standing.* An association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, "in attempting to secure relief from injury to itself, the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."[91] Even in the absence of injury to itself, an association may have standing solely as the represen-

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[89] As the Court noted in *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez*, 458 U.S. 592, 601 (1982), "[t]wo sovereign interests are easily identified: first, the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal; second, the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders." In *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992), the Court recognized a state's standing to bring a negative Commerce Clause action on the basis of its consequential loss of tax revenue.

[90] Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601–02, 607–08 (1982). A state does not have standing as *parens patriae* to bring an action against the federal government. *See* Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923) ("While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.").

[91] Warth v. Seldin, 422 U.S. 490, 511 (1975), *citing* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 458–60 (1958).

tative of its members. "[A]n association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests at stake are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the law suit."[92]

[A38] *Shareholders.* The so-called shareholder standing rule is "a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good faith business judgment. . . . There is,

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[92] Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). There the Washington Apple Advertising Commission brought suit to declare as violative of the Commerce Clause a North Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers be identified by no grade other than the applicable federal grade or a designation that the apples were not graded. The Commission was a statutory agency designed for the promotion and protection of the Washington state apple industry and composed of 13 state growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whom by mandatory assessments financed the Commission's operations. The Court held that, while the apple growers and dealers were not "members" of the Commission in the traditional trade association sense, they possessed all of the indicia of membership in an organization, and concluded that the Commission had standing to bring the above action in a representational capacity. As the Court noted in *United Food & Commercial Workers v. Brown Group, Inc.* 517 U.S. 544, 546 (1996), "*Hunt* held that 'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members, but indicated that such participation would be required in an action for damages to an association's members, thus suggesting that an association's action for damages running solely to its members would be barred for want of the association's standing to sue. *See Hunt* at 343."

In *United Food & Commercial Workers v. Brown Group, Inc.* 517 U.S. 544, 555–57 (1996), the Court held that Congress may abrogate the *Hunt* standing limitation, and *disentangled the constitutional from the prudential strands of the associational standing test:* "[*Hunt*'s] first prong can only be seen as itself an Article III necessity for an association's representative suit. . . . *Hunt*'s second prong is at the least, complementary to the first, for its demand that an association plaintiff be organized for a purpose germane to the subject of its member's claim raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary. But once an association has satisfied *Hunt*'s first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more. To see *Hunt*'s third prong as resting on less than constitutional necessity is not, of course, to rob it of its value. It may well promote adversarial intensity. It may guard against the hazard of litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity. And it may hedge against any risk that the damages recovered by the association will fail to find their way into the pockets of the members on whose behalf injury is claimed. But these considerations are generally on point whenever one plaintiff sues for another's injury. . . . [T]he general prohibition on a litigant's raising another person's legal rights is a judicially self-imposed limit on the exercise of federal jurisdiction, not a constitutional mandate. Indeed, the entire doctrine of 'representational standing,' of which the notion of 'associational standing' is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common law tradition or by statute) are sufficient to rebut the background presumption . . . that litigants may not assert the rights of absent third parties. Hence the third prong of the associational standing test is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution."

however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated."[93]

[A39] *Intervention—Appeal.* An intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Article III.[94] Similarly, "[t]he standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance. . . . The decision to seek review is not to be placed in the hands of concerned bystanders, persons who would seize it as a vehicle for the vindication of value interests."[95]

e. Mootness

[A40] To qualify as a case fit for federal court adjudication, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."[96] A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[97] In such a case, any opinion as to the legality of the challenged action would be advisory.[98]

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93 Franchise Tax Bd. of California v. Alcan Aluminium, Ltd., 493 U.S. 331, 336 (1990).

94 Diamond v. Charles, 476 U.S. 54, 68 (1986).

95 Arizonans for Official English v. Arizona, 520 U.S. 43, 64–65 (1997).

96 Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997), *quoting* Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

97 *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 496 (1969).

98 Erie v. Pap's A.M., 529 U.S. 277, 287 (2000).

Distinction between Mootness and Standing. The Court has stated that the doctrine of mootness can be described as "the doctrine of standing set in a timeframe: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 68, n.22 (1997), *quoting* United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980).

However, in *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 190–92 (2000), the Court said:

> Careful reflection on the long-recognized exceptions to mootness . . . reveals that the *description of mootness as "standing set in a timeframe" is not comprehensive.* (emphasis added) . . . [A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. By contrast, in a law suit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the "threatened injury [is] certainly impending." Whitmore v. Arkansas, 495 U.S. 149, 158 (1990). Thus, in *Los Angeles v. Lyons*, 461 U.S. 95 (1983), we held that a plaintiff lacked initial standing to seek an injunction against the enforcement of a police choke-hold policy because he could not credibly allege that he faced a realistic threat arising from the policy. 461 U.S. at 105–110. Elsewhere in the opinion, however, we noted that a city-wide moratorium on police choke-holds—an action that surely diminished the already slim likelihood that any particular individual would be choked by police—would not have mooted an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent. *Id.* at 101. The plain lesson of these cases is that there are circumstances in which the prospect that a defen-

[A41] Since a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law, which cannot affect the matter in issue in the case before it, if an event occurs while a case is pending that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the complaint must be dismissed. But while a court may not be able to return the parties to the *status quo ante*, when a court can fashion some form of meaningful relief, the case cannot be deemed moot.[99]

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dant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.

Furthermore, if mootness were simply "standing set in a timeframe," the exception to mootness that arises when the defendant's allegedly unlawful activity is "capable of repetition, yet evading review" could not exist. When, for example, a mentally disabled patient files a law suit challenging her confinement in a segregated institution, her post-complaint transfer to a community-based program will not moot the action, Olmstead v. L.C., 527 U.S. 581, 594, n.6 (1999), despite the fact that she would have lacked initial standing had she filed the complaint after the transfer. Standing admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum. *See* Steel Co. v. Citizens for a Better Envi't, 523 U.S. 83, 109 (1998) ("the mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced"). . . .

We acknowledged the distinction between mootness and standing most recently in *Steel Co.:* "The United States . . . argues that the injunctive relief does constitute remediation because there is a presumption of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation, even if that occurs before a complaint is filed. . . . This makes a sword out of a shield. The presumption the Government refers to has been applied to refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity. . . . It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based." 523 U.S. at 109.

Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often . . . for years. To abandon the case at an advanced stage may prove more wasteful than frugal. This argument from sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lacks a continuing interest, as when the parties have settled, or a plaintiff pursuing a non-surviving claim has died. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974) (*per curiam*) (non-class-action challenge to constitutionality of law school admissions process mooted when plaintiff, admitted pursuant to preliminary injunction, neared graduation and defendant law school conceded that, as a matter of ordinary school policy, plaintiff would be allowed to finish his final term); Arizonans, 520 U.S. at 67 (non-class-action challenge to state constitutional amendment declaring English the official language of the State became moot when plaintiff, a state employee who sought to use her bilingual skills, left state employment). But the argument surely highlights an important difference between the two doctrines. *See* generally Honig v. Doe, 484 U.S. 305, 329–332 (1988) (Rehnquist, C.J., concurring).

[99] Church of Scientology of California v. United States, 506 U.S. 9, 12 (1992). This case involved two tapes recording conversations between officials of the Church of Scientology

[A42] The Court has recognized an exception to the mootness doctrine for cases that are "*capable of repetition, yet evading review.*" This doctrine "applies only in exceptional situations, . . . where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."[100]

[A43] As a general rule, voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot; if it did, "the courts would be compelled to leave the defendant free to return to his old ways."[101] "But jurisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both conditions are satisfied, it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law."[102] The "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."[103]

Church and their attorneys, which were delivered to the IRS, pursuant to a court order enforcing compliance with an IRS summons. The Court said: "Taxpayers have an obvious possessory interest in their records. When the Government has obtained such materials as a result of an unlawful summons, that interest is violated, and a court can effectuate relief by ordering the Government to return the records. Moreover, even if the Government retains only copies of the disputed materials, a taxpayer still suffers injury by the Government's continued possession of those materials, namely, the affront to the taxpayer's privacy. A person's interest in maintaining the privacy of his 'papers and effects' is of sufficient importance to merit constitutional protection. Indeed, that the Church considers the information contained on the disputed tapes important is demonstrated by the long, contentious history of this litigation. Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession. The availability of this possible remedy is sufficient to prevent this case from being moot." *Id.* at 13.

100 *See, e.g.*, Spencer v. Kemna, 523 U.S. 1, 17 (1998). The mootness exception for disputes capable of repetition yet evading review will not revive a dispute that became moot before the action commenced. *See* Renne v. Geary, 501 U.S. 312, 320–21 (1991), *citing* O'Shea v. Littleton, 414 U.S. 488, 495–96 (1974) (past exposure to illegal conduct does not, in itself, show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects).

In *Roe v. Wade*, 410 U.S. 113, 125 (1973), the Court held that a continuing controversy over the constitutionality of Texas abortion laws existed as to a named plaintiff who was pregnant when the suit was filed, even though she might not have been pregnant at later stages of the appeal. The Court concluded that this case provided an example of an issue capable of repetition, yet evading review, and that the termination of the plaintiff's pregnancy while the case was on appeal did not render the case moot: "[T]he . . . human gestation period is so short that . . . pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, . . . appellate review will be effectively denied."

101 Friends of Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc., 528 U.S. 167, 189 (2000).

102 County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

103 Friends of Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc., 528 U.S. 167, 189 (2000), *citing* United States v. Concentrated Phosphate Exp. Ass'n, Inc., 393 U.S. 199, 203 (1968).

Mootness and Class Actions. In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court held that, in the class action context, mootness of the named plaintiff's individual claim after a class has been

f. Final Judgments—Reopening of Cases

[A44] "The Constitution enumerates and separates the powers of the three branches of government in Articles I, II, and III, and it is this very structure of the Constitution that exemplifies the concept of separation of powers. . . . While the boundaries between the three branches are not hermetically sealed, . . . the Constitution prohibits one branch from encroaching on the central prerogatives of another."[104] "Article III establishes a judicial department with the province and duty to say what the law is in particular cases and controversies. . . . [T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that a judgment conclusively resolves the case because a judicial Power is one to render dispositive judgments."[105]

[A45] *Hayburn's Case*[106] arose out of a 1792 statute that authorized pensions for veterans of the Revolutionary War. The statute provided that the circuit courts were to review the applications and determine the appropriate amount of the pension, but that the Secretary of War had the discretion either to adopt or reject the courts' findings. Although the Court did not reach the constitutional issue in *Hayburn's Case*, the opinions of five Justices sitting on circuit courts were reported, and the Court has since recognized that the case "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."[107] "Such an effort by a coequal branch to annul a final judgment is an assumption of Judicial power and therefore forbidden."[108]

[A46] "No decision of any court of the United States can, under any circumstances be liable to a revision, or even suspension, by the Legislature."[109] *Plaut* held that a federal statute, which required federal courts to reopen final judgments that had been entered before the statute's enactment, was unconstitutional on separation of powers grounds. The plaintiffs had brought a civil securities fraud action seeking money damages. While that action was pending, the Court ruled, in *Lampf*, that such suits must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation.[110] In light of this intervening decision, the *Plaut* plaintiffs' suit was untimely, and the district court accordingly dismissed the action as time barred. After the judgment dismissing the case had become final, Congress

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duly certified does not render the action moot. The Court reasoned that "even though appellees . . . might not again enforce the Iowa durational residency requirement against [the class representative], it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified." *Id.* at 400.

104 Miller v. French, 530 U.S. 327, 341 (2000).

105 Plaut v. Spendthrift Farms, 514 U.S. 211, 218–19 (1995).

106 Hayburn's Case, 2 Dall. 409 (1792).

107 *See* Plaut v. Spendthrift Farms, 514 U.S. 211, 218 (1995), *discussing* Hayburn's Case, 2 Dall. 409 (1792).

108 Miller v. French, 530 U.S. 327, 343 (2000), *citing* Plaut v. Spendthrift Farms, 514 U.S. 211, 224 (1995).

109 Plaut v. Spendthrift Farms, 514 U.S. 211, 226 (1995), *discussing* Hayburn's Case, 2 Dall. 409, 413 (1792) (opinion of Iredell, J., and Sitgreaves, D.J.).

110 Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).

enacted a statute providing for the reinstatement of those actions, including the *Plaut* plaintiffs', which had been dismissed under *Lampf* but that would have been timely under the previously applicable statute of limitations. The Court concluded that this retroactive command that federal courts reopen final judgments exceeded Congress' authority. "The decision of an inferior court within the Article III hierarchy is not the final word of the department (unless the time for appeal has expired), and it is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court at every level, must decide according to existing laws. . . . But once a judicial decision achieves finality, it becomes the last word of the judicial department, . . . and Congress cannot retroactively command Article III courts to reopen final judgments."[111]

[A47] Nevertheless, "prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law."[112] This conclusion follows from the Court's decisions in *Wheeling Bridge I*[113] and *Wheeling Bridge II*.[114] In the first case, the Court held that a bridge across the Ohio River, because it was too low, unlawfully obstructed the navigation of the Ohio, and ordered that the bridge be raised or permanently removed. Shortly thereafter, Congress enacted legislation declaring the bridge to be a lawful structure, establishing the bridge as a "post-road for the passage of the mails of the United States," and declaring that the Wheeling and Belmont Bridge Company was authorized to maintain the bridge at its then-current site and elevation. After the bridge was destroyed in a storm, Pennsylvania sued to enjoin the bridge's reconstruction, arguing that the statute legalizing the bridge was unconstitutional, because it effectively annulled the Court's decision in *Wheeling Bridge I*. The Court rejected that argument, concluding that the decree in *Wheeling Bridge I* provided for ongoing relief by "directing the abatement of the obstruction" that enjoined the defendants from any continuance or reconstruction of the obstruction. "The Court explained that, had *Wheeling Bridge I* awarded money damages in an action at law, then that judgment would be final, and Congress' later action could not have affected plaintiff's right to those damages. . . . But because the decree entered in *Wheeling Bridge I* provided for prospective relief—a continuing injunction against the continuation or reconstruction of the bridge—the ongoing validity of the injunctive relief depended on 'whether or not the bridge interferes with the right of navigation.' . . . When Congress altered the underlying law such that the bridge was no longer an unlawful obstruction, the injunction against the maintenance of the bridge was not enforceable."[115]

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111 *See* Miller v. French, 530 U.S. 327, 344 (2000), *referring to* Plaut v. Spendthrift Farms, 514 U.S. 211, 218–19, 227 (1995). However, "Congress' mere waiver of the *res judicata* effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers." *See United States v. Sioux Nation*, 448 U.S. 371, 407 (1980), where the Court upheld a law required the Court of Claims, "[n]otwithstanding any other provision of law . . . to review on the merits, without regard to the defense of *res judicata* or collateral estoppel" a Sioux claim for just compensation from the United States.

112 Miller v. French, 530 U.S. 327, 344 (2000).

113 Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518 (1852) (*Wheeling Bridge I*).

114 Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421 (1856) (*Wheeling Bridge II*).

115 Miller v. French, 530 U.S. 327, 345–46 (2000), *discussing* Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 431–32 (1856).

[A48] Hence, "when Congress changes the law underlying a judgment awarding prospective relief, that relief is no longer enforceable to the extent it is inconsistent with the new law."[116] *Miller v. French* involved the Prison Litigation Reform Act of 1995 (PLRA), which established standards for the entry and termination of prospective relief in civil actions challenging prison conditions. If prospective relief under an existing injunction did not satisfy these standards, a defendant or intervenor was entitled to immediate termination of that relief. And under the PLRA's "automatic stay" provision, a motion to terminate prospective relief operated as a stay of that relief during the period beginning 30 days after the filing of the motion (extendable for up to 90 days for "good cause") and ending when the court ruled on the motion. Congress clearly intended to make operation of the automatic stay mandatory, precluding courts from exercising their equitable powers to enjoin the stay. The Court held that the "automatic stay" provision did not violate separation of powers principles, since "the stay merely reflects the changed legal circumstances—that prospective relief under the existing decree is no longer enforceable, and remains unenforceable unless and until the court makes the findings" required by the new legal standard for relief.[117]

3. Adequate State Grounds

[A49] The Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."[118] "This rule applies whether the state law ground is substantive or procedural."[119] "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional."[120] Because the Court "has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment, and would therefore be advisory."[121]

[A50] It is not always easy for a federal court to apply the independent and adequate state ground doctrine. "State court opinions will, at times, discuss federal questions at length and mention a state law basis for decision only briefly. In such cases, it is often

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[116] Miller v. French, 530 U.S. 327, 347 (2000).

[117] *Id.* at 348.

[118] Coleman v. Thompson, 501 U.S. 722, 729 (1991), *citing* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Klinger v. Missouri, 13 Wall. 257, 263 (1872).

[119] *See* Coleman v. Thompson, 501 U.S. 722, 729 (1991), *citing* Fox Film Corp. v. Muller, 296 U.S. 207 (1935) and Herndon v. Georgia, 295 U.S. 441 (1935).

[120] Coleman v. Thompson, 501 U.S. 722, 729 (1991). "The independent and adequate state ground doctrine is not technically jurisdictional when a federal court considers a state prisoner's petition for habeas corpus pursuant to 28 U.S.C. § 2254, since the federal court is not formally reviewing a judgment, but is determining whether the prisoner is 'in custody in violation of the Constitution or laws or treaties of the United States.' The Court has nonetheless held that the doctrine applies to bar consideration on federal habeas of federal claims that have been defaulted under state law." *See* Lambrix v. Singletary, 520 U.S. 518, 523 (1997) (citing cases). In the habeas context, the application of the doctrine, "is grounded in concerns of comity and federalism." *Id.* at 730.

[121] *See* Coleman v. Thompson, 501 U.S. 722, 729 (1991), *citing* Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945) (the Court is "not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

difficult to determine if the state law discussion is truly an independent basis for decision, or merely a passing reference. In other cases, state opinions purporting to apply state constitutional law will derive principles by reference to federal constitutional decisions from the Court. Again, it is unclear from such opinions whether the state law decision is independent of federal law."[122] *Michigan v. Long* provided a partial solution to this problem in the form of a conclusive presumption. Prior to *Long*, when faced with ambiguous state court decisions, the Court had adopted various inconsistent and unsatisfactory solutions including dismissal of the case,[123] remand to the state court for clarification,[124] or an independent investigation of state law.[125] "These solutions were burdensome both to the Court and to the state courts. They were also largely unnecessary in those cases where it fairly appeared that the state court decision rested primarily on federal law. The most reasonable conclusion in such cases is that there is not an independent and adequate state ground for the decision. Therefore, in order to minimize the costs associated with resolving ambiguities in state court decisions while still fulfilling [its] obligation to determine if there was an independent and adequate state ground for the decision,"[126] the Court established in *Long* a conclusive presumption of jurisdiction in these cases: "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."[127] "After *Long*, a state court that wishes to look to federal law for guidance or as an alternative holding while still relying on an independent and adequate state ground can avoid the presumption by stating 'clearly and expressly that [it's decision] is . . . based on *bona fide* separate, adequate, and independent grounds.'"[128]

[A51] In *Caldwell*, the Court applied the *Long* presumption in the context of an alleged independent and adequate state procedural ground.[129] Caldwell, a criminal defendant, challenged at trial part of the prosecutor's closing argument to the jury, but he did not raise the issue on appeal to the Mississippi supreme court. That court raised the issue *sua sponte*, discussing this federal question at length in its opinion and deciding it against Caldwell. It also made reference to its general rule that issues not raised on appeal are deemed waived. The state argued to the Court that the procedural default constituted an independent and adequate state ground for the Mississippi court's decision. The Court rejected this argument, noting that the state decision fairly appeared to rest primarily on federal law, and there was no clear and express statement that the Mississippi supreme court was relying on procedural default as an independent ground.[130]

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122 *See* Coleman v. Thompson, 501 U.S. 722, 732 (1991).

123 *See, e.g.*, Lynch v. New York *ex rel.* Pierson, 293 U.S. 52 (1934).

124 *See, e.g.*, California v. Krivda, 409 U.S. 33 (1972); Herb v. Pitcairn, 324 U.S. 117 (1945).

125 *See, e.g.*, Texas v. Brown, 460 U.S. 730, 732–33, n.1 (1983) (plurality opinion).

126 *See* Coleman v. Thompson, 501 U.S. 722, 732–33 (1991).

127 Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

128 *See* Coleman v. Thompson, 501 U.S. 722, 733 (1991), *quoting* Michigan v. Long, 463 U.S. 1032, 1041 (1983).

129 A state procedural default is not an "independent and adequate state ground" barring subsequent federal review unless the state rule was "firmly established and regularly followed" at the time it was applied. *See* Ford v. Georgia, 498 U.S. 411, 423–24 (1991).

130 Caldwell v. Mississippi, 472 U.S. 320, 327 (1985). *Harris v. Reed*, 489 U.S. 255 (1989),

4. The Abstention Doctrine

[A52] The doctrine of abstention, under which a federal court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of federal courts to adjudicate the controversies properly before them. "Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest,"[131] for example "where abstention is warranted by considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration."[132] *Pullman* abstention generally is appropriate when determination of an unsettled question of state law by a state court could avoid the need for decision of a substantial question of federal constitutional law.[133] *Younger* declared that federal restraint of state prosecutions is permissible only if the state defendant establishes "great and immediate" irreparable injury, beyond that "incidental to every criminal proceeding brought lawfully and in good faith."[134] As

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applied in federal habeas the presumption the Court adopted in *Long* and *Caldwell* for direct review cases.

[131] Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 188–89 (1959).

[132] Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996). In "cases where the relief sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court. . . . [The Court has] applied abstention principles to actions 'at law' only to permit a federal court to enter a stay order that postpones adjudication of the dispute, not to dismiss the federal suit altogether." Those principles also do not support the outright dismissal or remand of damages actions. *Id.* at 719, 721.

[133] R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941). Nevertheless, the Court has "never held that a federal litigant must await a state court construction or the development of an established practice before bringing the federal suit." *See* Stenberg v. Carhart, 530 U.S. 914, 945 (2000).

"In cases involving a *facial challenge* to a statute, the pivotal question in determining whether abstention is appropriate is whether the statute is fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question. . . . If the statute is not obviously susceptible of a limiting construction, then, even if the statute has never been interpreted by a state tribunal, it is the duty of the federal court to exercise its properly invoked jurisdiction." *See* Harman v. Forssenius, 380 U.S. 528, 534–35 (1965).

[134] Younger v. Harris, 401 U.S. 37, 46–47 (1971). *Younger* recognized, however, the prospect of extraordinary circumstances in which immediate federal injunctive relief might be obtained. The Court referred initially to bad faith, harassing police and prosecutorial actions pursued without "any expectation of securing valid convictions." *Id.* at 48. Further, the Court observed that there may be other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment"—for example, where a statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Id.* at 53–54.

The Court has been particularly reluctant to abstain in cases involving *facial challenges based on the First Amendment*. *See* Houston v. Hill, 482 U.S. 451, 467, and n.17 (1987) (citing cases). In *Dombrowski v. Pfister*, 380 U.S. 479, 489–90 (1965), the Court held that "abstention is inappropriate for cases where statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities. In such cases, to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings

the Court recognized in *Huffman* and its progeny, the principles underlying *Younger*—that state courts are fully competent to adjudicate constitutional claims and that threat to the federal system is posed by displacement of state courts by those of the national government—are also applicable to civil proceedings in which important state interests are involved.[135] Under the *Burford* doctrine,[136] where timely and adequate state court review is available, a federal court does not interfere with the proceedings or orders of state administrative agencies when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or when the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[137] Finally, under the *Rooker/Feldman* abstention doctrine, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court, based on the losing party's claim that the state judgment itself violates the loser's federal rights."[138]

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might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *See also* Zwickler v. Koota, 389 U.S. 241, 252 (1967). Nevertheless, in *Younger v. Harris*, 401 U.S. 37, 50–51 (1971), the Court held that a chilling effect does not "by itself justify federal intervention."

[135] *See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (non-criminal proceedings directed at obtaining the closure of places exhibiting obscene films); Juidice v. Vail, 430 U.S. 327 (1977) (contempt proceedings); Trainor v. Hernandez, 431 U.S. 434 (1977) (welfare fraud action); Moore v. Sims, 442 U.S. 415 (1979) (child abuse regulation); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (bar disciplinary proceedings); Ohio Civil Rights Comm. v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986) (anti-discrimination laws).

Where vital state interests are involved, a federal court should abstain unless state law clearly bars the interposition of federal constitutional claims. *See* Moore v. Sims, 442 U.S. 415, 426 (1979). The pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. *Id.* at 430.

[136] Burford v. Sun Oil Co., 319 U.S. 315 (1943).

[137] New Orleans Pub. Serv., Inc. v. New Orleans, 491 U.S. 350, 361 (1989). *See, e.g.*, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (scope of the eminent domain power of municipalities under state law); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) (collection of state taxes); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (reasonableness under Texas state law of a state commission's permit to drill oil; the reasonableness of the permit in that case was not of transcendent importance, but review of reasonableness by the federal courts in that and future cases, where the state had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields).

Since the Constitution leaves with the states primary responsibility for apportionment of their federal congressional and state legislative districts (U.S. Const., art. I, § 2), absent evidence that the branches of state government will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it. *See* Growe v. Emison, 507 U.S. 25, 34 (1993).

[138] *See* Johnson v. De Grandy, 512 U.S. 997, 1005–06 (1994), *citing* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983) and Rooker v. Fid. Trust Co., 263 U.S. 413, 416 (1923).

5. The "Not Pressed or Passed Upon Below" Rule

[A53] Only in exceptional cases will the Court review a question neither raised before nor considered by the court below.[139] There are several purposes underlying the "not pressed or passed upon" rule. First, "questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. . . . [Moreover,] due regard for the appropriate relationship of th[e] Court to state courts, . . . demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, to rest their decisions on adequate and independent state grounds, and, equally important, to fashion the appropriate remedies for unconstitutional actions."[140] By contrast, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."[141]

6. Political Questions

[A54] Although it is the province and duty of the judicial department to say what the law is, sometimes "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be 'nonjusticiable' or 'political questions.'"[142] "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions, as courts are fundamentally under-equipped to formulate national policies or develop standards for matters not legal in nature."[143] In *Baker* v. *Carr*, the Court set forth six tests for the existence of a political question: "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility

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[139] For example, in *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Court reversed a state criminal conviction on a constitutional ground not urged in state court, nor even in the Court. Likewise, *Vachon v. New Hampshire*, 414 U.S. 478 (1974), summarily reversed a state criminal conviction on the ground, not raised in state court, or in the Court, that it had been obtained in violation of the Due Process Clause of the Fourteenth Amendment. The Court indicated in a footnote (*id.* at 479, n.3), that it possessed discretion to ignore the failure to raise in state court the question on which it decided the case.

The Court has expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts. *See* Illinois v. Gates, 462 U.S. 213, 218–20 (1983); Howell v. Mississippi, 543 U.S. 440, 445 (2005) (*per curiam*). In cases arising from federal courts, the rule is prudential only. *See, e.g.*, Yee v. Escondido, 503 U.S. 519, 533 (1992), *citing* Carlson v. Green, 446 U.S. 14, 17, n.2 (1980).

Where issues presented in petition for certiorari were not raised below nor passed upon by the state's highest court, and where the only issue actually litigated does not alone justify exercise of certiorari jurisdiction, the writ of certiorari is dismissed as improvidently granted. *See* Tacon v. Arizona, 410 U.S. 351, 352 (1973).

[140] Illinois v. Gates, 462 U.S. 213, 221–22 (1983).

[141] Yee v. Escondido, 503 U.S. 519, 534 (1992).

[142] Vieth v. Jubelirer, 541 U.S. 267, 277 (2004).

[143] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[144]

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[144] Baker v. Carr, 369 U.S. 186, 217 (1969). In *Nixon v. United States*, 506 U.S. 224, 228–29 (1993), the Court pointed out that "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch. . . . [T]he courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed."

Application of the doctrine.

Political gerrymandering. See paras. K170–K171.

Foreign relations. In *Baker v. Carr*, 369 U.S. 186, 211–13 (1969), the Court said:

> [I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question, governmental action must be regarded as of controlling importance, if there has been no conclusive governmental action, then a court can construe a treaty, and may find it provides the answer. . . . Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law. . . .
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> While recognition of foreign governments so strongly defies judicial treatment that, without executive recognition, a foreign state has been called a republic of whose existence we know nothing, and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative. . . . Still again, though it is the executive that determines a person's status as representative of a foreign government, . . . the executive's statements will be construed where necessary to determine the court's jurisdiction. . . . Similar judicial action in the absence of a recognizedly authoritative executive declaration occurs in cases involving the immunity from seizure of vessels owned by friendly foreign governments.

Legality of wars. In the *Prize Cases*, 2 Black 635, 668 (1863), the Court said:

> By the Constitution, Congress alone has the power to declare a national or foreign war. The Constitution confers on the President the whole Executive power. He has no power to initiate or declare a war either against a foreign nation or a domestic State. . . .
>
> If a war be made by invasion of a foreign nation, the President is not only authorized, but bound, to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.

7. The "Act of State" Doctrine

[A55] The classic statement of the act of state doctrine, is found in *Underhill*, where the Court said: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts

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In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court held that President Truman, in the undeclared Korean war, had no power to seize the steel mills in order to increase war production. Regarding the "war" in Vietnam, which was not declared by Congress, the lower courts generally ruled that the question of the war's legality was not a justiciable one, but the Court never passed on the question authoritatively. *See*, in particular, Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd summarily sub. nom*, Atlee v. Richardson 411 U.S. 911 (1973).

Dates of duration of hostilities. In *Baker v. Carr*, 369 U.S. 186, 213–14 (1969), the Court said:

> [T]hough it has been stated broadly that the power which declared the necessity is the power to declare its cessation, and what the cessation requires [Commercial Trust Co. v. Miller, 262 U.S. 51, 57 (1923)], here too analysis reveals isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands "a prompt and unhesitating obedience," Martin v. Mott, 12 Wheat. 19, 30 (1827) (calling up of militia). Moreover, the cessation of hostilities does not necessarily end the war power . . . [which] includes the power to remedy the evils which have arisen from its rise and progress, and continues during that emergency. . . . But deference rests on reason, not habit. The question in a particular case may not seriously implicate considerations of finality—e.g., a public program of importance (rent control), yet not central to the emergency effort. Further, clearly definable criteria for decision may be available. In such case, the political question barrier falls away: [A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended. Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–548 (1924). On the other hand, even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for evenhanded application may impel reference to the political departments' determination of dates of hostilities' beginning and ending.

Validity of enactments. In *Baker v. Carr*, 369 U.S. 186, 214 (1969), the Court noted:

> [I]n Coleman v. Miller, 307 U.S. 433 (1939), this Court held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp. Similar considerations apply to the enacting process: "[t]he respect due to coequal and independent departments," and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities. *See* Field v. Clark, 143 U.S. 649, 672, 676–77 (1892); Leser v. Garnett, 258 U.S. 130, 137 (1922).

The status of Indian tribes. In Baker v. Carr, *supra* at 214, the Court said:

> This Court's deference to the political departments in determining whether Indians are recognized as a tribe, while it reflects familiar attributes of political questions, also has a unique element in that "The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else. . . . [The Indians are] domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *See* The Cherokee Nation

of the government of another, *done within its own territory*. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sover-

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v. Georgia, 5 Pet. 1, 16–17 (1831). Yet here, too, there is no blanket rule. While "[I]t is for [Congress] . . . and not for the courts, to determine when the true interests of the Indian require his release from [the] condition of tutelage, . . . it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." *See* United States v. Sandoval, 231 U.S. 28, 46 (1913).

The Guarantee Clause. The Guarantee Clause (art. IV, § 4 of the Constitution) provides that "The United States shall guarantee to every State in this Union a *republican form of government*. . ." (emphasis added). In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be non-justiciable under the "political question" doctrine. *See, e.g.*, Taylor & Marshall v. Beckham, 178 U.S. 548 (1900) (claim that Kentucky's resolution of contested gubernatorial election deprived voters of republican government); Pac. States Tel. Co. v. Oregon, 223 U.S. 118 (1912) (claim that initiative and referendum negated republican government held non-justiciable); Kiernan v. Portland, 223 U.S. 151 (1912) (claim that municipal charter amendment per municipal initiative and referendum negated republican government); Marshall v. Dye, 231 U.S. 250 (1913) (claim that Indiana's constitutional amendment procedure negated republican government); O'Neill v. Leamer, 239 U.S. 244 (1915) (claim that delegation to court of power to form drainage districts negated republican government); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916) (claim that invalidation of state reapportionment statute per referendum negates republican government); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (claim that workmen's compensation violates republican government); Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74 (1930) (claim that rule requiring invalidation of statute by all but one justice of state court negated republican government). The view that the Guarantee Clause implicates only non-justiciable political questions has its origin in *Luther v. Borden*, 7 How. 1 (1849), in which the Court was asked to decide which of two rival governments was the legitimate government of Rhode Island. The Court held that "it rests with Congress," not the judiciary, "to decide what government is the established one in a State." *Id.* at 42. Nevertheless, in some cases, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. *See* Attorney Gen. of Michigan *ex rel.* Kies v. Lowrey, 199 U.S. 233, 239 (1905); Forsyth v. Hammond, 166 U.S. 506, 519 (1897); *In re* Duncan, 139 U.S. 449, 461–62 (1891); Minor v. Happersett, 21 Wall. 162, 175–76 (1875). More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present non-justiciable political questions. *See* Reynolds v. Sims, 377 U.S. 533, 582 (1964) ("some questions raised under the Guarantee Clause are nonjusticiable"). *Cf.* New York v. United States, 505 U.S. 144, 185 (1992), where the Court avoided "this difficult question." In *Baker v. Carr*, 369 U.S. 186 (1962), the Court held that the manner of apportionment of members of a state legislature raised a non-justiciable question under the Guarantee Clause, but a justiciable question under the Equal Protection Clause.

Qualifications of Members of Congress: The issue in *Powell v. McCormack*, 395 U.S. 486 (1969), was whether courts could review the House of Representatives' conclusion that Powell was "unqualified" to sit as a member because he had been accused of misappropriating public funds and abusing the process of the New York courts. The Court stated that the question of justiciability turned on whether the Constitution committed authority to the House to judge its members' qualifications, and if so, the extent of that commitment. Article I, Section 5 provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." In turn, Article I, Section 2 specifies three requirements for membership in the House: the candidate must be at least 25 years of age, a citizen of the United States for no less than seven years, and an inhabitant of the state he is chosen to represent. The Court "held that, in light of the three requirements specified in the Constitution, the word 'qualifications'—of which the House was to be the Judge—was of a precise, limited nature. . . . The claim by the House that its power to 'be the Judge of the Elections, Returns and Qualifications of its own

eign powers as between themselves."[145] The doctrine is not an inflexible one; "it is a principle of decision binding on federal and state courts alike, but compelled by neither international law nor the Constitution. . . . The act of state doctrine does, however, have constitutional underpinnings. It arises out of the basic relationships between

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Members' was a textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the only qualifications which might be imposed for House membership. The decision as to whether a member satisfied these qualifications was placed with the House, but the decision as to what these qualifications consisted of was not." *See* Nixon v. United States, 506 U.S. 224, 237 (1993), *discussing Powell.*

Impeachment. The Impeachment Trial Clause (art. I, § 3, cl. 6, of the Constitution) provides that the "Senate shall have the sole Power to try all Impeachments." *Nixon v. United States*, 506 U.S. 224 (1993), involved the issue whether a Senate rule, allowing a committee of senators to hear evidence against an individual who had been impeached and to report that evidence to the full Senate, violated the Impeachment Trial Clause. The Court decided that the question was not a justiciable one, considering that (1) the language and structure of the Clause demonstrated a textual commitment of impeachment to the Senate, and that (2) the lack of finality, inherent in exposing the country's political life "to months, or perhaps years, of chaos," and the difficulty of fashioning relief, other than simply setting aside the Senate's judgment of conviction, counseled against justiciability.

The Origination Clause. United States v. Munoz-Flores, 495 U.S. 385 (1990), raised the question whether a federal statute, which required courts to impose a monetary "special assessment" on any person convicted of a federal misdemeanor, violated the Origination Clause of the Constitution. That Clause mandates that "[a]ll Bills for raising Revenue shall originate in the House of Representatives" (U.S. Const., art. I, § 7, cl. 1). The Court concluded that the case did not present a political question, since it had none of the six characteristics identified in *Baker v. Carr* as essential to a finding that a case raises such a question.

The President's executive privilege. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court reviewed the denial of a motion to quash a third-party subpoena *duces tecum*, issued by a district court, which directed the President of the United States to produce certain tape recordings and documents relating to his conversations with aides and advisers. At issue was the production or non-production of specified evidence that the Special Prosecutor deemed to be relevant and admissible in a pending criminal case, but the Chief Executive considered as involving the confidentiality of the communications of the President. The Court held that these issues were "of a type which are traditionally justiciable." *Id.* at 697. The Court emphasized that it was its province and duty "to say what the law is" with respect to the claim of privilege presented in that case, and concluded that

> Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.
>
> The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.

Id. at 706–07.

[145] Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (emphasis added). Following this precept, the Court, in that case, refused to inquire into acts of Hernandez, a revolutionary Venezuelan military commander whose government had been later recognized by the United States, which were made the basis of a damage action by Underhill, an American citizen, who claimed that he had had unlawfully assaulted, coerced, and detained in Venezuela by Hernandez.

branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder, rather than further, the country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[146]

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[146] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427, 423 (1964). Some Justices have suggested *possible exceptions* to application of the doctrine, where the underlying policies would seemingly not be served: an exception, for example, for acts of state that consist of "purely commercial" transactions (*see* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695–706 (1976) (opinion of White, J., joined by Burger, C.J., Powell and Rehnquist, JJ.)); or an exception for cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act, since then the courts would be impeding no foreign policy goals (*see* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768–70 (1972) (opinion of Rehnquist, J., in which Burger, C.J., and White, J., joined)).

In *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947), suit was brought to recover from an assignee property allegedly taken, in effect, by the Nazi government, because plaintiff was Jewish. Recognizing the odious nature of this act of state, the court, through Judge Learned Hand, nonetheless refused to consider it invalid on that ground. Rather, it looked to see if the Executive had acted in any manner that would indicate that U.S. courts should refuse to give effect to such a foreign decree. Finding no such evidence, the court sustained dismissal of the complaint. In a later case involving similar facts, the same court again assumed examination of the German acts improper, *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949), but, quite evidently following the implications of Judge Hand's opinion in the earlier case, amended its mandate to permit evidence of alleged invalidity, 210 F.2d 375 (2d Cir. 1954), subsequent to receipt by plaintiff's attorney of a letter from the Acting Legal Adviser to the State Department written for the purpose of relieving the court from any constraint upon the exercise of its jurisdiction to pass on that question. At least five members of the Court in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), disapproved the *Bernstein* exception to the act of state doctrine. *Id.* at 773 (Powell, J., concurring in judgment); *id.* at 776–77 (dissenting opinion of Brennan, J., with whom Justices Stewart, Marshall, and Blackmun joined). Justice Brennan said: "Mr. Justice Rehnquist's opinion reasons that the act of state doctrine exists primarily, and perhaps even solely, as a judicial aid to the Executive to avoid embarrassment to the political branch in the conduct of foreign relations. Where the Executive expressly indicates that invocation of the rule will not promote domestic foreign policy interests, his opinion states the view, adopting the *Bernstein* exception, that the doctrine does not apply. This syllogism—from premise to conclusion—is, with all respect, mechanical and fallacious. Moreover, it would require us to abdicate our judicial responsibility to define the contours of the act of state doctrine so that the judiciary does not become embroiled in the politics of international relations to the damage not only of the courts and the Executive, but of the rule of law." *Id.* at 777–78.

In *W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990), respondent complained that petitioners had obtained a construction contract from the Nigerian government by bribing Nigerian officials. Nigerian law prohibits both the payment and the receipt of such bribes. Respondent, an unsuccessful bidder for the contract, filed an action for damages against petitioners under various federal and state statutes. The Court held the act of state doctrine does not bar a court in the United States from entertaining a cause of action that "does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of such an official act." *Id.* at 401.

C. JUDICIAL REVIEW

1. Generally

[A56] The Supreme Court's greatest task is to review the constitutionality of governmental acts. The principle of "judicial review" was first enunciated in *Marbury v. Madison*, where Chief Justice Marshall wrote:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. . . .
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation. . . .
>
> The judicial power of the United States is extended to all cases arising under the Constitution. . . .
>
> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . .
>
> If then the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.[147]

2. Standards of Review in Constitutional Rights Cases

[A57] In deciding questions of constitutional rights, the Court has employed various standards or review that reflect a balancing of the competing interests involved. The Court's case law, in the equal protection context, provides a good example of the different levels of constitutional review:

> The general rule is that legislation is presumed to be valid, and will be sustained if the classification drawn by the statute is *rationally related to a legitimate state interest* . . . . When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, . . . and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.
>
> The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons, and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to *strict scrutiny*, and will be sustained only if they are *suitably tailored to serve a compelling state interest*. . . . Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution. . . .

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147 Marbury v. Madison, 1 Cranch 137, 163, 177–78 (1803).

> Legislative classifications based on gender also call for a *heightened*, though less strict, standard of review. That factor generally provides no sensible ground for differential treatment. . . . [Hence, a] gender classification fails unless it is *substantially related to a sufficiently important governmental interest* . . . . Because illegitimacy is beyond the individual's control and bears no relation to the individual's ability to participate in and contribute to society, . . . official discriminations resting on that characteristic are also subject to somewhat heightened review. Those restrictions will survive equal protection scrutiny to the extent they are *substantially related to a legitimate state interest.*[148]

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[148] *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–41 (1985) (citing cases—emphasis added—internal quotation marks omitted).

In *Tuan Anh Nguyen v. Immigration & Naturalization Service*, 533 U.S. 53, 74–78 (2001), Justice O'Connor *summarized the differences between "rational basis" and "heightened" scrutiny*, as deduced from the Court's case law:

> [U]nder heightened scrutiny, "the burden of justification is demanding and it rests entirely on [the party defending the classification]." . . . Under rational basis scrutiny, by contrast, the defender of the classification "has no obligation to produce evidence to sustain the rationality of a statutory classification." . . . Instead, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." . . .
>
> Further, a justification that sustains a sex-based classification "must be genuine, not hypothesized or invented *post hoc* in response to litigation." . . . "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." . . . Under rational basis review, by contrast, it is "constitutionally irrelevant what reasoning in fact underlay the legislative decision." . . .
>
> Heightened scrutiny does not countenance justifications that "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." . . . Rational basis review, by contrast, is much more tolerant of the use of broad generalizations about different classes of individuals, so long as the classification is not arbitrary or irrational. . . .
>
> Moreover, overbroad sex-based generalizations are impermissible even when they enjoy empirical support. . . . Under rational basis scrutiny, however, empirical support is not even necessary to sustain a classification. . . .
>
> The different burdens imposed by these equal protection standards correspond to the different duties of a reviewing court in applying each standard. The court's task in applying heightened scrutiny to a sex-based classification is clear: "Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'" . . . In making this determination, the court must inquire into the actual purposes of the discrimination, "for a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." . . . The rational basis standard, on the other hand, instructs that "a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." This standard permits a court to hypothesize interests that might support legislative distinctions, whereas heightened scrutiny limits the realm of justification to demonstrable reality.

[A58] The various formulations adopted by the Court in cases involving the freedoms of speech and assembly constitute another example of the Court's complex approach of constitutional issues in the field of individual rights. "Strict scrutiny" applies to content-based restrictions: the restriction must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[149] Under the "intermediate" standard of review (a form of "heightened" scrutiny), applicable to content-neutral "time, place and manner regulations" of speech, the regulations are permissible so long as they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[150] Nevertheless, when evaluating a content-neutral *injunction*, the Court asks whether the challenged provisions of the injunction "burden no more speech than necessary to serve a significant government interest,"[151] a standard that is more stringent than intermediate scrutiny but less rigorous than strict scrutiny.

[A59] However, one may infer from the Court's case law that statutes (or government policies or actions) endangering fundamental rights are usually subject to some form of "heightened scrutiny," under which the party defending the challenged statute must show *at least* that the statute serves *important governmental objectives and that there is a sufficiently close fit between the regulation at issue and the interests it serves.*[152] Statutory

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> These different standards of equal protection review also set different bars for the magnitude of the governmental interest that justifies the statutory classification. Heightened scrutiny demands that the governmental interest served by the classification be "important," . . . whereas rational basis scrutiny requires only that the end be "legitimate." . . .
>
> The most important difference between heightened scrutiny and rational basis review, of course, is the required fit between the means employed and the ends served. Under heightened scrutiny, the discriminatory means must be "substantially related" to an actual and important governmental interest. . . . Under rational basis scrutiny, the means need only be "rationally related" to a conceivable and legitimate state end. . . .
>
> The fact that other means are better suited to the achievement of governmental ends therefore is of no moment under rational basis review. . . . "[W]here rationality is the test, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." . . . But because we require a much tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification.

149 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

150 *Id.*

151 Madsen v. Women's Health Ctr., Inc. 512 U.S. 753, 765 (1994).

152 A statute is *narrowly tailored if "it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." See* Frisby v. Schultz, 487 U.S. 474, 485 (1988) (emphasis added). *See also* para. K10.

The "*quantum of empirical evidence needed* to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *See* Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 391 (2000) (emphasis added).

In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 665–66 (1994), the Court pointed out that

> [C]ourts *must accord substantial deference to the predictive judgments of Congress* [emphasis added]. . . . Sound policymaking often requires legislators to forecast future events

limitations on individual freedoms are also examined for definiteness or certainty of expression.[153]

3. Facial Challenges

[A60] A "facial" challenge means "a claim that the law is invalid *in toto*, and therefore

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> and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. . . . As an institution, moreover, Congress is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon [legislative] issue[s]. . . . And Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.
>
> That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether. On the contrary, [the Court has] stressed in First Amendment cases that the deference afforded to legislative findings does "not foreclose our independent judgment of the facts bearing on an issue of constitutional law." This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.

"When a legislature 'undertakes to act in *areas fraught with medical and scientific uncertainties*, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'" *See* Kansas v. Hendricks, 521 U.S. 346, 360, n.3 (1997), *quoting* Jones v. United States, 463 U.S. 354, 370 (1983) (emphasis added).

153 *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983); Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966).

"*[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise.*" (Emphasis added.) *See* Watson v. Memphis, 373 U.S. 526, 535 (1963), *citing* Wright v. Georgia, 373 U.S. 284, 292 (1963), and Brown v. Bd. of Educ. of Topeka, 349 U.S. 294, 300 (1955). As declared in *Cooper v. Aaron*, 358 U.S. 1, 16 (1958), "law and order are not . . . to be preserved by depriving the Negro children of their constitutional rights."

Inquiry into legislative motivation. In principle, the Court "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *See* United States v. O'Brien, 391 U.S. 367, 383 (1968); Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 652 (1994).

Nevertheless, in certain cases, legislative motive has been a relevant inquiry in determining the constitutionality of a statute. *See*, in particular, paras. K26–K27 (*racial discrimination*); paras. H63–H65 (*establishment of religion*); para. E29 (*bills of attainder*). The distinction between improper legislative motive and impermissible statutory object or goal is sometimes unclear. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (statute targeting at a particular class of religious observers held violative of the Free Exercise Clause), at 540–42 (plurality opinion); and at 557–58 (Scalia, J., concurring in part and concurring in the judgment).

Relatedly, the Court noted in *McCreary County, Kentucky, v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005):

> Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, . . . and governmental purpose is a key element of a good deal of constitutional doctrine, *e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (discriminatory purpose required for Equal Protection violation); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 352–353 (1977) (dis-

incapable of any valid application."[154] As a general matter, for a facial challenge to be successful, "the challenger must establish that no set of circumstances exists under which the [statute] would be valid."[155] In a facial challenge to the overbreadth of a law, the court should determine whether the enactment "reaches a substantial amount of constitutionally protected conduct,"[156] i.e., whether the statute is "unconstitutional in a sub-

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criminatory purpose relevant to dormant Commerce Clause claim); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (discriminatory purpose raises level of scrutiny required by free exercise claim). With enquiries into purpose this common, if they were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago. But scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an *understanding of official objective emerges from readily discoverable fact*, without any judicial psychoanalysis of a drafter's heart of hearts. . . . The eyes that look to purpose belong to an "objective observer," one who takes account of the *traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act.* (Emphasis added.)

Review of factual determinations. In cases in which there is a claim of denial of rights under the federal Constitution, the Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded. *See* Bose Corp. v. Consumers Union of United States, Inc. 466 U.S. 485, 509–10 (1984). The requirement of independent appellate review is a rule of federal constitutional law, which does not limit the Court's deference to a trial court on matters of witness credibility, but which generally requires the Court to review the finding of facts by a court below where "a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 568 (1995). For example, in cases involving the area of tension between the First and Fourteenth Amendments, on the one hand, and state defamation laws, on the other, the Court reviews the evidence in the record to determine whether it could constitutionally support a judgment for the plaintiff. *See, e.g.*, Time, Inc. v. Pape, 401 U.S. 279, 284 (1971).

Sometimes the Court adopts *presumptions to guide lower court determinations*. *See* Cheff v. Schnackenberg, 384 U.S. 373, 379–80 (1966) (plurality opinion) (adopting rule, based on definition of "petty offense" in U.S. Code, that right to jury trial extends to all cases in which sentence of six months or greater is imposed); County of Riverside v. McLaughlin, 500 U.S. 44, 56–58 (1991) (adopting presumption, based on lower court estimate of time needed to process arrestee, that 48–hour delay in probable cause hearing after arrest is reasonable, hence constitutionally permissible); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (few punitive damage awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process).

"[A] *universal and long-established tradition* of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional." *See* Republican Party of Minnesota v. White, 536 U.S. 765, 785 (2002) (emphasis added).

154 *See, e.g.*, Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, n.5 (1982).

155 United States v. Salerno, 481 U.S. 739, 745 (1987); Reno v. Flores, 507 U.S. 292, 301 (1993). The threat of criminal prosecution is not a necessary condition for the entertainment of a facial challenge. *See* Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999).

156 Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 489, 494 (1982). In making that determination, "a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. . . . [A]mbiguous meanings cause citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id.* at 494, n.6.

stantial portion of the cases to which it applies."[157] "Facial overbreadth challenges are especially to be discouraged. Not only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: [such] challenges call for relaxing prudential requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand."[158] Accordingly, the Court has recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, "generally, on the strength of specific reasons weighty enough to overcome [its] well-founded reticence."[159]

4. Avoidance of Constitutional Questions

[A61] The Court has developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. First, the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."[160] Second, the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[161] In addition, normally the Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.[162] This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.[163] Appeals

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157 Regan v. Time, Inc. 468 U.S. 641, 650 (1984).

158 Sabri v. United States, 541 U.S. 600, 609 (2004). *See also* New York v. Ferber, 458 U.S. 747, 767–68 (1982): "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. . . . [T]his rule reflects two cardinal principles of our constitutional order: the personal nature of constitutional rights and the prudential limitations on constitutional adjudication. . . . [I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. By focusing on the factual situation before it, and similar cases necessary for development of a constitutional rule, we face 'flesh and blood' legal problems with data relevant and adequate to an informed judgment."

159 *See* Sabri v. United States, 541 U.S. 600, 609 (2004), *citing* Broadrick v. Oklahoma, 413 U. S. 601 (1973) (free speech); Aptheker v. Secretary of State, 378 U. S. 500 (1964) (right to travel); Stenberg v. Carhart, 530 U. S. 914, 938–46 (2000) (abortion). Facial challenges to overly broad statutes are allowed primarily for the benefit of society, e.g., to prevent the statute from chilling the First Amendment rights of other parties not before the court. The *First Amendment overbreadth doctrine* is discussed at length in paras. I32 *et seq.*

160 *See, e.g.*, Liverpool, New York & Philadelphia S.S. Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985).

161 *See, e.g.*, Rescue Army v. Mun. Court of Los Angeles, 331 U.S. 549, 570, n.34 (1947); Clinton v. Jones, 520 U.S. 681, 690, n.11 (1997).

162 *See, e.g.*, Rescue Army v. Mun. Court of Los Angeles, 331 U.S. 549, 569 (1947); Escambia County, Florida v. McMillan, 466 U.S. 48, 51 (1984) (*per curiam*).

163 *See, e.g.*, Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 191 (1909) (state or local law); Dep't of Commerce v. House of Representatives, 525 U.S. 316, 344 (1999) (federal statute); Slack v. McDaniel, 529 U.S. 473, 485 (2000) (district court is allowed and encouraged to deny a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim).

from the highest court of a state challenging its decision of a question under the federal Constitution are frequently dismissed, because the judgment can be sustained on an independent state ground.[164] And the Court may assume, without deciding, that the alleged right or interest is constitutionally protected if it considers that the claim of constitutional infringement cannot be sustained on the merits.[165]

[A62] Finally, "where an otherwise acceptable construction of a federal statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."[166] "[T]his interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. . . . Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution. . . . Proper respect for those powers implies that 'statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'"[167] The rule allows courts to choose among constructions that are "fairly possible,"[168] not to press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.[169] Hence, the constitutional doubt canon does not apply where the statute is unambiguous;[170] where Congress has made its intent clear, the Court must give effect to that intent.[171]

D. EFFECTS OF THE COURT'S DECISIONS

1. Judicial Supremacy[172]

[A63] Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in

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164 *See, e.g.*, Berea College v. Kentucky, 211 U.S. 45, 53 (1908). *See, in extenso*, paras. A49–A51.

165 *See, e.g.*, Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 847 (1977). The fact that there may be buried in the record a non-constitutional ground for decision is not, by itself, enough to invoke the prudential rule of avoiding constitutional questions, when the relevant issue was neither raised before nor considered by the court below. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993).

166 Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). *See also* Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (construction of statute that avoids invalidation best reflects congressional will).

167 United States v. Albertini, 472 U.S. 675, 680 (1985), *quoting* Park 'N Fly v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985).

168 Crowell v. Benson, 285 U.S. 22, 62 (1932).

169 Salinas v. United States, 522 U.S. 52, 60 (1997).

170 *See, e.g.*, Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998).

171 Miller v. French, 530 U.S. 327, 336 (2000). A constitutional question confronted in order to preserve, if possible, a congressional enactment is not a constitutional question confronted unnecessarily. *See* Edmond v. United States, 520 U.S. 651, 658 (1997).

172 *See also* paras. A44–A48 (*finality of judgments*).

the notable case of *Marbury v. Madison*, that "it is emphatically the province and duty of the judicial department to say what the law is."[173] This decision "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle constitutes a permanent and indispensable feature of the constitutional system of the United States."[174] It follows that "Congress may not legislatively supersede [the Court's] decisions interpreting and applying the Constitution."[175] And Article VI of the Constitution makes the Court's constitutional decisions of binding effect on the states "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[176]

2. Declaration of Unconstitutionality

[A64] An unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[177] However, a party can be held in contempt of court for violating an injunction, even if the injunction was invalid under the federal Constitution.[178]

[A65] "In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary. . . . [Hence,] whenever [a statute] contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of the court to so declare, and to maintain the [enactment] insofar as it is valid."[179] The question of severability is one of legislative intent: would the legislature still have passed certain provisions had it known that other provisions of the statute were invalid?[180] "Partial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid."[181]

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[173] Marbury v. Madison, 1 Cranch 137, 177 (1803).

[174] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[175] Dickerson v. United States, 530 U.S. 428, 437 (2000). "Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned, or refused faith and credit by another Department of Government." *See* Plaut v. Spendthrift Farms, 514 U.S. 211, 225–26 (1995), *quoting* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

[176] Cooper v. Aaron, 358 U.S. 1, 18 (1958). The guarantees of the Bill of Rights "are warrants for the here and now, and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." *See* Watson v. Memphis, 373 U.S. 526, 533 (1963).

[177] Norton v. Shelby County, 118 U.S. 425, 442 (1886).

[178] *See* Walker v. Birmingham, 388 U.S. 307, 313–14 (1967). Nevertheless, in upholding the contempt citations at issue, the Court noted that that was "not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." *Id.* at 315.

[179] *See* Regan v. Time, Inc., 468 U.S. 641, 652–53 (1984) (plurality opinion).

[180] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Communications Comm'n, 518 U.S. 727, 767 (1996) (plurality opinion). If a statute contains no express "severability clause," courts can find the statute's "severability" intention in its structure and purpose. *Id.*

In *United States v. Booker*, 543 U.S. 220, 223 (2005), the Court held that it should retain those portions of the federal statute at issue that were constitutionally valid, "capable of functioning independently," and "consistent with Congress' basic objectives in enacting the statute."

[181] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985). *See also* Champlin Ref. Co. v. Corp. Comm'n of Oklahoma, 286 U.S. 210, 234 (1932) ("Unless it is evident that the

3. Power of Precedent

[A66] The Court's decisions are binding as precedents on state and lower federal courts. *Stare decisis* means that the Court should regard its prior decisions as controlling precedents. "The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law."[182] This doctrine "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[183] *Stare decisis* "is not an inexorable command, . . . but instead reflects a policy judgment that, in most matters, it is more important that the applicable rule of law be settled than that it be settled right."[184] That policy is at its weakest when the Court interprets the Constitution, because its interpretation can be altered only by constitutional amendment or by the Court itself.[185] But even in constitutional cases, the doctrine carries such persuasive force that the Court requires a departure from precedent to be supported by some "special justification."[186] Thus, the Court has held, for example, that *stare decisis* does not prevent it from overruling a previous decision that is "unworkable or badly reasoned"[187] or where there has been a significant change in or subsequent development of the constitutional law.[188]

4. Retroactivity[189]

[A67] The Court has recognized a general rule of retrospective effect for its constitutional decisions.[190] In *Linkletter*, however, it developed a doctrine under which it could

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Legislature would not have enacted those provisions which are within its power independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

Although the Court does not normally grant petitions for certiorari solely to review what purports to be an application of state law, it has done so where a lower federal court's severability decision is plainly wrong and leads to blatant nullification of state law. *See* Leavitt v. Jane L., 518 U.S. 137, 144–45 (1996) (*per curiam*).

182 Lawrence v. Texas, 539 U.S. 558, 577 (2003).

183 Payne v. Tennessee, 501 U.S. 808, 827 (1991).

184 Agostini v. Felton, 521 U.S. 203, 235 (1997).

185 *Id.*

186 United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996).

187 *See, e.g.*, United States v. Dixon, 509 U.S. 688, 712 (1993).

188 *See* Agostini v. Felton, 521 U.S. 203, 235–36 (1997), *citing* United States v. Gaudin, 515 U.S. 506, 521 (1995) (*stare decisis* may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court"); Alabama v. Smith, 490 U.S. 794, 803 (1989) (noting that a "later development of . . . constitutional law" is a basis for overruling a decision). *See also* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 854–55 (1992): "[F]or example, we may ask whether the rule has proved to be intolerable simply in defying practical workability, Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, e.g., United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, *see* Patterson v. McLean Credit Union, 491 U.S. 164, 173–174 (1989); or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification."

189 *See also* paras. E51–E54 (*retroactive judicial decision making and the "fair warning" doctrine*).

190 *See, e.g.*, Norton v. Shelby County, 118 U.S. 425, 442 (1886).

deny retroactive effect to a newly announced rule of criminal law. Under *Linkletter*, "a decision to confine a new rule to prospective application rested on the purpose of the new rule, the reliance placed upon the previous view of the law, and the "effect on the administration of justice of a retrospective application' of the new rule."[191] In the civil context, *Chevron Oil* similarly permitted the denial of retroactive effect to "a new principle of law" if such a limitation "would avoid 'injustice or hardship' without unduly undermining the 'purpose and effect' of the new rule."[192]

[A68] The Court subsequently overruled *Linkletter* in *Griffith*, and eliminated limits on retroactivity in the criminal context by holding that all newly declared constitutional rules must be applied retroactively to all criminal cases pending on direct review. This holding rested on two basic norms of constitutional adjudication. First, the Court reasoned that, unlike a legislature, it does not promulgate new rules of constitutional criminal procedure on a broad basis, and that the integrity of judicial review requires application of a new constitutional rule announced in a specific case to all similar cases pending on direct review. Second, the Court concluded that "selective application of new rules violates the principle of treating similarly situated defendants the same."[193] Relying on the same principles, *Harper* held that when the Court applies a rule of federal law to the parties before it in a non-criminal case, that rule is "the controlling interpretation of federal law, and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate" its announcement of the rule.[194] Conversely, new constitutional rules for the conduct of criminal prosecutions are not applicable to those cases that have become final before the new rules are announced by the Court, unless the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,"[195] or "addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense,"[196] or could be considered a "'watershed rule of criminal procedure,' implicating the fundamental fairness and accuracy of the criminal proceeding."[197]

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191 *See* Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 94 (1993), *discussing* Linkletter v. Walker, 381 U.S. 618, 636 (1965).

192 *See* Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 94–95 (1993), *referring to* Chevron Oil Co. v. Huson, 404 U.S. 97, 106–07 (1971).

193 Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987).

194 Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993).

195 Caspari v. Bohlen, 510 U.S. 383, 396 (1994), *quoting* Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion).

196 Saffle v. Parks, 494 U.S. 484, 494 (1990).

197 Saffle v. Parks, 494, U.S. 484, 488 (1990), *quoting* Teague v. Lane, 489 U.S. 288, 311 (1989). *See also* Graham v. Collins, 506 U.S. 461, 478 (1993). To fall within this exception, a new rule must meet two requirements: infringement of the rule must "*seriously* diminish the likelihood of obtaining an accurate conviction," and the rule must "alter [the] understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *See* Tyler v. Cain, 533 U.S. 656, 665 (2001) (emphasis added).

A holding constitutes a "new rule" within the meaning of *Teague* if it "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final." *See, e.g.*, Graham v. Collins, 506 U.S. 461, 467 (1993).

E. HOW THE COURT ADJUDICATES CASES

[A69] Until 1988, the Supreme Court was required to hear and decide a significant portion of cases appealed from lower courts. In that year, Congress abolished most of the mandatory appellate jurisdiction of the Supreme Court, giving the Court almost complete control over its docket. As a result, the Court reviews, as a matter of principle, only those cases it chooses to hear by means of the writ of certiorari,[198] i.e., an order directing a lower court to send the record of a case for review. Under Rule 10 of the *Rules of the Supreme Court* (Sup.Ct.Rules),

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

To apply *Teague*, a federal habeas court must: (1) determine the date on which the defendant's conviction became final; (2) survey the legal landscape as it existed on that date to determine whether a state court then considering the defendant's claim would have felt compelled by existing precedent to conclude that the rule the defendant seeks was constitutionally required; and (3) if not, consider whether the relief sought falls within one of two narrow exceptions to non-retroactivity. *See* Lambrix v. Singletary, 520 U.S. 518, 527 (1997).

198 28 U.S.C. Section 1254 provides that "Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Under 28 U.S.C. Section 1257(a), "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Sup.Ct.Rule 11 provides that "A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." The Court ordinarily considers "only the questions set forth in the petition, or fairly included therein" (Sup.Ct.Rule 14.1(a)). Nevertheless, it may request the parties to address an important question of law not raised in the petition for certiorari,[199] and will consider such a question in exceptional cases.[200]

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[199] *See, e.g.*, Payne v. Tennessee, 498 U.S. 1080 (1991).

[200] Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 28 (1993) (*per curiam*).

Content of a Petition for a Writ of Certiorari. Sup.Ct.Rule 14 provides that:

1. A petition for a writ of certiorari shall contain, in the order indicated:
   - (a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.
   - (b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties), and a list of parent companies and non-wholly owned subsidiaries as required by Rule 29.6.
   - (c) If the petition exceeds five pages, a table of contents and a table of cited authorities.
   - (d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.
   - (e) A concise statement of the basis for jurisdiction in this Court, showing:
     - (i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petition is filed under this Court's Rule 11);
     - (ii) the date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari;
     - (iii) express reliance on Rule 12.5, when a cross-petition for a writ of certiorari is filed under that Rule, and the date of docketing of the petition for a writ of certiorari in connection with which the cross-petition is filed;
     - (iv) the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question; and
     - (v) if applicable, a statement that the notifications required by Rule 29.4(b) or (c) have been made.
   - (f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i).
   - (g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:
     - (i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or

[A70] Except where the petitioner proceeds in *forma pauperis*, the petitioner must file 40 copies of a petition for a writ of certiorari and pay a docket fee (Sup.Ct.Rule 12). "Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals is timely when it is filed with the Clerk of th[e] Court within 90

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manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

(ii) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. *See* Rule 10.

(i) An appendix containing, in the order indicated:

(i) the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed;

(ii) any other opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry);

(iii) any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry;

(iv) the judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph;

(v) material required by subparagraphs 1(f) or 1(g)(i); and

(vi) any other material the petitioner believes essential to understand the petition.

If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

2. All contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition, as provided in subparagraph 1(h) of this Rule. No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file any petition for a writ of certiorari to which any supporting brief is annexed or appended.

3. A petition for a writ of certiorari should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33 (30 pages).

4. The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.

5. If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition received no more than 60 days after the date of the Clerk's letter will be deemed timely.

days after entry of the judgment." (Sup.Ct.Rule 13.1.) "A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not mandatory, except in a capital case, or when ordered by the Court." (Sup.Ct.Rule 15.1.)

[A71] After considering the relevant documents, the Court enters an appropriate order, which may be a summary disposition on the merits (Sup.Ct.Rule 16.1). According to the "*Rule of Four*" principle, the votes of four Justices are enough to grant certiorari and bring a case before the Court for oral argument. Nevertheless, five Justices can undo the grant by voting, after the case has been heard, to dismiss the writ as improvidently granted. Of the 7,000 or so certiorari petitions filed each year,[201] plenary review with oral arguments is granted in about 100 cases per term. Formal written opinions are delivered in about 80 cases; approximately half of them concern issues of constitutional law. The Court disposes of 50 or so additional cases summarily. The Court's denial of certiorari does not constitute a ruling on the merits.[202]

[A72] A party to a judgment sought to be reviewed by the Court may present to a Justice an application to stay the enforcement of that judgment. The application must be addressed to the Justice allotted to the circuit from which the case arises. The conditions that must be shown to be satisfied before a circuit Justice may grant such an application are well established: "a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits."[203] "[I]n a close case, it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large."[204] The burden is on the applicant "to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct."[205]

[A73] When the Court grants certiorari, the parties submit briefs before oral argument. The petitioner must file 40 copies of the brief on the merits within 45 days of the order granting the writ of certiorari (Sup.Ct.Rule 25.1). The respondent will file 40 copies of the brief on the merits within 30 days after receiving the brief for the petitioner (Sup.Ct.Rule 25.2). The petitioner files 40 copies of the reply brief, if any, within 30 days after receiving the brief for the respondent, but any reply brief must actually be received by the Clerk no more than one week before the date of oral argument (Sup.Ct.Rule 25.3).[206]

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[201] The Court's caseload has increased rapidly in recent years. In 1960, only 2,313 cases were on the docket.

[202] *See, e.g.*, Barber v. Tennessee, 513 U.S. 1184 (1995) (opinion of Stevens, J., respecting denial of certiorari). In considering which cases are certworthy, the Justices usually rely on memoranda prepared for that purpose by their law clerks.

[203] *See, e.g.*, Planned Parenthood of Se. Pennsylvania v. Casey, 510 U.S. 1309, 1310 (1994) (Justice Souter in chambers).

[204] Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Justice Brennan in chambers).

[205] *Id.*

[206] *Content of Briefs.* Rule 24 of the Rules of the Supreme Court provides that:

1. A brief on the merits for a petitioner or an appellant shall comply in all respects with Rules 33.1 and 34 and shall contain in the order here indicated:
   (a) The questions presented for review under Rule 14.1(a). The questions shall be set out on the first page following the cover, and no other information may appear on

[A74] "An *amicus curiae* brief which brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." (Sup.Ct.Rule 37.1.) "An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file." (Sup.Ct.Rule 37.3.) "No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before the Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer." (Sup.Ct.Rule 37.4.)

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that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is under review (unless the caption of the case in this Court contains the names of all parties). Any amended list of parent companies and nonwholly owned subsidiaries as required by Rule 29.6 shall be placed here.

(c) If the brief exceeds five pages, a table of contents and a table of cited authorities.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts and administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text, if not already set out in the petition for a writ of certiorari, jurisdictional statement, or an appendix to either document, shall be set out in an appendix to the brief.

(g) A concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e. g., App. 12, or to the record, e. g., Record 12.

(h) A summary of the argument, suitably paragraphed. The summary should be a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient.

(i) The argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on.

(j) A conclusion specifying with particularity the relief the party seeks.

2. A brief on the merits for a respondent or an appellee shall conform to the foregoing requirements, except that items required by subparagraphs 1(a), (b), (d), (e), (f), and (g) of this Rule need not be included unless the respondent or appellee is dissatisfied with their presentation by the opposing party.

3. A brief on the merits may not exceed the page limitations specified in Rule 33.1(g) (50 pages). An appendix to a brief may include only relevant material, and counsel are cautioned not to include in an appendix arguments or citations that properly belong in the body of the brief.

4. A reply brief shall conform to those portions of this Rule applicable to the brief for a respondent or an appellee, but, if appropriately divided by topical headings, need not contain a summary of the argument.

[A75] All Justices read the briefs before oral argument, which should emphasize and clarify the written arguments in the briefs (Sup.Ct.Rule 28.1). Unless the Court directs otherwise, each side is allowed one-half hour for argument (Sup.Ct.Rule 28.3). Oral argument is more like a conversation than a lecture, since the advocate is usually called upon to answer questions from the bench. As a matter of principle, only one attorney will be heard for each side (Sup.Ct.Rule 28.4). Oral argument is not allowed on behalf of any party for whom a brief has not been filed (Sup.Ct.Rule 28.6). By leave of the Court, counsel for an *amicus curiae* who has filed a brief may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for an *amicus curiae* may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances (Sup.Ct.Rule 28.7).

[A76] The Supreme Court does not sit in panels; all nine Justices sit to hear the oral arguments and decide each case. A member of the Court may disqualify himself or herself from sitting in a case, e.g., when he or she has a personal interest in the outcome of the case. If the remaining Justices are divided in opinion, the judgment below is affirmed; an affirmance by an equally divided Court is not entitled to precedential weight.[207] Similarly, the lower court's decision is affirmed when the Court fails to find a quorum of six Justices.

[A77] The Court's view of the law in each case is expressed by the majority opinion. By tradition, the senior Justice in the majority either assumes responsibility for the task of writing the Court's opinion or assigns that task to another of the Justices who make up the majority. Justices file concurring opinions when they do not agree with all or part of the majority's (or the plurality's) reasoning but agree with the outcome in a case. Justices who disagree with the result the Court has reached file dissenting opinions.[208] The Court's official decisions are published in the *United States Reports*.

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5. A reference to the joint appendix or to the record set out in any brief shall indicate the appropriate page number. If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge shall be indicated, e.g., Pl. Exh. 14, Record 199, 2134.
6. A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph.

[207] *See, e.g.*, United States v. Pink, 315 U.S. 203, 216 (1942).

[208] "When a *fragmented Court* decides a case and no single rationale explaining the result 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 judgments on the narrowest grounds." *See* Marks v. United States, 430 U.S. 188, 193 (1977) (emphasis added). When a disposition of a litigation does not command a majority of the Court, and in order that disposition may be made of the case, a Justice has to join the order that is more nearly in accord with his or her own views concerning appropriate disposition. *See* Screws v. United States, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring).

CHAPTER 2

GENERAL ISSUES OF CONSTITUTIONAL RIGHTS

A. RIGHTHOLDERS

1. Fetus

[B1] In *Roe v. Wade*, the Court examined thoroughly and rejected the argument of the state of Texas that the fetus is a "person," within the language and meaning of the Fourteenth Amendment. After a brief analysis of the use of the term "person" in the Constitution,[1] the Court came to the conclusion that none of the relevant constitutional provisions "indicates, with any insurance, that it has any possible pre-natal application." Moreover, although "unborn children have been recognized by the law as acquiring rights or interests by way of inheritance or other devolution of property, . . . perfection of the interests involved . . . has generally been contingent upon live birth." "In short, the unborn have never been recognized in the law as persons in the whole sense." Thus, without resolving the awkward question of when life begins, the Court decided unanimously that abortion does not terminate life protected by the Fourteenth Amendment.[2]

2. Private Associations and Corporations

[B2] Associations and corporations, recognized by the state as legal persons, enjoy several constitutional rights. A corporation is a "person" within the meaning of the equal protection and due process of law clauses of the Constitution.[3] Corporations have the right to publicize their views on issues of public importance, even though not materially affecting their business or property, because the role of the First Amendment is not only to foster individual self-expression, but also to guarantee "the public access to dis-

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1 Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is also used in other places in the Constitution: in the listing of qualifications for representatives and senators, Article I, Section 2, Clause 2, and Section 3, Clause 3; in the Apportionment Clause, Article I, Section 2, Clause 3; in the Migration and Importation provision, Article I, Section 9, Clause 1; in the Emolument Clause, Article I, Section 9, Clause 8; in the Electors provisions, Article II, Section 1, Clause 2, and the superseded Clause 3; in the provision outlining qualifications for the office of President, Article II, Section 1, Clause 5; in the Extradition provisions, Article IV, Section 2, Clause 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in Sections 2 and 3 of the Fourteenth Amendment.

2 Roe v. Wade, 410 U.S. 113, 156–62 (1973).

3 Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936). By contrast, the *Privileges and Immunities Clause* (art. IV, § 2) is inapplicable to corporations. *See* Hemphill v. Orloff, 277 U.S. 537, 548–50 (1928); W. & S. Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 656 (1981).

cussion, debate, and the dissemination of information and ideas."[4] Political parties have the First Amendment right of self-government[5] and the right to exclude the non-members from participating in the primary elections of party nominees for federal or state offices.[6] The Fourth Amendment guarantee against unreasonable searches and seizures is applicable to corporations.[7] Yet, artificial entities are not entitled to "purely personal" guarantees whose "historic function . . . has been limited to the protection of individuals."[8] Hence, corporations enjoy no constitutional privilege against compulsory self-incrimination by virtue of the Fifth Amendment,[9] and they may be compelled to produce their books and records in criminal proceedings,[10] even if these documents might incriminate their representatives.[11]

3. Governmental Bodies

[B3] A state is not a "person" within the meaning of the Due Process Clause of the Fifth Amendment; nor does it have standing to invoke the Bill of Attainder Clause of Article I or the principle of separation of powers, which exist only to protect private individuals or groups.[12] A state has the power to create—and dissolve—legal entities as its political subdivisions. Such entities are the municipalities, which are not entitled to self-government, under the federal Constitution. A city, either as "an agent of the state for governmental purposes [or] as an organization to care for local needs in a private or proprietary capacity," cannot invoke against its state the constitutional right of property[13] or the equal protection clause of the Fourteenth Amendment.[14] Likewise, the purpose of the First Amendment is "to protect private expression, and nothing in the guarantee precludes the government from controlling its own expression."[15]

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4 *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."). In that case, appellants, national banking associations and business corporations, wanted to spend money to publicize their views opposing a referendum proposal to amend the Massachusetts Constitution to authorize the legislature to enact a graduated personal income tax and challenged the constitutionality of a Massachusetts criminal statute that prohibited them and other specified business corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."

5 *See* Marchioro v. Chaney, 442 U.S. 191, 199 (1979).

6 California Democratic Party v. Jones, 530 U.S. 567, 574–75, 586 (2000).

7 Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385, 392 (1920); G. M. Leasing Corp. v. United States, 429 U.S. 338, 353–54 (1977).

8 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 779, n.14 (1978).

9 California Bankers Ass'n v. Shultz, 416 U.S. 21, 55 (1974).

10 United States v. White, 322 U.S. 694, 699 (1944).

11 Wilson v. United States, 221 U.S. 361, 384–86, 400 (1911); Braswell v. United States, 487 U.S. 99, 109–18 (1988).

12 S. Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966).

13 Trenton v. New Jersey, 262 U.S. 182, 191–92 (1923).

14 Newark v. New Jersey, 262 U.S. 192, 196 (1923).

15 *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139, n.7 (1973) (concurring opinion of Justice Stewart).

B. PERSONS BOUND BY CONSTITUTIONAL RIGHTS—THE CONCEPT OF "STATE ACTION"

1. Public Authorities and Agents

[B4] The action of all state and federal officers is constrained by the constitutional provisions on individual rights, when they act in their official capacity,[16] even in the context of administrative practices[17] or in relation to private policies.[18] A body of citizens that enacts laws, via referenda, is also bound by individual rights and liberties.[19] The Constitution constrains governmental action "by whatever instruments or in whatever modes . . . [or] under whatever congressional label" that action may be taken.[20] Hence, government agencies must comply with constitutional guarantees even when acting under conditions similar to those under which an individual entrepreneur does business.[21]

[B5] The concept of "*state action*" is closely interconnected to the notion of "*acting under color of (state) law*," which is a requirement for a lawsuit under 42 U.S.C. Section 1983[22] or a conviction under 18 U.S.C. Section 242.[23] The Court has made clear that, if a defendant's conduct satisfies the state action requirement of the Fourteenth Amendment, that conduct also constitutes action "under color of state law" for Section 1983 purposes.[24] The traditional definition of acting under color of state law requires that the defendant in a Section 1983 action or the accused of a Section 242 offense has exercised power "possessed by virtue of state law" and that the misuse of such power

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[16] *See, e.g.*, Chicago Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 234 (1897); Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

[17] *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886), involved the power of municipal authorities to grant, at their own will, licenses to keep lawful business of public laundries and washhouses. As the Court stated, "[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 protection of the laws is still within the prohibition of the Constitution."

[18] *Griffin v. Maryland*, 378 U.S. 130, 136–37 (1964), concerned the exclusion of African Americans from a privately owned amusement park. The Court held that "when a State undertakes to enforce a private policy of racial segregation," the state violates the Equal Protection Clause of the Fourteenth Amendment.

[19] Reitman v. Mulkey, 387 U.S. 369, 373–81 (1967) (judicial scrutiny, under the Equal Protection Clause of the Fourteenth Amendment, of rules added to a state constitution, pursuant to a referendum). However, "statements made by private individuals during a citizen-driven petition drive . . . do not, in and of themselves, constitute state action for Fourteenth Amendment purposes," and private motives behind a referendum drive are not, in principle, attributable to the state. *See* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003).

[20] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392–93 (1995).

[21] *See*, in particular, Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) (when a state agency leases a restaurant located in a publicly owned and operated automobile parking building, "the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself").

[22] 42 U.S.C. Section 1983 provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights.

[23] 18 U.S.C. Section 242 makes it an offense for any person, under color of law, willfully to subject any inhabitant of any state, territory, or district to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States.

[24] Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982).

was "made possible only because the wrongdoer is clothed with the authority of state law."[25] To constitute *state action*, the deprivation of constitutional rights must "be caused by the exercise of some right or privilege created by the State or by a person for whom the State is responsible and the party charged with the deprivation must be a person who may fairly be said to be a state actor. . . . State employment is generally sufficient to render the defendant a state actor. It is firmly established that an individual acts under color of state law when he abuses the position given to him by the State. . . . Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." In the light of the previous observations, the Court has held that a physician who is under contract with the state to provide medical services to inmates at a state prison hospital, on a part-time basis, acts under color of state law when he treats an inmate (even though he acts in accordance with professional discretion and judgment and even when he does not exercise custodial or supervisory authority), given the state's obligation, under the Eighth Amendment and state law, to provide adequate medical care to those whom it has incarcerated.[26] Moreover, the action of an individual who, as a deputy sheriff possessing state authority, purports to act pursuant to that authority, is state action; it is immaterial that he could have taken the same action in a purely private capacity, or that his action was not authorized by state law.[27] Similarly, a private detective, employed by a business corporation to find the thieves of its property, who held a special police officer's card issued by the City of Miami, and had taken an oath and qualified as a special police officer, acted "under color of law," within the meaning of 18 U.S.C. Section 242, when, showing his badge and accompanied by a regular policeman, he beat certain suspects and thereby obtained confessions.[28] By contrast, a public defender does not act "under color of state law" when performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding, because he keeps his professional independence *vis-à-vis* the state and works on behalf of his client, to whom he owes a duty of undivided loyalty.[29] And the murder of a 15-year-old girl by a parolee five months after he was released from prison, despite his history as a sex offender, cannot be fairly characterized as state action, since the parolee was in no sense an agent of the parole board, which was not aware that the girl faced any special danger.[30]

[B6] The Court has also dealt with the character of activities of various legal entities created by the government. With respect to that matter, it is established that whenever "the Government creates a corporation by special law for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of that corporation's directors, the corporation is part of the Government for pur-

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[25] United States v. Classic, 313 U.S. 299, 326 (1941); Williams v. United States, 341 U.S. 97, 99 (1951); Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982).

[26] West v. Atkins, 487 U.S. 42, 49–57 (1988).

[27] Griffin v. Maryland, 378 U.S. 130, 135 (1964). In that case, petitioners, five young African-Americans, were convicted of criminal trespass for refusing to leave a privately owned and operated amusement park (which had a policy of racial segregation), at the command of an employee of the amusement park acting under color of his authority as a deputy sheriff.

[28] Williams v. United States, 341 U.S. 97, 98–100 (1951).

[29] Polk County v. Dodson, 454 U.S. 312, 317–22 (1981).

[30] Martinez v. California, 444 U.S. 277, 285 (1980) (under the particular circumstances of the case, "appellants' decedent's death [wa]s too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law").

poses of the First Amendment." A contrary holding would allow government to evade its constitutional obligations by simply resorting to the corporate form. Hence Amtrak, the National Railroad Passenger Corporation, though nominally a private corporation and though its authorizing statute provides that it "will not be an agency or establishment of the United States Government," must be regarded as an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the government by the Constitution, since it was created by the Rail Passenger Service Act of 1970, in the interest of the public convenience and necessity, and the legislation establishes detailed goals for Amtrak, sets forth its structure and powers, and assigns the appointment of a majority of its board of directors to the President.[31] On the contrary, the United States Olympic Committee (USOC), a private corporation, is not a governmental actor to whom the Fifth Amendment applies; the mere fact that Congress granted it a corporate charter does not render the USOC a government agent.[32]

[B7] A legal entity's character is "determined neither by its expressly private characterization in statutory law, nor by the law's failure to acknowledge its inseparability from recognized government officials or agencies." Hence, state action can be found when there is "public entwinement in the management and control" of a private organization. The nominally private character of an association may be "overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it."[33] The decisions of the Court in that area can be summarized as follows.

[B8] By will probated in 1831, a testator left a fund to the City of Philadelphia in trust for the erection, maintenance, and operation of a "college," providing that it was to admit poor white male orphans. The college was established and being operated by a Board appointed under a Pennsylvania statute. Even though the Board was acting as a trustee, it was an agency of the state, and its refusal to admit African-American boys to the college solely because of their race violated the Fourteenth Amendment.[34]

[B9] A tract of land was willed in trust to the Mayor and City Council of Macon, Georgia, as a park for white people, to be controlled by a white Board of Managers. The Court assumed that "[i]f a testator wanted to leave a school or center for the use of one race only, and in no way implicated the State in the supervision, control, or management of that facility," no constitutional difficulty would be encountered. The park in issue, however, was in a different posture. "For years, it was an integral part of the City of Macon's activities. It was swept, manicured, watered, patroled, and maintained by the city as a public facility for whites only, as well as granted tax exemption." Despite the appointment of "private" trustees, there had been no change in municipal maintenance and concern over this facility. If a municipality is "firmly entwined in the management or control" of such a park, it remains subject to the constitutional restraints. Taking into account that "the service rendered even by a private park of this character is municipal

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[31] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 383–99 (1995).

[32] San Francisco Arts & Athletics Inc. v. United States Olympic Comm., 483 U.S. 522, 542–47 (1987).

[33] Brentwood Acad. v. Tennessee Ass'n, 531 U.S. 288, 298 (2001).

[34] Pennsylvania v. Bd. of Dirs. of City Trusts of the City of Philadelphia, 353 U.S. 230, 230–31 (1957) (*per curiam*).

in nature," the Court concluded that the park should "be treated as a public institution" and had to comply with the commands of the Fourteenth Amendment.[35]

[B10] A not-for-profit athletic association, organized to regulate inter-scholastic sport among the public and private high schools in Tennessee that belonged to it, penalized a private high school member of the association for violating a rule prohibiting "undue influence" in recruiting athletes. "To the extent of 84 percent of its membership, the Association was an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling," inter-scholastic athletics. School officials made up the voting membership of the association's governing council and control board, which typically held meetings during regular school hours. The association set membership standards and student eligibility rules and had the power to penalize any member school that violated those rules. The State Board of Education had long acknowledged the association's role in regulating inter-scholastic competition in public schools, and its members were non-voting members of the association's governing bodies. In the light of the above, the Court held that such a "pervasive entwinement of state school officials in the structure of the Association" required that the association be charged with a public character and judged by constitutional standards, regarding its regulatory activity.[36]

2. Private Persons

a. General Principles[37]

[B11] Some rights established by the Constitution are protected from both governmental and private abridgment.[38] However, most rights secured by the Constitution are protected only against infringement by governments.[39] In relation to the Fourteenth

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[35] Evans v. Newton, 382 U.S. 296, 299–302 (1966). The park was eventually eliminated and reverted to the testator's heirs because the park's segregated character was considered to be an essential and inseparable part of the testator's plan. *See* Evans v. Abney, 396 U.S. 435 (1970).

[36] Brentwood Academy v. Tennessee Ass'n, 531 U.S. 288 (2001).

[37] *See also* para. B4 (*referendary rules*).

[38] *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 942 (1988), concerning the Thirteenth Amendment's prohibition of "involuntary servitude;" United States v. Classic, 313 U.S. 299, 315 (1941) (the constitutional right of the people to choose representatives in Congress is secured against the action of individuals, as well as of states).

[39] *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978).

It must be noted that, *although private action is not, in principle, restrained by any constitutional rights, it does not follow that the federal government or a state cannot impose, by proper legislation, such restrictions. See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (prohibition of racial discrimination in places of public accommodation, under the Civil Rights Act of 1964); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (federal law which provides that all citizens shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property); Runyon v. McCrary, 427 U.S. 160 (1976) (federal law precluding private, commercially operated, nonsectarian schools from denying admission to prospective students because of their race); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (state constitutional provisions that permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (state statute requiring Rotary Clubs to admit women).

Amendment, the Courts has emphasized "the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, however discriminatory or wrongful, against which the Fourteenth Amendment offers no shield."[40] Careful adherence to the "state action" requirement "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power [and] also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed."[41] The question whether particular conduct is "private," on the one hand, or "state action," on the other, frequently admits to no easy answer. Reflecting the discontinuity that marks the law in this area, the Court has variously characterized the inquiry as whether "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself,"[42] whether the state, "by encouraging the challenged conduct, could be thought "responsible for those actions,"[43] or whether "the alleged infringement of federal rights [is] fairly attributable to the State."[44] Whatever the semantic formulation, "what is fairly attributable to the State is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government."[45] Though each case giving rise to the question of "state action" is "decided separately by sifting facts and weighing circumstances,"[46] the Court's opinions reflect a two-part approach to this question of "fair attribution:" "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State. . . . Second, the private party charged with the deprivation must be a person who may fairly be said to be a state actor, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them."[47] From the Court's case law, one can reasonably infer some safe, substantive criteria[48] upon which the Court relies its judgments in that field.

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[40] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974), *citing Civil Rights Cases* (United States v. Singleton), 109 U.S. 3 (1883).

[41] Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

[42] Brentwood Acad. v. Tennessee Ass'n, 531 U.S. 288, 295 (2001), *quoting* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

[43] See Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 408 (1995) (opinion of Justice O'Connor), *citing* Blum v. Yaretsky, 457 U.S. 991, 1005 (1982).

[44] Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

[45] Brentwood Acad. v. Tennessee Ass'n, 531 U.S. 288, 295–96 (2001).

[46] Evans v. Newton, 382 U.S. 296, 299–300 (1966), *quoting* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[47] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

[48] These criteria are objective. The motives underlying the action in question are not to be taken into consideration. *Cf.* Edmonson v. Leesville Concrete Co. Inc., 500 U.S. 614, 626 (1991) and, in particular, Georgia v. McCollum, 505 U.S. 42, 54–55 (1992) (the exercise by a criminal defendant or by a private party in a civil case of peremptory challenges in selecting the jury constitutes state action, even though the motive underlying the exercise of the peremptory challenge may be to protect a private interest).

[B12] One of the basic criteria applied by the Court resides in the *delegation of public functions*. "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[49] However, the mere fact that a private entity performs a "function which serves the public" doesn't suffice to render this entity a state actor,[50] even if it enjoys a substantial monopoly in its activities.[51] The function performed ought to constitute an "exclusive public function,"[52] or, according to a slightly different semantic formulation, must "traditionally" constitute an "exclusive prerogative of the State,"[53] or be "associated with sovereignty, such as eminent domain."[54]

[B13] In addition, a state can be held responsible for a private decision when it has exercised "*coercive power*"[55] *or* has provided "such *significant encouragement*, either overt or covert, that the choice must in law be deemed to be that of the State."[56] However, a state's inaction or mere acquiescence regarding a private action cannot be deemed an "authorization" or "encouragement" of the private action at issue and does not convert such action into that of the state.[57] "Private use of state-sanctioned private remedies or procedures does not rise to the level of state action,"[58] nor "is the State's involvement in the mere running of a general statute of limitations generally sufficient to implicate due process."[59] But when private parties "make use of state procedures with the overt, significant assistance of state officials," state action can be found.[60] Such assistance may consist, particularly, in the placement of state sanctions "behind" the private practice in question.[61]

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49 Evans v. Newton, 382 U.S. 296, 299 (1966).

50 Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

51 Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

52 *See* Flagg Bros. v. Brooks, 436 U.S. 149, 161 (1978); Am. Mfrs.' Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 57 (1999).

53 *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974); Blum v. Yaretsky, 457 U.S. 991, 1005, 1011 (1982).

54 Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974).

55 *See* Blum v. Yaretsky, 457 U.S. 991, 1005, 1004 (1982) and, in particular, Peterson v. City of Greenville, 373 U.S. 244, 248 (1963) (when the state has commanded by law a particular result, it has saved to itself the power to determine that result, and thereby, to a significant extent, has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice; in this case, there is state action even if the private person would have acted as he did independently of the existence of the state law).

56 Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

57 *See* Flagg Bros. v. Brooks, 436 U.S. 149, 164–65 (1978).

58 Tulsa Prof'l Collection Servs. Inc. v. Pope, 485 U.S. 478, 485 (1988), *citing* Flagg Bros. v. Brooks, 436 U.S. 149, 165 (1978) ("If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.").

59 Tulsa Prof'l Collection Servs. Inc. v. Pope, 485 U.S. 478, 485–86 (1988), *citing* Texaco, Inc. v. Short, 454 U.S. 516 (1982). Nevertheless, there is "state action" when the time bar is activated only after specific actions, in which a court is intimately involved.

60 Tulsa, *supra* note 59, at 486.

61 Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178 (1972). See also Barrows v. Jackson, 346 U.S. 249, 254 (1953).

[B14] A private conduct may also be attributed to the state, when the state "place[s] its power, property and prestige behind" the private practice at issue, and therefore "insinuate[s] itself into a position of interdependence" (in other words, into a "*symbiotic relationship*") with the private person, it must be recognized as a "joint participant" in the challenged activity.[62] Nonetheless, "the mere fact that a private business is subject to [extensive] state regulation does not, by itself, convert its action into that of the State."[63] Furthermore, the receipt of public funds is not a crucial element for the characterization of a private behavior as state action; the situation of a private person subsidized by the government "is not fundamentally different from many private corporations whose business depends primarily on contracts" with the government and whose acts "do not become acts of the government by reason of their significant or even total engagement in performing public contracts."[64]

b. Particular Applications

[B15] *Party Primaries.* If a primary election to nominate a party candidate for state or federal office is regulated by state statute, the duties performed under this statute are acts under color of state law.[65] In a series of decisions known as the "White Primary Cases," the Court applied the Fifteenth and Fourteenth Amendments to strike down a succession of measures by authorities in Texas to exclude minority voters from their nomination processes. These cases demonstrate that electoral practices implemented by political parties have the potential to deny or abridge the right to vote on account of race or color. The first case involved the validity of a Texas statute enacted in 1923 that flatly provided "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas." The statute was found to be a direct and obvious infringement of the Fourteenth Amendment.[66] Promptly after the announcement of that decision, the Texas legislature replaced the invalid provision with a substitute that authorized the executive committee of every political party to determine "in its own way" who would be "qualified to vote or otherwise participate in such political party." The State Executive Committee of the Democratic Party adopted a rule that only "white democrats" could participate in the party's primary elections. The Court held that the authors of the discriminatory rule "should be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."[67] The decision "relied on the fact that a state statute authorized the Party's Executive Committee to determine the qualifications of

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62 Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

63 *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974); Am. Mfrs.' Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999).

64 Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982).

65 United States v. Classic, 313 U.S. 299, 325 (1941) (if a statute requires the election officials "to count the ballots, to record the result of the count and to certify the result of the election," the actions of election official in willfully altering and falsely counting and certifying the ballots, are acts under color of state law); Bullock v. Carter, 405 U.S. 134, 140 (1972) (state statute requiring payment of a filing fee as an absolute prerequisite to a candidate's participation in a primary election; since the mechanism of party primary elections is the creature of state legislative choice, it is "state action" within the meaning of the Fourteenth Amendment).

66 Nixon v. Herndon, 273 U.S. 536, 540 (1927).

67 Nixon v. Condon, 286 U.S. 73, 85–89 (1932).

voters."[68] Thereafter, the party implemented the same discriminatory policy without statutory authorization by adopting a resolution at a state convention restricting party membership to "white persons." When it first confronted the issue, the Court held that implementation of that rule by the managers of the primary election was not state action, because the Democratic Party, as a voluntary political association, had "the right . . . to define its membership" and to adopt such policies as seemed wise to it.[69] A few years later, however, the Court overruled *Grovey* and decided that a similar resolution adopted by the party's state convention constituted state action violative of the Fifteenth Amendment, even though it was not expressly authorized by statute. What changed was not the extent of state regulation, but the Court's understanding, based on its intervening decision in *United States v. Classic*,[70] that primaries were "a part of the machinery for choosing officials."[71] In *Smith v. Allwright*, the Court pointed out that if the state "requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by [state] law with the determination of the qualifications of participants in the primary. . . . [T]he recognition [by state law] of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state."[72]

[B16] The previous rationale was extended to a non-official "all-white" pre-primary Democratic Party nominating process, which was meant to circumvent the commands of the Fifteenth Amendment. The same policy of excluding all non-white voters from the electoral process was implemented in a Texas county by a private organization known as the Jaybird Democratic Association. The Association held an election in each election year to select candidates for county offices to run for nomination in the official Democratic primary. The Association's elections were not governed by state laws, and did not utilize state elective machinery or funds. Candidates elected by the Association were not certified by the Association as its candidates in the Democratic primary but filed their own names as candidates. However, for more than 60 years, the Association's county-wide candidates had invariably been nominated in the Democratic primaries and elected to office. After admitting that such a discriminatory policy in the county-operated primaries would be unconstitutional, the Court found that it violated the Fifteenth Amendment for a state "to permit within its borders the use of any device that produce[d] an equivalent of the prohibited election."[73] Although the Jaybirds had no official status, received no state funds, and conducted a purely private election, the Court readily concluded that, since the Jaybird primary had become, as a matter of fact, an integral part, indeed the only effective part, of the elective process that determined who would rule and govern in the county, this voluntary association's exclusion of

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68 *See* Morse v. Republican Party of Virginia, 517 U.S. 186, 212 (1996) (leading opinion of Justice Stevens, joined by Justice Ginsburg).

69 Grovey v. Townsend, 295 U.S. 45, 49–55 (1935).

70 United States v. Classic, 313 U.S. 299, 318 (1941).

71 *See* Morse v. Republican Party of Virginia, 517 U.S. 186, 200, n.17 (1996) (leading opinion of Justice Stevens, joined by Justice Ginsburg), *discussing Smith v. Allwright.*

72 Smith v. Allwright, 321 U.S. 649, 660, 664 (1944).

73 Terry v. Adams, 345 U.S. 461, 469–70 (1953).

African-Americans voters from its primaries on racial grounds was prohibited by the Fifteenth Amendment and that the combined discriminatory Jaybird-Democratic-general election machinery had unlawfully deprived citizens of voting rights because of their color.[74]

[B17] *Peremptory Challenges.* The exercise by a private litigant in a civil case of a peremptory challenge in selecting the jury constitutes state action for purposes of the Equal Protection Clause. First, it involves the exercise of a right provided by federal or state statute, hence "having its source in state authority." Second, "without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist. . . . [P]eremptory challenges have no utility outside the jury system, a system which the government alone administers. . . . The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the 'final and practical denial' of the excluded individual's opportunity to serve on the petit jury." Moreover, the action in question involves the performance of a traditional governmental function, since "the peremptory challenge is used in selecting the jury, an entity that is a quintessential governmental body having no attributes of a private actor." Finally, the Court indicated that the courtroom setting in which the peremptory challenge is exercised intensifies the harmful effects of the private litigant's discriminatory act and contributes to its characterization as state action, for "[f]ew places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds."[75]

[B18] For similar reasons, the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.[76] This conclusion is not inconsistent with the Court's holding in *Polk County v. Dodson*,[77] in which it was decided that a public defender does not qualify as a state actor when engaged in his general representation of a criminal defendant, since the determination whether a public defender is a state actor for a particular purpose

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[74] *See* Morse v. Republican Party of Virginia, 517 U.S. 186, 213 (1996) (leading opinion of Justice Stevens, joined by Justice Ginsburg). *Morse* involved a party's requirement of payment of a registration fee as a condition for a candidate's participation in a primary election. Five members of the Court held that the requirement fell within the scope of Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Among these members, Justices Stevens and Ginsburg, guided by the reasoning of *Smith v. Allwright*, concluded that, because Virginia law provided that the nominees of the two major political parties would automatically appear on the general election ballot and authorized the two parties to determine for themselves how they would select their nominees, whether by primary, nominating convention, or some other method, the Republican Party of Virginia acted "under authority" of state law when it picked its candidate at the convention. The fact that Virginia did not require its political parties to conduct primary elections to nominate their candidates could not make a difference, since the right to choose the method of nomination made "the delegation of authority in this case more expansive, not less," for the party was granted even greater power over the selection of its nominees. *Id.* at 195–99.

[75] Edmonson v. Leesville Concrete Co. Inc., 500 U.S. 614, 618–28 (1991). *See also* Georgia v. McCollum, 505 U.S. 42, 50–53 (1992), analyzing *Edmonson*.

[76] Georgia v. McCollum, 505 U.S. 42, 50–55 (1992).

[77] Polk County v. Dodson, 454 U.S. 312 (1981).

depends on the nature and context of the specific function he is performing. "The exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense. In exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body."[78]

[B19] *Company Towns—Shopping Centers.* Another line of cases under the public function doctrine originated with *Marsh v. Alabama.* Marsh, a Jehovah's Witness, undertook to distribute religious literature on a sidewalk in the business district of Chickasaw, Alabama. Chickasaw, a so-called company town, was wholly owned by Gulf Shipbuilding Corporation. The town and its shopping district were accessible to and freely used by the public in general, and there was nothing to distinguish them from any other town and shopping center except the fact that the title to the property belonged to a private corporation. The corporation had posted notices in the stores stating that the premises were private property and that no solicitation of any kind without written permission would be permitted. Marsh was told that she must have a permit to distribute her literature, and that a permit would not be granted to her. When she declared that the company rule could not be utilized to prevent her from exercising her constitutional rights under the First Amendment, she was ordered to leave Chickasaw. She refused to do so, and was arrested for violating Alabama's criminal trespass statute. The Court reversed her conviction, by reasoning on the basis of the performance of public function. It indicated that "[t]he 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 constitutional (and statutory) rights of those who use it. . . . Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public, and since their operation is essentially a public function, it is subject to state regulation. . . . [S]uch regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes" with individual rights.[79] Since Gulf Shipbuilding Corp. performed "all the necessary municipal functions" in the town of Chickasaw, which it owned, the Court concluded that it was bound to recognize the right of Jehovah's Witnesses to distribute religious literature on its streets.[80]

[B20] The Court expanded this municipal function theory in *Food Employees v. Logan Valley Plaza*, to encompass the activities of a private shopping center. That case involved peaceful picketing within a large shopping center near Altoona, Pennsylvania. One of the tenants of the shopping center was a retail store that employed a wholly non-union staff. Members of a local union picketed the store, carrying signs proclaiming that it was non-union and that its employees were not receiving union wages or other union benefits. The picketing took place on the shopping center's property in the immediate vicinity of the store. A Pennsylvania court issued an injunction that required all picketing to be confined to public areas outside the shopping center, and the Supreme Court of Pennsylvania affirmed the issuance of this injunction. The Court's opinion reviewed the *Marsh* case in detail, emphasized the similarities between the business block in Chickasaw, and the Logan Valley shopping center, and unambiguously concluded that the shopping center there was clearly the "*functional equivalent*" of the business district of Chickasaw involved in Marsh. Upon the basis of that conclusion, the Court held that,

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78 Georgia v. McCollum, 505 U.S. 42, 54 (1992).

79 Marsh v. Alabama, 326 U.S. 501, 506–08 (1946).

80 *See* Flagg Bros. v. Brooks, 436 U.S. 149, 159 (1978), *discussing Marsh.*

because "the shopping center serves as the community business block and is freely accessible and open to the people in the area and those passing through, . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." Therefore the First and Fourteenth Amendments required reversal of the judgment of the Pennsylvania Supreme Court.[81]

[B21] Four years later, the Court had occasion to reconsider the *Logan Valley* doctrine in *Lloyd Corp. v. Tanner*. That case involved a shopping center covering some 50 acres in downtown Portland, Oregon. On a November day in 1968, five young people entered the mall of the shopping center and distributed handbills protesting the then ongoing American military operations in Vietnam. Security guards told them to leave, and they did so, to avoid arrest. They subsequently brought suit in a federal district court, seeking declaratory and injunctive relief. The trial court ruled in their favor, holding that the distribution of handbills on the shopping center's property was protected by the First and Fourteenth Amendments. The Court of Appeals for the Ninth Circuit affirmed the judgment, expressly relying on the Court's *Marsh* and *Logan Valley* decisions. The Court reversed the judgment of the court of appeals. Its "ultimate holding in *Lloyd* amounted to a rejection of the holding in *Logan Valley*."[82] After reminding that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used non-discriminatorily for private purposes only, the Court emphasized that *Marsh* "involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-social municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers, and stood in the shoes of the State." By contrast, in the *Lloyd* case, "there [wa]s no comparable assumption or exercise of municipal functions or power." Hence, it was held that there had been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.[83] The reasoning in *Lloyd* was confirmed in the *Hudgens* case, which involved a strikers' picketing in front of their employer's leased store located in petitioner's shopping center. The Court decided that the pickets "did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike" against their employer and concluded that the constitutional guarantee of free expression had no part to play in a case such as that.[84]

[B22] *Restaurants—Clubs.* The Court has dealt, on several occasions, with discriminatory refusal of service in public eating places. In *Peterson*, ten African-Americans were convicted of trespass in violation of a city ordinance after they had seated themselves at a restaurant to protest its refusal of service to African-Americans. There, the Court held that, although the initiative for the trespass prosecution came from the proprietor, the existence of a local ordinance requiring segregation of races in such places was tantamount to the state's having "commanded a particular result" and, thereby, "to a signif-

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[81] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc. 391 U.S. 308, 318–20 (1968).

[82] *See* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 518 (1976).

[83] Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551, 569–70 (1972).

[84] Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 520–21 (1976).

icant extent, [having] become involved in it." Hence, the manager's conduct should be deemed state action, forbidden by the Fourteenth Amendment, independently of "the mental urges of the discriminators."[85] In a similar case, decided the same day as *Peterson*, the petitioners' convictions were reversed, as violative of the Equal Protection Clause of the Fourteenth Amendment, because, although no state statute or city ordinance required racial segregation in restaurants, both the Mayor and the Superintendent of Police had announced publicly that such "sit-in demonstrations" would not be permitted and, thus, had issued "an official command which ha[d] at least as much coercive effect as an ordinance."[86]

[B23] In *Burton*, a restaurant located in a publicly owned and operated automobile parking building refused to serve an African-American food or drink solely because of his race. The building was built and maintained with public funds and devoted to a public parking service. It was owned and operated by an agency of the state of Delaware, from which the private operator of the restaurant leased its premises. The restaurant was not only physically but also financially "an integral part of the public building," since it constituted "an indispensable part of the State's plan to operate its project as a self-sustaining unit." The lease relationship between the private entrepreneur and the state agency entailed "an incidental variety of mutual benefits:" tax exemptions for the restaurant, rent payments for the parking authority, and increased business for both. Because of this "interdependence," the state should be recognized as a "joint participant in the challenged activity, which, on that account, [could not] be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." In drawing this conclusion, the Court stressed that, "by its inaction, . . . the State ha[d] not only made itself a party to the refusal of service, but ha[d] elected to place its power, property and prestige behind the admitted discrimination."[87]

[B24] In *Moose Lodge*, appellee Irvis, an African-American guest of a Caucasian member of appellant, a private club, was refused service at the club's dining room and bar solely because of his race. In suing for injunctive relief, Irvis contended that the discrimination was state action and thus a violation of the Equal Protection Clause of the Fourteenth Amendment, because the Pennsylvania Liquor Board had issued appellant a private club liquor license. The district court adopted Irvis' view that state action was present, pointing out that an applicant for a club license should make such physical alterations in its premises as the Board might require, should file a list of the names and addresses of its members and employees, should keep extensive financial records, and was subject to Board's inspections at any time when patrons, guests, or members were present. The Court disagreed, holding that, with the exception noted below, there was no state action in the mere fact that the club's beverage bar was licensed and regulated by the state. It stressed that the Pennsylvania Liquor Control Board played "absolutely no part in establishing or enforcing the membership or guest policies of the

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85 Peterson v. City of Greenville, 373 U.S. 244, 248 (1963). *See also* Robinson v. Florida, 378 U.S. 153, 156 (1964) (while the state regulations, which required segregated rest rooms and segregated facilities, did not "directly and expressly forbid restaurants to serve both white and colored people together, they embod[ied] a state policy putting burdens upon any restaurant which serve[d] both races, burdens bound to discourage the serving of the two races together").

86 Lombard v. Louisiana, 373 U.S. 267, 273 (1963).

87 Burton v. Wilmington Parking Auth., 365 U.S. 715, 721–26 (1961).

club" that it had licensed to serve liquor, concluding that "[h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination" nor could it be said to "make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." The "one exception" further illustrates this point. The Court enjoined enforcement of a state rule requiring Moose Lodge to comply with its own constitution and bylaws insofar as they contained racially discriminatory provisions. The effect of this particular regulation on Moose Lodge "would be to place state sanctions behind its discriminatory membership rules."[88] "State enforcement of this rule, either judicially or administratively, would, under the circumstances, amount to a governmental decision to adopt a racially discriminatory policy."[89]

[B25] *Parks.* In *Evans v. Newton*, it was decided that private trustees to whom a city had transferred a park were nonetheless state actors barred from enforcing racial segregation, since the park served the community by providing mass recreation, and "the municipality remain[ed] entwined in [its] management [and] control."[90]

[B26] *Public Utility Corporations.* The Capital Transit Company, a privately owned public utility corporation, whose service and equipment were subject to regulation by the Public Utilities Commission of the District of Columbia (an agency authorized by Congress), received and amplified radio programs through loudspeakers in its streetcars and buses. The programs consisted generally of 90 percent music, 5 percent announcements, and 5 percent commercial advertising. The Commission, after an investigation and public hearings, concluded that the radio service was not inconsistent with public convenience, comfort, and safety and permitted it to continue, despite protests of some passengers that to do so violated their constitutional rights under the First and Fifth Amendments. The Court found "a sufficiently close relation between the Federal Government and the radio service to make it necessary for [the Court] to consider those Amendments." In finding this relation, the Court didn't "rely on the mere fact that Capital Transit operate[d] a public utility on the streets of the District of Columbia under authority of Congress." Nor did it "rely upon the fact that, by reason of such federal authorization, Capital Transit enjoye[d] a substantial monopoly of street railway and bus transportation in the District of Columbia." The Court relied "particularly upon the fact that the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation." In light of these considerations, the Court assumed that "the action of Capital Transit in operating the radio service, together with the action of the Commission in permitting such operation, amounte[d] to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto."[91]

[B27] In *Jackson v. Metropolitan Edison*, a New York resident brought suit against a privately owned and operated utility corporation, claiming that she had been denied due process when the utility terminated her electric service without notice or a hearing and alleging that the utility's summary termination procedures had been "specifically authorized and approved" by the state. In sustaining dismissal of the complaint, the Court "held that authorization and approval did not transform the procedures of the company into the procedures of the State."[92] As *Jackson* pointed out, "[t]he nature of gov-

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88 Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171–79 (1972).

89 *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 938, n.20 (1982).

90 Evans v. Newton, 382 U.S. 296, 301–02 (1966).

91 Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

92 *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 251 (1977) (Powell, J., concurring).

ernmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.' At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it, and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." Moreover, the mere fact that the private utility provided services affected with a public interest did not, by itself, convert its action into that of the state, for purposes of the Fourteenth Amendment, in the absence of any exercise of power delegated to it by the state that was "traditionally associated with sovereignty."[93]

[B28] *Schools.*[94] In *Rendell-Baker*, a former vocational counselor and teachers at a privately operated school for maladjusted high school students brought actions in federal district court under 42 U.S.C. Section 1983, claiming that they had been discharged by the school in violation of their First, Fifth, and Fourteenth Amendment rights. Nearly all of the school's students had been referred to the school by city school committees under a Massachusetts statute or by a state agency. When the students were referred to the school by the city committees, these cities paid for the students' education. The school was also receiving funds from a number of state and federal agencies. Public funds accounted for at least 90 percent of the school's operating budget. To be eligible for tuition funding under the state statute, the school should comply with certain state regulations, but these regulations imposed few specific requirements as regards personnel standards and procedures. Similarly, the school's contracts with the state and the city committees generally did not cover personnel policies. The Court, first, noted that the school's receipt of public funds could not be considered sufficient to make the discharge decisions acts of the state, since the school was not fundamentally different from many private corporations whose business depends primarily on contracts with the government and whose acts do not become acts of the government by reason of "their significant or even total engagement in performing public contracts." The decision to discharge petitioners was not "compelled or even influenced by any state regulation," and the fact that the school performed a public function in educating maladjusted high school students did not make its acts state action, given that the services rendered by the school were not the "exclusive province" of the state. Moreover, since the school's fiscal relationship with the state was not any different from that of many contractors performing services for the government, there was no "symbiotic relationship" between the school and the state. Under these circumstances, the Court held that the school did not act under color of state law when it discharged petitioner employees.[95]

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[93] Jackson v. Metro. Edison Co., 419 U.S. 345, 349–59 (1974).

[94] *See also* para. B32.

[95] Rendell-Baker v. Kohn, 457 U.S. 830, 839–43 (1982).

In *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court invalidated a program in which a state purchased textbooks and loaned them to students in public and private schools, including private schools with racially discriminatory policies. In so doing, the Court noted that "[a] State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 466.

[B29] *Nursing Homes.* In *Blum*, the Court considered whether certain private nursing homes, participating in the Medicaid program established by the Social Security Act in 1965, were state actors for the purpose of determining whether decisions regarding transfers of patients to lower levels of care could be fairly attributed to the state and, hence, be subjected to Fourteenth Amendment due process requirements. These nursing homes were subject to extensive regulation by the state, which encouraged them to transfer patients to less expensive facilities when possible. However, the Court rejected the respondents' argument that, under the pertinent statutes and regulations, the state "affirmatively command[ed] the summary discharge or transfer of Medicaid patients who [we]re thought to be inappropriately placed in their nursing facilities." The state, by requiring completion by physicians or nursing homes of forms relating to a patient's condition and discharge or transfer decisions, was not responsible for the decisions of the physicians or nursing homes. "Those decisions ultimately turn[ed] on medical judgments made by private parties according to professional standards that [we]re not established by the State." Similarly, regulations imposing penalties on nursing homes that failed to discharge or transfer patients whose continued stay was inappropriate did not themselves "dictate the decision to discharge or transfer in a particular case." And even though the state subsidized the operating and capital costs of the facilities, paid the medical expenses of more than 90 percent of the patients in the facilities, and licensed the facilities, the action of the nursing homes could not thereby be converted into "state action." Finally, the Court rejected the argument that "state action" should be found because of the nature of the functions performed by the nursing home, noting "decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public."[96]

[B30] *Insurance Companies.* A private insurer's decision, made pursuant to a state statute, to withhold payment for disputed medical treatment, pending an independent review to determine whether the treatment is reasonable and necessary, was held, in *American Manufacturer's Mutual Insurance Co. v. Sullivan*, not to be fairly attributable to the state of Pennsylvania, so as to subject the insurer to the Fourteenth Amendment's constraints. The statute simply authorized, but did not require, insurers to withhold payments for disputed medical treatment. The decision to withhold payment "turn[ed] on judgments made by private parties" without "standards established by the State." Although the pertinent state statute could, in some sense, be seen as "encouraging" the insurers to make such a decision, "this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal remedy. [The Court has] never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it. . . . The State's decision to allow insurers to withhold payments pending review [could] just as easily be seen as state inaction, or, more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary." While the statutory scheme previously prohibited insurers from withholding payment for disputed medical services, it no longer did so. "Such permission of a private choice cannot support a finding of state action." The argument that state action was present because the state had delegated to insurers powers traditionally reserved to itself also lacked merit. First, nothing in Pennsylvania's constitution or statutory scheme obligated the state to provide either medical treatment or

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[96] Blum v. Yaretsky, 457 U.S. 991, 1003–12 (1982).

workers' compensation benefits to injured workers. Second, there was no traditionally exclusive governmental function of deciding whether to suspend payment for disputed medical treatment. "That Pennsylvania had [originally] recognized an insurer's traditionally private prerogative to withhold payment, then restricted it, and [afterwards] restored it [could] not constitute the delegation of an exclusive public function. Pennsylvania ha[d] done nothing more than authorize (and indeed limit)—without participation by any public official—what private insurers would tend to do, even in the absence of such authorization." Finally, the Court rejected the respondents' reliance on *Burton*, noting that "privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit" of the "*joint participation*" theory of state action, set forth in *Burton*, and that, although the workers' compensation insurers appeared to be extensively regulated, the state statutory and regulatory scheme left the challenged decisions to the judgment of insurers.[97]

[B31] *United States Olympic Committee.* San Francisco Arts & Athletics, Inc. (SFAA), a non-profit California corporation, promoted the "Gay Olympic Games," to be held in 1982, by using those words on its letterheads and mailings, in local newspapers, and on various merchandise sold to cover the costs of the planned games. The United States Olympic Committee (USOC), which, under the Amateur Sports Act of 1978, had the right to prohibit certain commercial and promotional uses of the word "Olympic" and various Olympic symbols, requested from SFAA to terminate the use of the word "Olympic" in its description of the planned games. When the SFAA failed to do so, the USOC brought suit in federal district court and obtained summary judgment and a permanent injunction. The federal district court did not reach the SFAA's claim that the USOC's enforcement of its rights was discriminatory in violation of the equal protection component of the Due Process Clause of the Fifth Amendment, because it held that the USOC was not a governmental actor to which the Constitution applied. The Court affirmed, holding that "[t]he USOC's choice of how to enforce its exclusive right to use the word 'Olympic' simply is not a governmental decision." "The fact that Congress granted it a corporate charter does not render the USOC a Government agent. All corporations act under charters granted by a government, usually by a State. . . . Nor is the fact that Congress has granted the USOC exclusive use of the word 'Olympic' dispositive. All enforceable rights in trademarks are created by some governmental act, usually pursuant to a statute or the common law. . . . Moreover, the intent on the part of Congress to help the USOC obtain funding does not change the analysis. The Government may subsidize private entities without assuming constitutional responsibility for their actions." And although "the activities performed by the USOC serve a national interest, . . . neither the conduct nor the coordination of amateur sports has been a traditional governmental function."[98]

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[97] Am. Mfrs.' Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49–58 (1999).

[98] San Francisco Arts & Athletics Inc. v. United States Olympic Comm., 483 U.S. 522, 542–47 (1987). In his dissenting opinion, Justice Brennan, considering the international political and athletic significance of the Olympic Games, indicated that the USOC, not only was inextricably intertwined with the government, but also performed "the distinctive, traditional governmental function . . . [of] represent[ing] th[e] Nation to the world community" and should therefore be considered as a governmental actor. *Id.* at 550.

[B32] *National Collegiate Athletic Association.* The State University of Nevada, Las Vegas (UNLV), an undoubtedly state actor, suspended its basketball coach, Tarkanian, in order to comply with rules and recommendations of the National Collegiate Athletic Association (NCAA), regarding improper recruiting practices. The coach charged the NCAA, an unincorporated association of approximately 960 members, including virtually all public and private universities and four-year colleges conducting major athletic programs in the United States, with deprivation of his Fourteenth Amendment due process rights. The Court rejected the allegation and held that the NCAA's participation in the events that led to Tarkanian's suspension did not constitute "state action" prohibited by the Fourteenth Amendment and was not performed "under color of" state law within the meaning of 42 U.S.C. Section 1983. The NCAA could not be deemed to be a state actor on the theory that it misused power it possessed by virtue of state law. "[T]he source of the legislation adopted by the NCAA [wa]s not Nevada, but the collective membership, speaking through an organization that [wa]s independent of any particular State." Moreover, taking into account that "UNLV retained the authority to withdraw from the NCAA and establish its own standards, . . . UNLV's decision to adopt the NCAA's standards . . . [was not] a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance." Tarkanian's assertion that the NCAA's investigation, enforcement proceedings, and consequent recommendations constituted state action, because they resulted from a delegation of power by UNLV, had equally no merit, because "UNLV delegated no power to the NCAA to take specific action against any university employee," "[d]uring the several years that the NCAA investigated the alleged violations, the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth," and the "NCAA enjoyed no governmental powers to facilitate its investigation." Finally the Court rejected Tarkanian's argument that the power of the NCAA was so great that UNLV had no practical alternative but to comply with the Association's demands, pointing out that even if "a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law."[99]

[B33] *Drug and Alcohol Testing of Railroad Employees.* Upon the basis of evidence indicating that alcohol and drug abuse by railroad employees had caused or contributed to a number of significant train accidents, the Federal Railroad Administration (FRA) promulgated regulations, which, among other things, required railroads to see that blood and urine tests of employees are conducted following certain major train accidents or incidents (Sub-part C), and authorized, but did not require, railroads to administer breath or urine tests, or both, to employees who violated certain safety rules (Sub-part D). The Court held that the Fourth Amendment was applicable to the drug and alcohol tests in question. These tests could not be viewed as private action. On the one hand, a railroad that complied with Sub-part C did so "by compulsion of sovereign authority." On the other hand, even though Sub-part D did not compel railroads to test, it could not be concluded that such testing would "be primarily the result of private initiative." "The Government ha[d] removed all legal barriers to the testing authorized by Subpart D, and indeed ha[d] made plain not only its strong preference for testing but also its desire to share the fruits of such intrusions. In addition, it ha[d] mandated that

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[99] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191–99 (1988).

the railroads not bargain away the authority to perform tests granted by Subpart D. These [we]re clear indices of the Government's encouragement, endorsement, and participation, and suffice[d] to implicate the Fourth Amendment."[100]

[B34] *Broadcast Stations.* A broadcast licensee refused to accept a paid editorial advertisement concerning the Vietnam conflict. Under the Communications Act, Congress maintained "a substantial measure of journalistic independence for the broadcast licensee," which had "the initial and primary responsibility for fairness, balance, and objectivity," while the role of the government was that of "an 'overseer' and ultimate arbiter and guardian of the public interest." Moreover, the Federal Communications Commission "ha[d] not fostered the licensee policy challenged [t]here; it ha[d] simply declined to command particular action because it fell within the area of journalistic discretion." Since it could not be said that the government was a "partner" to the contested action of the broadcast licensee, nor "was it engaged in a 'symbiotic relationship' with the licensee, profiting from the invidious discrimination of its proxy," the private conduct in question was not thought to be "government action" for First Amendment purposes.[101]

[B35] *Racially Restrictive Covenants.* "Private racial biases may be outside the reach of the Constitution, but the law cannot, directly or indirectly, give them effect."[102] Private agreements to exclude persons of designated race or color from the use or occupancy of real estate for residential purposes, standing alone, do not violate any rights guaranteed by the Fourteenth Amendment. However, given that the actions of state courts and judicial officers in their official capacities are actions of the states, within the meaning of the Fourteenth Amendment, judicial enforcement of such private agreements constitutes "state action" contrary to the constitutional command of the equal protection of the laws.[103] Similarly a court's awarding damages for breach of such a covenant constitutes state action, violative of the Fourteenth Amendment; indeed "the result of that sanction by the State would be to encourage the use of restrictive covenants" and to "coerce" the respondent contracting party to continue the use of the property in a discriminatory manner.[104]

[B36] *Lien Foreclosures—Seizures of Property.* In *Flagg Brothers*, a warehouseman was sued under 42 U.S.C. Section 1983 because it sought to execute a lien by selling goods, entrusted to him for storage, pursuant to a statute of the New York Uniform Commercial Code. While the sale was authorized by a state statute, it did not amount to "state action." No public officials participated in the proposed sale. The challenged statute did not delegate to the creditor storage company an exclusive prerogative of the sovereign. In addition, other remedies for the settlement of disputes between debtors and creditors, which is not traditionally a public function, remained available to the parties. And "a

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100 Skinner v. Ry. Labor Executives' Ass'n, 498 U.S. 602, 614–16 (1989).

101 *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114–21 (1973) (plurality opinion of three members of the Court).

102 *Cf.* Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984) ("[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother").

103 Shelley v. Kraemer, 334 U.S. 1, 18–23 (1948). *Cf.* Hurd v. Hodge, 334 U.S. 24, 31–35 (1948).

104 Barrows v. Jackson, 346 U.S. 249, 254 (1953).

State's mere acquiescence in a private action does not convert such action into that of the State. . . . the State of New York ha[d] not compelled the sale of a bailor's goods, but ha[d] merely announced the circumstances under which its courts [would] not interfere with a private sale." Therefore, the Fourteenth Amendment was not applicable to the action in question.[105] By contrast, "a private party's 'joint participation' with state officials in the seizure of disputed property is sufficient to characterize that party as a state actor for purposes of the Fourteenth Amendment."[106]

[B37] *Collective Bargaining Agreements.* A master collective bargaining agreement that includes an affirmative action plan for African-American employees does not involve state action and, thus, does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment.[107]

[B38] *Anti-Competitive Acts Under the Federal Anti-Trust Legislation.* Regarding the concept of state action, it is also worth observing that, in the field of the federal anti-trust legislation, the Court applies a two-pronged test to determine whether anti-competitive conduct engaged in by private parties should be deemed state action and thus shielded from the anti-trust laws: "first, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the anti-competitive conduct must be actively supervised by the State itself." "Only if an anti-competitive act of a private party meets both of these requirements is it fairly attributable to the State" and, hence, falls outside the scope of the Sherman Act.[108]

C. TERRITORIAL APPLICATION OF THE CONSTITUTIONAL PROVISIONS ABOUT INDIVIDUAL RIGHTS

[B39] During the late 19th century, the Court acknowledged that "the guarantees of protection contained in the Fourteenth Amendment to the Constitution extend to all persons within the *territorial jurisdiction* of the United States."[109] However, the constitutional protections may also operate outside the country's borders. Mrs. Clarice Covert killed her husband, a sergeant in the U.S. Air Force, at an airbase in England. Mrs. Covert, who was not a member of the armed services, was residing on the base with her husband at the time. She was tried and convicted by a court-martial for murder under the Uniform Code of Military Justice. The Court decided that her court-martial did not meet the requirements of Article III, Section 2 or the Fifth and Sixth Amendments. In reaching this conclusion, a four-Justice plurality rejected the idea that, "when the United States acts against citizens abroad, it can do so free of the Bill of Rights."[110]

[B40] The previous holding may not apply to aliens.[111] In *Eisentrager*, 21 German nationals were captured in China by the U.S. Army and tried and convicted in China

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105 Flagg Bros. v. Brooks, 436 U.S. 149, 155–66 (1978).

106 *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982), *citing* Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970) ("a willful participant in joint activity with the State or its agents" must be deemed as acting "under color" of law).

107 United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 200 (1979).

108 *See*, in particular, Patrick v. Burget, 486 U.S. 94, 100 (1988).

109 Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (emphasis added).

110 Reid v. Covert, 354 U.S. 1, 5 (1957).

111 "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their

by an American military commission for violations of the laws of war committed in China prior to their capture, specifically for giving certain information to Japanese military forces, after Germany had surrendered. They were transported to the American-occupied part of Germany and imprisoned there in the custody of the Army. At no time were they within the territorial jurisdiction of any American civil court. Claiming that their trial, conviction, and imprisonment violated, *inter alia*, Articles I and III, the Fifth Amendment, and other provisions of our Constitution, they petitioned the District Court for the District of Columbia for a writ of habeas corpus directed to the Secretary of Defense, the Secretary of the Army, and several officers of the Army having directive power over their custodian. The claim was rejected, for "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." By contrast, these prisoners "at no relevant time were within any territory over which the United States was sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." The Court also emphasized that "such trials would hamper the war effort," since they might mean that the U.S. Army should transport the prisoners across the seas for hearing, which "would require allocation of shipping space, guarding personnel, billeting, rations [and] transportation for whatever witnesses the prisoners desired to call, as well as transportation for those necessary to defend legality of the sentence." Apart from that, the result of such enemy litigiousness might be "a conflict between judicial and military opinion, highly comforting to enemies of the United States."[112] In dissent, three members of the Court stressed that the prisoners were convicted by American military tribunals, years after hostilities had ceased, and concluded that American courts have the power to grant habeas relief, "whenever any United States official illegally imprisons any person in any land . . . govern[ed]" by U.S. executive or military agencies.[113]

[B41] The German prisoners involved in *Eisentrager* "(a) [were] enemy alien[s]; (b) ha[d] never been or resided in the United States; (c) [were] captured outside of [U. S.] territory and there held in military custody as prisoner[s] of war; (d) [were] tried and convicted by a Military Commission sitting outside the United States; (e) for offenses committed against laws of war committed outside the United States; (f) and [were] at all times imprisoned outside the United States."[114] In *Rasul*, two Australians and 12 Kuwaitis, captured abroad during the country's military campaign against Al Qaeda and the Taliban regime established in Afghanistan, were being held in military custody at the Guantanamo Bay, Cuba, Naval Base, which the United States occupies under a lease and treaty recognizing Cuba's ultimate sovereignty, but giving the United States "complete jurisdiction and control" for so long as it does not abandon the leased areas. These prisoners differed from the *Eisentrager* detainees in important respects: "they [we]re not

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presence there is lawful, unlawful, temporary, or permanent." *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001). However, the temporary harborage of entering aliens aboard the vessel that carries them or in a state facility, pending determination of their admissibility, does not affect their status, since they are "treated as if stopped at the border." *See* Shaughnessy v. Mezei, 345 U.S. 206, 215 (1953); United States v. Ju Toy, 198 U.S. 253, 263 (1905). *Cf.* Kaplan v. Tod, 267 U.S. 228, 230 (1925).

112 Johnson v. Eisentrager, 339 U.S. 763, 769–81 (1950).

113 *Id.* at 798.

114 *Id.* at 777.

nationals of countries at war with the United States, and they den[ied] that they ha[d] engaged in or plotted acts of aggression against the United States; they ha[d] never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they ha[d] been imprisoned in territory over which the United States exercise[d] exclusive jurisdiction and control." Under those considerations, the Court concluded that U.S. courts had jurisdiction to consider "challenges to the legality of the detention of the foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base."[115]

[B42] After the government obtained an arrest warrant for Verdugo-Urquidez,—a Mexican citizen and resident believed to be a leader of an organization that smuggles narcotics into the United States—he was apprehended by Mexican police and transported to U.S. soil, where he was arrested. Following his arrest, Drug Enforcement Administration agents, working with Mexican officials, searched his Mexican residences and seized certain documents, without a warrant. Regarding his motion to suppress the evidence, on the basis of the Fourth Amendment, the Court held that this amendment does not apply to "the search and seizure by United States agents of property owned by a non-resident alien and located in a foreign country." The Court observed that the alleged constitutional violation had occurred solely in Mexico and pointed out that aliens can invoke the protection of the Fifth and Sixth Amendments only when they "have come within the territory of the United States, and [voluntarily] developed substantial connections with this country," which was not the case of Verdugo-Urquidez. Furthermore, the result of accepting his claim would have "significant and deleterious consequences for the United States in conducting activities beyond its boundaries." If the Fourth Amendment applied to the searches and seizures at issue, it should also apply "not only to law enforcement operations abroad but also to other foreign policy operations that might result in 'searches or seizures.' The United States frequently employs armed forces outside the country—over 200 times in [its] history—for the protection of American citizens or national security. . . . Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving [the Unites States'] national interest. . . . If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation."[116] This approach drew a sharp dissent from Justice Brennan who concluded that if foreign nationals, "wherever they may be, [are expected] to abide by [the United States] laws, [the government] cannot tell the world that its law enforcement officers need not do the same."[117]

[B43] In a series of decisions known as the *Insular Cases*, which involved territories that had only recently been conquered or acquired by the United States (Hawaii, Puerto Rico, and the Philippine Islands), the Court created the doctrine of "incorporated and unincorporated Territories." The former category encompassed those territories clearly destined for statehood, and the Constitution was applied to them with full force.[118] The latter category included those territories not possessing that anticipation of statehood, since they had not been expressly or impliedly incorporated into the Union by Congress;

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115 Rasul v. Bush, 542 U.S. 466, 476 (2004).

116 United States v. Verdugo-Urquidez, 494 U.S. 259, 273–75 (1990).

117 *Id.* at 297.

118 *See, e.g.*, Rassmussen v. United States, 197 U.S. 516, 520–25 (1905).

as to them, only "fundamental" constitutional rights—such as the due process rights[119]—were guaranteed to the inhabitants[120] because of their "wholly dissimilar traditions and institutions."[121]

D. CONSTITUTIONAL RIGHTS IN WARTIME OR IN CASE OF INSURRECTION[122]

[B44] The war power of the national government is "the power to wage war successfully."[123] The Constitution is not to be interpreted as a self-defeating charter;[124] hence, a "wide latitude of discretion" must be accorded to Congress in the exercise of the war powers[125] under Article I, Section 8, Clause 11 of the federal Constitution. War power "extends to every matter and activity so related to war as substantially to affect its conduct and progress. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war."[126] War power may be properly exercised even absent a declaration of war, since it also refers to "reasonable preparation for the storm of war."[127] Moreover, the war power carries with it the power "to guard against immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress"[128] and continues during that emergency. "Whatever may be the reach of that power, it is plainly adequate to deal with problems of law enforcement which arise during the period of hostilities, but do not cease with them."[129] The Court's constitutional review of government restrictive measures during wartime seems not go beyond the inquiry whether, "in the light of all the relevant circumstances [and the common experience,] the challenged orders and statute[s] afforded a reasonable basis for the action taken."[130] Such measures are to be interpreted as intend-

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119 Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922).

120 *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922) (fifth Amendment right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (Sixth Amendment grand jury provision inapplicable in Philippines); Dorr v. United States, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (revenue clauses of Constitution inapplicable to Puerto Rico).

On the other hand, the Court has held or otherwise indicated that *Puerto Rico* is subject to the First Amendment Speech Clause (*see* Balzac v. Porto Rico, 258 U.S. 298, 314 (1922)); the Fourth Amendment (*see* Torres v. Puerto Rico, 442 U.S. 465 (1979)); the Due Process Clause of either the Fifth or the Fourteenth Amendment, (*see* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668–69, n.5 (1974)); and the Equal Protection guarantee of either the Fifth or the Fourteenth Amendment (*see* Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 599–601 (1976)). In *Califano v. Torres*, 435 U.S. 1, 4, n.6 (1978) (*per curiam*), the Court assumed, without deciding, that the constitutional right to travel extends to the Commonwealth.

121 *See* Reid v. Covert, 354 U.S. 1, 14 (1957).

122 *See also* para. J57.

123 Hirabayashi v. United States, 320 U.S 81, 93 (1943).

124 *Cf.* Case v. Bowles, 327 U.S. 92, 102 (1946).

125 Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 163 (1919).

126 Hirabayashi v. United States, 320 U.S 81, 93 (1943).

127 Silesian-Am. Corp. v. Clark, 332 U.S. 469, 476 (1947).

128 Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 161 (1919).

129 Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116 (1947).

130 *Cf.* Hirabayashi v. United States, 320 U.S 81, 101–02 (1943).

ing "the greatest possible accommodation between [the constitutional liberties of the citizen] and the exigencies of war."[131]

[B45] "The resident enemy alien is constitutionally subject to summary arrest, internment, and deportation whenever a 'declared war' exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment."[132] Enemy aliens may be deported[133] or tried by a military commission for violations of the law of war, notwithstanding the fact that the civil courts are open and functioning normally,[134] even after hostilities have ceased, "at least until peace has been officially recognized by treaty or proclamation by the political branch of the Government."[135] "Although the official termination of the state of war is "a matter of political judgment for which judges have neither technical competence nor official responsibility,"[136] the Court makes sure that the constitutional guarantees are fully applied at a time long after cease-fire, when the continuation of restrictions of constitutional rights would be wholly unjustifiable. In a case involving a judgment of conviction pronounced by a court-martial for offences having occurred on June 10, 1949—after actual termination of hostilities in 1945, but before termination of the wars with Germany and Japan had been proclaimed by the President or the Congress—the Court read the term "in time of peace," used in a federal statute prohibiting court-martial for murder or rape committed in time of peace, so as not to deprive soldiers or civilians of the safeguards guaranteed in civil courts in capital cases, including the benefit of jury trials, four years after all hostilities had ceased.[137] In that respect, it has also been held that a law "depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change."[138] In such a case, it is open to the courts to inquire "whether the exigency still exists upon which continued operation of the law depends."[139]

[B46] During World War II, the Court dealt with measures involving restrictions against citizens of Japanese descent. While the United States was at war with Japan, the military commander of the Western Defense Command, pursuant to a presidential executive order ratified by Congress, promulgated an order requiring, *inter alia*, that all persons of Japanese ancestry within a designated military area "be within their place of residence between the hours of eight p.m. and six a.m." *Hirabayashi*, a U.S. citizen of Japanese ancestry, was convicted in the federal district court for violation of this curfew order. After admitting that "it was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under

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131 *Ex parte* Endo, 323 U.S. 283, 300 (1944). The mere existence of a state of war does not suspend the constitutional guaranties of due process of law and persons accused of crime must be adequately informed of the nature and cause of the accusation (Fifth and Sixth Amendments). *See* United States v. Cohen Grocery Co., 255 U.S. 81, 88 (1921).

132 Johnson v. Eisentrager, 339 U.S. 763, 775 (1950).

133 Ludecke v. Watkins, 335 U.S. 160, 163–75 (1948).

134 *Ex parte* Quirin, 317 U.S. 1 (1942).

135 *In re* Yamashita, 327 U.S. 1, 12 (1946).

136 Ludecke v. Watkins, 335 U.S. 160, 170 (1948).

137 Lee v. Madigan, 358 U.S. 228, 236 (1959).

138 Chastleton Corp. v. Sinclair, 264 U.S. 543, 547 (1924) (order regulating rents in the District of Columbia).

139 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1934).

consideration," the Court examined whether the order in question could be deemed reasonable. In the critical days of March 1942, approximately 112,000 persons of Japanese descent resided in California, Oregon, and Washington. The majority of these were American citizens, concentrated in or near three of the large cities, Seattle, Portland, and Los Angeles, all in the military area. In addition, large numbers of children of Japanese parentage were sent to Japanese language schools outside the regular hours of public schools; some of these schools were generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan. Furthermore children born in the United States of Japanese alien parents were, under many circumstances, deemed, by Japanese law, to be citizens of Japan. At a time "of threatened air raids and invasion by the Japanese forces," these facts and circumstances "could afford . . . ground for differentiating citizens of Japanese ancestry from other groups in the United States," given that, "in time of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry" and taking into consideration that it was impossible to bring about an immediate segregation of the disloyal from the loyal persons of Japanese origin. Hence, the challenged order was held to be a reasonable preventive measure against "sabotage of war materials and utilities in areas thought to be in danger of Japanese invasion and air attack."[140] For the same reasons, the Court sustained the validity of an order, which directed the exclusion after May 9, 1942, from a described West Coast military area of all persons of Japanese ancestry.[141] By contrast, the detention of a concededly loyal citizen in a concentration camp bears no relationship with the power to protect the war effort against espionage and sabotage and cannot be sustained as a useful or convenient step in an evacuation program.[142]

[B47] Limitation on the freedom of expression may be broader in wartime. *Schenck*, general secretary of the Socialist Party, was charged with attempts to cause insubordination in the military and obstruction of enlistment during World War I, by anti-draft leafleting. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. The Court rejected that defense, pointing out that when a nation is at war, "many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right."[143]

[B48] In exercising its war power, Congress has authority to draft business organization to support the fighting men in war[144] and to fix maximum prices for state sales or

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[140] Hirabayashi v. United States, 320 U.S 81, 94–102 (1943).

[141] Korematsu v. United States, 323 U.S. 214, 217–20 (1944).

[142] *Ex parte* Endo, 323 U.S. 283, 302 (1944).

[143] Schenck v. United States, 249 U.S. 47, 51–52 (1919). Justice Holmes noted, in an often-quoted passage, that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." The "clear and present danger" of *Schenck* evolved into the "incitement rule" of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (a state cannot forbid "advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

[144] United States v. Bethlehem Steel Corp., 315 U.S. 289, 305 (1942).

to control rents, in order to prevent the evils of inflation and profiteering,[145] even if the system of price control does not assure each landlord a "fair return" on his property.[146] Congress may also authorize administrative agencies to recoup "excess profits" paid under wartime government contracts.[147] Under the war power, the United States may confiscate the property of a national of an *enemy* nation. "This taking may be done as a means of avoiding the use of the property to draw earnings or wealth out of [the United States] to territory where it may more likely be used to assist the enemy than if it remains in the hands of [the American] government." Moreover, any property in U.S. territory of any *friendly* alien may be summarily reduced to possession by the United States in furtherance of the war effort, without prior compensation, the settlement of which may await the judicial process.[148] The wartime destruction by the Army of strategically important private property, in order to prevent its imminent capture and use by an advancing enemy, does not entitle the owner to compensation under the Fifth Amendment; in such circumstances the safety of the state overrides all considerations of private loss, which "must be attributed solely to the fortunes of war and not to the sovereign."[149] But the question whether an emergency existed, justifying the challenged deprivation of property rights, is judicially reviewable.[150] Similarly, the power to prohibit the liquor traffic as a means of increasing war efficiency is part of the war power of Congress and may be exercised without providing for compensation.[151] And a government order requiring non-essential gold mines to cease operations, for the purpose of conserving equipment and manpower for use in mines more essential to the war effort, is justified

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145 Case v. Bowles, 327 U.S. 92, 102 (1946).

146 Bowles v. Willingham, 321 U.S. 503, 519 (1944). *See also Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 143–44 (1948), where the Court upheld the constitutionality of control of housing rentals promulgated after hostilities were ended and before peace was formally declared, noting that Congress had the power to deal "with the consequences of a housing deficit greatly intensified during the period of hostilities by the war effort" and "to act to control the forces that a short supply of the needed article created."

147 In *Lichter v. United States*, 334 U.S. 742, 787–88 (1948), the Court held that "The recovery by the Government of excessive profits received or receivable upon war contracts is in the nature of the regulation of maximum prices under war contracts or the collection of excess profits taxes, rather than the requisitioning or condemnation of private property for public use. . . . The collection of renegotiated excessive profits on a war subcontract also is not in the nature of a penalty, and is not a deprivation of a subcontractor of his property without due process of law in violation of the Fifth Amendment."

148 Silesian-Am. Corp. v. Clark, 332 U.S. 469, 474–77 (1947).

149 United States v. Caltex (Philippines) Inc., 344 U.S. 149, 150–56 (1952) (demolition of oil terminal facilities located at the Philippines Islands).

United States v. Pacific Railroad Co., 120 U.S. 227, 238–39 (1887), involved bridges that had been destroyed during the war between the states by a retreating Northern Army to impede the advance of the Confederate Army. The Court raised the question of whether this act constituted a compensable taking by the United States and answered it in the negative. *See also Juragua Iron Co. v. United States*, 212 U.S. 297, 306–07 (1909), where recovery was denied to the owners of a factory that had been destroyed by American soldiers in the field in Cuba, because it was thought that the structure housed the germs of a contagious disease. In that case, the Court found that property of citizens of the United States in Cuba constituted during the war with Spain "enemy property subject to the laws of war."

150 *Cf.* Sterling v. Constantin, 287 U.S. 378, 400–04 (1932).

151 Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 164 (1919); Jacob Ruppert v. Caffey, 251 U.S. 264, 301–02 (1920).

by the exigency of war.[152] By contrast, the government's seizure and direction of operation of a coal mine to prevent a national strike of coal miners during the war constitutes a compensable taking.[153]

[B49] In case of insurrection, "the ordinary rights of individuals," including the right of habeas corpus,[154] may "yield to what [the government] deems the necessities of the moment." In a situation like that, the government "may kill persons who resist [or] use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power."[155] Nevertheless, a State Organic Act, authorizing the governor, "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it," to place the territory under martial law, does not give the armed forces, during a period of martial law, power "to supplant all civilian laws and to substitute military for judicial trials" of civilians not charged with violations of the law of war, if it is not impossible for the civilian government and the courts to function.[156] If a state of martial law is proclaimed and state officials invade rights safeguarded by the Constitution, the question whether an exigency existed, justifying the challenged interference with constitutional rights is subject to judicial inquiry and determination. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[157] "[T]he matter is to be judged on the facts as they appeared then, and not merely in the light of the event."[158]

E. RETROACTIVE LAWMAKING

[B50] In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to enact retroactive rules.[159] The *Ex Post Facto* Clause (Article I,

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[152] United States v. Cent. Eureka Mining Co., 357 U.S. 155, 165–69 (1958). As the Court noted, "War . . . demands the strict regulation of nearly all resources. . . . But wartime economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands." *Id.* at 168.

[153] United States v. Pewee Coal Co., 341 U.S. 114, 115–17 (1951).

[154] Article I, Section 9, Clause 2, of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

[155] Moyer v. Peabody, 212 U.S. 78, 84–85 (1909), *cited in* United States v. Salerno, 481 U.S. 739, 748 (1987).

[156] Duncan v. Kohanamoku, 327 U.S. 304 (1946).

[157] Sterling v. Constantin, 287 U.S. 378, 401 (1932) (military orders restricting the production of oil wells).

[158] Moyer v. Peabody, 212 U.S. 78, 85 (1909).

"*Emergency does not create power.* Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. . . . [However,] emergency may furnish the occasion for the exercise of [existing] power" in conformity to constitutional principles. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425–26 (1934) (emphasis added). *Cf.* Wilson v. New, 243 U.S. 332, 348 (1917).

[159] "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. . . . Rather, [the question is] whether the new provision attaches new legal consequences to events completed before its enactment." *See* Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994).

Section 9, Clause 3; Section 10, Clause 1) flatly prohibits retroactive application of penal legislation. The prohibitions on "Bills of Attainder" in Article I, Sections 9–10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. Article I, Section 10, Clause 1, prohibits states from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The Due Process Clause also prohibits "arbitrary and irrational" retroactive legislation.[160]

[B51] These provisions demonstrate that retroactive statutes raise particular concerns. Indeed, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."[161] Accordingly, the Court has adopted a rebuttable presumption against the retroactive application of new laws, as "an essential thread in the mantle of protection that the law affords the individual citizen."[162]

F. AFFIRMATIVE OBLIGATIONS OF GOVERNMENT

[B52] "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual."[163] Nor do they guarantee "certain minimal levels of safety and security" against private violence, even if state officials may be aware of the threatened dangers, as long as the state played no part in their creation and did not do anything to render the person harmed more vulnerable to them.[164]

[B53] The government "has no constitutional duty to subsidize an activity merely because it is constitutionally protected."[165] Thus, it may validly choose to allocate public funds for medical services relating to childbirth but not to abortion,[166] even if medically necessary.[167] Indeed the Court has implicitly rejected the idea that welfare is a fundamental right.[168] Furthermore there is no constitutional right to public education,[169]

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160 *See, e.g.*, Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 733 (1984).

161 Landgraf v. USI Film Prods., 511 U.S. 244, 265–66 (1994).

162 Lynce v. Mathis, 519 U.S. 433, 439 (1997).

163 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989). *Cf.* Collins v. City of Harker Heights, 503 U.S. 115, 126–30 (1992).

164 *DeShaney v. Winnebago County Department of Social Services*, 489 U.S 189, 194–203 (1989), involved a case of child abuse that resulted in the permanent brain damage of the minor. In that case, the social workers of the county department of social services, although they had received complaints that the boy was beaten and injured by his father, and had taken various steps to protect him, did not act to remove the child from his father's custody.

165 Rust v. Sullivan, 500 U.S. 173, 201 (1991).

166 Webster v. Reprod. Health Servs., 492 U.S. 490, 509–11 (1989). *See also* Maher v. Roe, 432 U.S. 464, 474 (1977).

167 Harris v. McRae, 448 U.S. 297, 325 (1980).

168 *See* Dandridge v. Williams, 397 U.S. 471, 484 (1970).

169 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–36 (1973). Nevertheless,

to any particular job or occupation,[170] or to access to dwellings of a particular quality.[171] The First Amendment does not impose any affirmative obligation on the government to listen and respond to an association of public employees or to bargain with it, even if the government has listened to individual employees.[172] And when the government makes general policy, it is under no constitutional obligation to listen to the public at large or to any specially affected class.[173]

[B54] Nevertheless, certain "special relationships" created or assumed by the state with respect to particular individuals may give rise to an affirmative duty, enforceable through the Due Process Clause, to provide adequate protection. "[W]hen the State, by the affirmative exercise of its power, so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs, . . . it transgresses the substantive limits on state action set by . . . the Due Process Clause. . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf, through imprisonment, institutionalization, or other similar restraint of personal liberty."[174] The Court has recognized that the Due Process Clause requires the responsible governmental entity to provide medical care to suspects in police custody who have been injured while being apprehended by the police.[175] Furthermore, federal prison officials have a duty under the Eighth Amendment to provide "humane conditions of confinement." Thus, they "must ensure that inmates receive adequate food, clothing, shelter, and medical care," and must "protect prisoners from violence at the hands of other prisoners;" however, a constitutional violation occurs only where the deprivation alleged is, "objectively, sufficiently serious," and the official has acted with "'deliberate indifference' to inmate health or safety."[176] Similarly, the state is obligated, under the Due Process Clause of the Fourteenth Amendment, to provide involuntarily committed mental patients with adequate food, shelter, clothing, and medical care. Such individuals enjoy constitutionally

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the Court has not foreclosed the possibility that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either the right to speak or the right to vote. *See* Papasan v. Allain, 478 U.S. 265, 284 (1986); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 25, n.60, 36–37 (1973).

170 *See* dissenting opinion of Justice Douglas in *Barsky v. Bd. of Regents of the Univ. of the State of New York*, 347 U.S. 442 (1954), involving the suspension of a physician's license to practice.

171 Lindsey v. Normet, 405 U.S. 56, 73–74 (1972).

172 Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 465 (1979) (*per curiam*).

173 Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283–87 (1984).

174 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S 189, 199–200 (1989). *See also* Collins v. City of Harker Heights, 503 U.S. 115, 126–27 (1992) (the Due Process Clause does not impose a duty upon municipalities to provide certain minimal levels of safety and security in the workplace of their employees).

175 City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244–45 (1983). However, as long as the governmental entity ensures that the medical care needed is in fact provided, the Constitution does not dictate how the cost of that care should be allocated as between the entity and the provider of the care. That is a matter of state law.

176 Farmer v. Brennan, 511 U.S. 825, 832–34 (1994). *See also* Estelle v. Gamble, 429 U.S. 97, 103–06 (1976) and West v. Atkins, 487 U.S. 42, 54–56 (1988) (the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the states through the Fourteenth Amendment's Due Process Clause, requires the state to provide adequate medical care to incarcerated prisoners).

protected liberty interests in "reasonable conditions of safety and freedom from unreasonable restraints" and such "minimally adequate training . . . as may be reasonable in light of" these interests. Whether the patient's constitutional rights have been violated must be determined by balancing these liberty interests against the relevant state interests. The proper standard for determining whether the state has adequately protected such rights is whether "professional judgment, in fact, was exercised." In determining what is "reasonable," courts must show "deference to the judgment exercised by a qualified professional," whose decision is "presumptively valid."[177]

[B55] The Constitution also imposes upon the state affirmative duties in favor of the criminal defendant. Every indigent defendant in a criminal trial has a constitutional right to the assistance of appointed counsel.[178] "Once the right to counsel has attached and been asserted, . . . [t]he Sixth Amendment . . . imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance."[179] "To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures, even when they are not strictly and inescapably necessary."[180]

[B56] Moreover "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers. . . . [W]hile adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, . . . alternative means to achieve that goal, . . . [such as] legal assistance programs, [are not to be foreclosed.] Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices."[181] Special care must be taken to ensure that "inmates with language problems have a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement."[182]

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[177] Youngberg v. Romeo, 457 U.S. 307, 321–25 (1982).

[178] Gideon v. Wainwright, 372 U.S. 335, 339–45 (1963). The suspect held in police custody must, prior to interrogation, be clearly informed that, if he is indigent, a lawyer will be appointed to represent him. *See* Miranda v. Arizona, 384 U.S. 436, 472–73 (1966). *Argersinger v. Hamlin*, 407 U.S. 25 (1972), established that counsel must be provided before any indigent may be sentenced to prison, even where the crime is petty and the prison term brief. However, the Court has refused to extend the right to appointed counsel to include prosecutions that, though criminal, do not result in the defendant's loss of personal liberty. *See* Scott v. Illinois, 440 U.S. 367 (1979). The Constitution also may require the appointment of counsel for indigent persons in certain "quasi-criminal" proceedings. *See Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 27–32 (1981), concerning parental status termination proceedings.

[179] Maine v. Moulton, 474 U.S. 159, 170–74 (1985).

[180] In *Gannett Co. Inc. v. DePasquale*, 443 U.S. 368, 378 (1979), the Court stressed that publicity concerning pre-trial suppression hearings poses special risks of unfairness, because it may influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.

[181] Bounds v. Smith, 430 U.S. 817, 824–32 (1977).

[182] Lewis v. Casey, 518 U.S. 343, 356 (1996).

G. WAIVER OF CONSTITUTIONAL RIGHTS

1. In General

[B57] The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege."[183] The relinquishment of a constitutional right must be "voluntary in the sense that it was the product of a free and deliberate choice, rather than intimidation, coercion, or deception;"[184] there is no effective consent if government officers "convey a message that compliance with their requests is required."[185] The Court has also underlined that a waiver of constitutional rights may be invalid if it "impairs to an appreciable extent any of the public policies behind the rights involved."[186]

[B58] An express written or oral statement is not thought to be indispensable, in any case, for a valid waiver, which may be inferred from an action or omission; indeed "an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case."[187] However, the Court does "not presume acquiescence in the loss of fundamental rights."[188] In that respect, it has been implicitly acknowledged that, while a confession after proper *Miranda* warnings may be found "voluntary" for Fifth Amendment purposes, such a confession does not carry with it a waiver of the right to invoke the Fourth Amendment in case of an arrest without probable cause.[189]

[B59] As a matter of principle, waivers of constitutional rights during the *criminal process* must be "voluntary, knowing, intelligent acts done with sufficient awareness of

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183 Coll. Sav. Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) *quoting* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

In *Singer v. United States*, 380 U.S. 24 (1965), the Court held that an accused has no right to a bench trial, despite his capacity to waive his right to a jury trial. In so holding, the Court stated that "*[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.*" *Id.* at 34–35 (emphasis added).

184 *See*, in particular, Moran v. Burbine, 475 U.S. 412, 421 (1986). *See also* Miranda v. Arizona, 384 U.S. 436, 453 (1966) (indicting police tactics "to induce a confession out of trickery," such as using fictitious witnesses or false accusations).

Nevertheless, in *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), the Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary,' within the meaning of the Due Process Clause." *Hoffa v. United States*, 385 U.S. 293 (1966), held that placing an undercover agent near Hoffa in order to gather incriminating information did not affect the voluntariness of Hoffa's statements. Similarly, in *Illinois v. Perkins*, 496 U.S. 292 (1990), the Court held that the Fifth Amendment's guarantee against compulsory self-incrimination does not require suppression of a statement made by an incarcerated suspect to an undercover agent.

185 Florida v. Bostick, 501 U.S. 429, 435 (1991).

186 McGautha v. California, 402 U.S. 183, 213 (1971). *See also* Town of Newton v. Rumery, 480 U.S. 386, 392, n.2 (1987).

187 N. Carolina v. Butler, 441 U.S. 369, 373–76 (1979). *Cf. also* United States v. Gagnon, 470 U.S. 522, 529 (1985) (*per curiam*) (failure by a criminal defendant to invoke his right to be present under Federal Rule of Criminal Procedure 43 at a conference that he knows is taking place between the judge and a juror in chambers constitutes a valid waiver of that right).

188 Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio, 301 U.S. 292, 307 (1937). *See also* Barker v. Wingo, 407 U.S. 514, 530–33 (1972) (the Court does not presume waiver of a fundamental right from inaction).

189 Dunaway v. New York, 442 U.S. 200, 216–17 (1979).

the relevant circumstances and likely consequences."[190] In criminal cases in which the suspect waives his right to remain silent and to refuse to answer any questions that might incriminate him or his right to the presence of counsel, the waiver must be made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it;"[191] the failure of police to administer *Miranda* warnings means that courts will "presume the privilege against compulsory self-incrimination has not been intelligently exercised."[192] Nevertheless, the Constitution does not require that "a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."[193] "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it."[194] Nor does the Constitution require "that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."[195]

[B60] The determination whether statements obtained during custodial interrogation are admissible against the accused is to be made "upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel."[196] "This 'totality of the circumstances' approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved."[197] Those potential circumstances include not only the crucial element of

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[190] Brady v. United States, 397 U.S. 742, 748 (1970); United States v. Ruiz, 536 U.S. 622 (2002), *citing* Boykin v. Alabama, 395 U.S. 238 (1969).

In *New York v. Hill*, 528 U.S. 110, 114–15 (2000), the Court noted that "For certain fundamental rights, the defendant must personally make an informed waiver. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938) (right to counsel); Brookhart v. Janis, 384 U.S. 1, 7–8 (1966) (right to plead not guilty). For other rights, however, waiver may be effected by action of counsel. Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. *See* Taylor v. Illinois, 484 U.S. 400, 417–18 (1988). As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney. . . . Thus, decisions by counsel are generally given effect as to what arguments to pursue, *see* Jones v. Barnes, 463 U.S. 745, 751 (1983), what evidentiary objections to raise, *see* Henry v. Mississippi, 379 U.S. 443, 451 (1965), what agreements to conclude regarding the admission of evidence. . . . Absent a demonstration of ineffectiveness, counsel's word on such matters is the last. Scheduling matters are plainly among those for which agreement by counsel generally controls."

[191] Moran v. Burbine, 475 U.S. 412, 421 (1986).

[192] Oregon v. Elstad, 470 U.S. 298, 310 (1985).

[193] Colorado v. Spring, 479 U.S. 564, 574–77 (1987) (a suspect's awareness of all the crimes about which he may be questioned is not relevant to determining the validity of his decision to waive the Fifth Amendment privilege, for it may "affect only the wisdom of a Miranda waiver, not its essentially voluntary and knowing nature").

[194] See United States v. Ruiz, 536 U.S. 622, 629 (2002).

[195] Moran v. Burbine, 475 U.S. 412, 422 (1986).

[196] Fare v. Michael C., 442 U.S. 707, 725 (1979)

[197] *Id.* at 725 (involving the right against self-incrimination). *Cf.* Reno v. Flores, 507 U.S. 292 (1993) (concerning the right to a hearing).

police physical brutality,[198] or mental/psychological coercion, through various interrogation techniques, such as the length of the interrogation,[199] its location,[200] its continuity,[201] or the administration of a "truth serum" to the suspect,[202] but also the defendant's age,[203] experience,[204] education,[205] physical[206] or mental[207] condition, and intelligence.[208] Yet, the Fifth Amendment privilege is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion;"[209] thus a defendant's "perception of coercion flowing from the 'voice of God' . . . is a matter to which the United States Constitution does not speak."[210]

[B61] The voluntariness of a confession is a mixed question of fact and law, meriting independent determination by a federal habeas court.[211] A relevant factual dispute needs to be resolved only by a preponderance of the evidence.[212] Consequently "a waiver of the auxiliary protections established in *Miranda* should require no higher burden of proof."[213]

[B62] "[A] guilty plea, is not simply 'an admission of past conduct,' but also constitutes a waiver of constitutional trial rights such as the right to call witnesses, to confront and cross-examine one's accusers, and to trial by jury."[214] Only a "voluntary and intelli-

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198 Colorado v. Connelly, 479 U.S. 157, 167 (1986).

199 Ashcraft v. Tennessee, 322 U.S. 143, 153–54 (1944).

200 Reck v. Pate, 367 U.S. 433, 441 (1961).

201 Leyra v. Denno, 347 U.S. 556, 561 (1954).

202 Townsend v. Sain, 372 U.S. 293, 307–09 (1963).

203 *See, e.g.*, Haley v. Ohio, 332 U.S. 596, 599–601 (1948).

204 *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

205 Clewis v. Texas, 386 U.S. 707, 712 (1967).

206 Greenwald v. Wisconsin, 390 U.S. 519, 520–21 (1968) (*per curiam*).

207 Colorado v. Connelly, 479 U.S. 157, 164 (1986).

208 Fikes v. Alabama, 352 U.S. 191, 196 (1957).

209 Colorado v. Connelly, 479 U.S. 157, 170 (1986), *quoting* Oregon v. Elstad, 470 U.S. 298, 305 (1985).

210 Colorado v. Connelly, 479 U.S. 157, 170–01 (1986).

"Events occurring outside of a suspect's presence and entirely unknown to him can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." Hence, the police's failure to inform a suspect that an attorney retained for him by somebody else sought to reach him does not taint the validity of the waivers of his *Miranda* rights and does not therefore require exclusion of his confessions. *See* Moran v. Burbine, 475 U.S. 412, 421–24 (1986).

211 Miller v. Fenton, 474 U.S. 104, 111–12 (1985).

212 Lego v. Twomey, 404 U.S. 477, 488–89 (1972).

213 Colorado v. Connelly, 479 U.S. 157, 169 (1986).

214 Harine v. Prosise, 462 U.S. 306, 319 (1983), *citing* Brady v. United States, 397 U.S. 742, 747–48 (1970).

In *Mitchell v. United States*, 526 U.S. 314 (1999), the Court held that, in the federal criminal system, *a guilty plea does not waive the self-incrimination privilege at sentencing*, noting, *inter alia*, that "Treating a guilty plea as a waiver of the privilege would be a grave encroachment on defendants' rights. . . . [For example, with respect to drug distribution offenses, it would allow prosecutors to] indict without specifying a drug quantity, obtain a guilty plea, and then put the defendant on the stand at sentencing to fill in the quantity. . . . Where the sentence has not yet been imposed, a defendant may have a legitimate fear of adverse consequences from further testimony. [And any] effort by the State to compel the defendant to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment."

gent" guilty plea by a competent criminal defendant is constitutionally valid.[215] A plea is not intelligent unless a defendant first receives "real notice of the true nature of the charge against him;"[216] yet the Constitution does not require the government to provide affirmative defense information to the defendant prior to plea bargaining.[217] Furthermore "conscious waiver is not necessary with respect to each potential defense relinquished by a plea of guilty."[218] A plea of guilty is not invalid "merely because entered to avoid the possibility of the death penalty."[219] A defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel"[220] was not "within the range of competence demanded of attorneys in criminal cases."[221] The defendant must show, on one hand, that "counsel's representation fell below an objective standard of reasonableness" and, on the other hand, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[222] The competency standard for pleading guilty is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him."[223]

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[215] *See* Godinez v. Moran, 509 U.S. 389, 396–402 (1993); Bousley v. United States, 523 U.S. 614, 618 (1998), *citing* Brady v. United States, 397 U.S. 742, 748 (1970).

The plea-bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but the government "may encourage a guilty plea by offering substantial benefits in return for the plea." *See* Corbitt v. New Jersey, 439 U.S. 212, 219 (1978) (upholding a statute that imposed higher sentences on defendants who went to trial than on those who entered guilty pleas). "While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[216] Bousley v. United States, 523 U.S. 614, 618 (1998), *citing* Smith v. O'Grady, 312 U.S. 329, 334 (1941).

[217] United States v. Ruiz, 536 U.S. 622 (2002).

[218] United States v. Broce, 488 U.S. 563, 573 (1989).

[219] Brady v. United States, 397 U.S. 742, 755 (1970).

In *United States v. Jackson*, 390 U.S. 570 (1968), the Court held that the death sentence provided by the Federal Kidnapping Act was invalid, because it could be imposed only upon the recommendation of a jury accompanying a guilty verdict, whereas the maximum penalty for those tried to the court after waiving a jury and for those pleading guilty was life imprisonment: only those insisting on a jury trial faced the possibility of a death penalty. The Court found that the interest of the government in having the jury retain the power to render the death penalty could be realized without this imposition on the rights of the accused. In *Brady v. United States*, 397 U.S. 742, 746 (1970), the Court succinctly articulated the narrow holding in *Jackson:* "Because the legitimate goal of limiting the death penalty to cases in which a jury recommends it could be achieved without penalizing those defendants who plead not guilty and elect a jury trial, the death penalty provision needlessly penalized the assertion of a constitutional right."

[220] Tollett v. Henderson, 411 U.S. 258, 267 (1973).

[221] McMann v. Richardson, 397 U.S. 759, 771 (1970).

[222] Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

[223] Godinez v. Moran, 509 U.S. 389, 397–400 (1993).

[B63] In relation to the above, it is worth noting that the Court "evaluate[s] the knowing and intelligent nature of the waiver of trial rights in trial-type situations,"[224] such as the waiver of the privilege against compulsory self-incrimination before an administrative agency[225] or a congressional committee[226] or the waiver of counsel in a juvenile proceeding.[227]

[B64] Constitutional rights regarding the execution of criminal sentences are also waivable. Indeed the Court has admitted that the Eighth Amendment protections can be waived even in the area of capital punishment.[228]

[B65] However, there is "a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures. . . . When the subject of a search is not in custody and the State would justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact, voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is . . . to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."[229] Thus, the Fourth Amendment does not require that "a lawfully seized defendant be advised that he is 'free to go' before his consent to search will be recognized as voluntary."[230] In case of a warrantless search, permission (voluntary consent) to search may be obtained from a third party who possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected."[231]

[B66] The waiver question has also arisen in relation to civil trials. It is settled that "parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether."[232] "The due process rights to notice and hearing prior to a civil judgment are subject to waiver."[233] A cognovit clause agreed to by the parties with advice of counsel and with full awareness of the legal consequences is, in principle, valid.[234] Furthermore, a "release-dismissal" agreement, whereby a prosecutor dismisses the charges against a

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[224] Schneckcloth v. Bustamonte, 412 U.S. 218, 238 (1973).

[225] Smith v. United States, 337 U.S. 137, 149–52 (1949).

[226] Emspak v. United States, 349 U.S. 190, 196–98 (1954).

[227] *In re* Gault, 387 U.S. 1, 42 (1967).

[228] Stewart v. La Grand, 526 U.S. 115, 119 (1999) (*per curiam*) (La Grand waived his claim that execution by lethal gas was unconstitutional, by choosing lethal gas over lethal injection).

[229] Schneckloth v. Bustamonte, 412 U.S. 218, 241, 248–49 (1973).

[230] Ohio v. Robinette, 519 U.S. 33, 39–40 (1996).

[231] United States v. Matlock, 415 U.S. 164, 171 (1974).

[232] Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964).

[233] D. H. Overmyer Co., Inc. of Ohio v. Frick, 405 U.S. 174, 185 (1972); Swarb v. Lennox, 405 U.S. 191, 200–01 (1972).

[234] D. H. Overmyer Co., Inc. of Ohio v. Frick, 405 U.S. 174, 182–88 (1972) ("where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue").

criminal defendant since the latter agrees voluntarily to release any claims he might have against the government or its officials for any harm caused by his arrest, may be a valid waiver of the right to sue under 42 U.S.C. Section 1983, which provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights.[235] However, a guilty plea, while it results in the defendant's loss of any meaningful opportunity he might otherwise have had in the criminal proceeding to challenge the admissibility of evidence obtained in violation of the Fourth Amendment, is not "a waiver of antecedent Fourth Amendment claims that may be given effect outside the confines of the criminal proceeding."[236]

[B67] Finally, revocation of a valid waiver is not to be excluded. Although a guilty plea may not be withdrawn,[237] one has the right to withdraw the waiver of his privilege against self-incrimination[238] or a waiver of his right to the presence of counsel during his interrogation by the police.[239] If a waiver is part of an agreement, the relevant principle is that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[240]

2. Waiver of a Constitutional Right as a Condition for Receiving Discretionary Government Benefits—Doctrine of Unconstitutional Conditions[241]

[B68] Particularly interesting is the doctrine of "unconstitutional conditions," under which, "[e]ven though government has no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right"[242] or the sacrifice of a constitutionally protected interest.[243] "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence;"[244] the government is not allowed to establish such statutory conditions in order "to produce a result that it could not command directly."[245] The Court has found unconstitutional, *inter alia*,

(1) the requirement of loyalty oaths as a condition of tax exemptions provided for veterans by a state Constitution;[246]

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[235] Town of Newton v. Rumery, 480 U.S. 386, 392, 400 (1987). The Court pointed out that " although we agree that, in some cases, these agreements may infringe important interests of the criminal defendant and of society as a whole, we do not believe that the mere possibility of harm to these interests calls for a *per se* rule." *Id.* at 392.

[236] Haring v. Prosise, 462 U.S. 306, 319 (1983).

[237] *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970).

[238] Stevens v. Marks, 383 U.S. 234, 238–44 (1966).

[239] *See* Miranda v. Arizona, 384 U.S. 436, 502 (1966) (opinion of Justice Clark).

[240] Town of Newton v. Rumery, 480 U.S. 386, 392 (1987).

[241] *See also* paras. I225 *et seq.* (*government funding of speech*).

[242] Frost & Frost Trucking Co. v. R.R. Comm'n of California, 271 U.S. 583, 594 (1926); Liquormart Inc. v. Rhode Island, 517 U.S. 484, 513 (1996).

[243] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[244] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 831 (1995), *quoting* Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960) and Frost & Frost Trucking Co. v. R.R. Comm'n of California, 271 U.S. 583, 594 (1926).

[245] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[246] Speiser v. Randall, 357 U.S. 513, 514–29 (1958) (enforcement of this provision "through procedures which place the burdens of proof and persuasion on the taxpayer[s]" deny

(2) the disqualification of a member of the Seventh-Day Adventist Church for unemployment compensation benefits, solely because of her refusal to accept employment in which she would have to work on Saturday contrary to her religious belief;[247]

(3) the imposition of more onerous taxes or other burdens on foreign corporations doing business within the United States than those imposed on domestic corporations, "unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose;"[248]

(4) the non-renewal of the contract of a government employee or independent contractor because of his constitutionally protected speech;[249]

(5) patronage decisions regarding hiring, promotion, transfer, recall, or dismissal of public employees, based on party affiliation and support, *unless* these practices are "narrowly tailored to further vital government interests;"[250]

(6) a federal law that forbids any non-commercial educational station that receives public grants to engage in editorializing;[251]

(7) a federal program that provides financial support for legal assistance to indigent clients in, *inter alia*, welfare benefits claims, on the condition that legal representation funded by the program does not involve an effort to amend or otherwise challenge existing welfare law.[252]

[B69] The Court seemed to deviate from its prior holdings in *Posadas*, which involved Puerto Rico's Act providing that no gambling room would be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico. There a five-member majority upheld the constitutionality of the Act, noting, *inter alia*, that, since the Puerto Rico Legislature "surely could have prohibited casino gambling by the residents of Puerto Rico altogether, the greater power to completely ban casino gambling necessarily included the lesser power to ban advertising of casino gambling."[253] But the *Posadas* syl-

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them freedom of speech without the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment).

[247] Sherbert v. Verner, 374 U.S. 398, 404–05 (1963) (unconstitutional burden on the free exercise of religion).

[248] W. & S. Life Ins. Co. v. Bd. of Equalization, 451 U.S. 648, 657, 667–68 (1981).

[249] Perry v. Sindermann, 408 U.S. 593, 597–98 (1972); Bd. of County Comm'rs, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668, 673–86 (1996).

[250] *See* Elrod v. Burns, 427 U.S. 347, 355–60, 375 (1976); Branti v. Finkel, 445 U.S. 507, 514 (1980); and, in particular, Rutan v. Republican Party of Illinois, 497 U.S. 62, 68–79 (1990) ("A government's interest in securing effective employees can be met by discharging, demoting, or transferring persons whose work is deficient, [and its] interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing high-level employees on the basis of their political views.")

[251] Fed. Communications Comm'n v. League of Women Voters of California, 468 U.S. 364, 374–402 (1984) (ban held violative of the First Amendment).

[252] Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

[253] Posadas de Puerto Rico Assocs., dba Condado Holiday Inn v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345–46 (1986). Nevertheless, the Court reached this argument only after it already had found that the state regulation survived *the Central Hudson* test (see, *in extenso*, para. I185).

logism was expressly disavowed some years later. In *Liquormart*, concerning a state law banning the advertisement of retail liquor prices except at the place of sale, a four-member plurality rejected the "greater includes the lesser" argument of the state—which reasoned that its undisputed authority to ban alcoholic beverages should include the power to restrict advertisements offering them for sale—as inconsistent with the well-settled doctrine of unconstitutional conditions.[254] *Meyer* rejected the position that a state's power to end ballot initiatives includes the power to limit discussion of political issues raised in initiative petitions and to prohibit the use of paid petition circulators.[255] And in *Greater New Orleans Broadcasting*, the Court made clear that "the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."[256]

[B70] Nevertheless, the doctrine of unconstitutional conditions does not preclude the government from imposing conditions reasonably related to the purpose of the relevant government benefit. A state program, providing for aid to families with dependent children, which requires home visits by caseworkers as a condition for assistance "in order that any treatment or service tending to restore beneficiaries to a condition of self-support and to relieve their distress may be rendered," does not violate any right guaranteed by the Fourth and Fourteenth Amendments, as this requirement is a "reasonable administrative tool," mainly in light of the state's "appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax produced assistance are the ones who benefit from the aid it dispenses."[257] A statute that provides the government benefit of obtaining registration of an insecticide may confer upon the government a license to use and disclose the trade secrets contained in the application, thus making new end-use products available to consumers more quickly and assuring the public that the product is safe and effective.[258] In the same context, the Court has admitted that the government may not require a person to give up his constitutional right to receive just compensation when his property is taken for a public use, in exchange for a discretionary granting of a construction permit, where "the property sought has little or no relationship to the benefit."[259]

[B71] Regulations that prohibit federally funded family-planning projects from engaging in counseling concerning, referrals for, and activities advocating abortion as a method of family planning, are permissible. Such restrictions on the subsidization of

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[254] Liquormart Inc. v. Rhode Island, 517 U.S. 484, 513 (1996). The Court struck down the statutory ban as an unconstitutional abridgment of the freedom of commercial speech.

[255] Meyer v. Grant, 486 U.S. 414, 424–25 (1988). *See also* Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (the greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance; if the state chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles).

[256] Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 193 (1999).

[257] Wyman v. James, 400 U.S. 309, 318–25 (1971).

[258] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014–15 (1984).

[259] Dolan v. City of Tigard, 512 U.S. 374, 385–86 (1994). More particularly, it must be determined whether an "essential nexus" exists between a "legitimate state interest" and the permit condition and, if one does, then it must be decided whether "the degree of the exactions demanded by the permit conditions" is "roughly proportionate" to "the projected impact of the proposed development."

abortion-related speech were not held to unconstitutionally condition the receipt of a benefit (funding) on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. The Court has pointed out that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[260] "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest [such as to subsidize family planning services which will lead to conception and childbirth, and declining to 'promote or encourage abortion'], without at the same time funding an alternate program which seeks to deal with the problem in another way. . . . In contrast, [the Court's] 'unconstitutional conditions' doctrine involves situations in which the government has placed a condition on the recipient of the subsidy, *rather that on a particular program or service*, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[261]

H. SUBSTANTIVE DUE PROCESS

[B72] The Due Process Clauses of the Fifth and Fourteenth Amendments contain "a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them."[262] So-called "substantive due process" protects against government power exercised "without any reasonable justification in the service of a legitimate governmental objective;"[263] it prevents the government from engaging in conduct that "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty."[264]

[B73] "While due process protection in the substantive sense limits what the government may do in both its legislative, . . . and its executive capacities, . . . criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue. [The Court's] cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense."[265] Thus, the Court has spoken of the cognizable level of executive abuse of power as that which "shocks the conscience;"[266] "while the measure of what is conscience-shocking is no calibrated yardstick, it does point the way."[267]

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[260] Maher v. Roe, 432 U.S. 464, 475 (1977).

[261] Rust v. Sullivan, 500 U.S. 173, 193, 197 (1991) (emphasis added).

[262] Zinermon v. Burch, 494 U.S. 113, 125 (1990).

[263] County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

[264] United States v. Salerno, 481 U.S. 739, 746 (1987).

[265] County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). In *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992), for example, the Court said that the Due Process Clause was intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression."

[266] The Court first put the test this way in *Rochin v. California*, 342 U.S. 165, 172–173 (1952), where it found the forced pumping of a suspect's stomach enough to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct."

[267] *See* County of Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998). The issue in that case was whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death in a high-speed automobile chase aimed at apprehending a suspected

[B74] The Due Process Clauses provide heightened protection against government interference with certain fundamental rights and liberty interests.[268] The Court's established method of substantive due process analysis has two primary features. First, the Due Process Clauses specially protect those fundamental rights and liberties that are, objectively, "deeply rooted in [the] Nation's history and tradition,"[269] or "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[270] Second, the Court has required in substantive due process cases a "careful description" of the asserted fundamental liberty interest.[271] Thus, the Court has held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clauses includes the rights to marry,[272] to have children,[273] to direct the education and upbringing of one's children,[274] to marital privacy,[275] to use contraception[276] to engage in intimate sexual conduct with a member of the same sex,[277] to bodily integrity,[278] and to abortion.[279] The Court has also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.[280]

[B75] However, as a general matter, the Court has been "reluctant to expand the concept of substantive due process, because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[281] For example, the Court has held

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offender. The Court answered no, and held that, "in such circumstances, only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience necessary for a due process violation."

[268] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 301–02 (1993) ("the Fifth and Fourteenth Amendments' guarantee of due process of law . . . include[s] a substantive component which forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest").

Where another provision of the Constitution provides "an explicit textual source of constitutional protection," a court must assess a plaintiff's claims under that explicit provision and "not the more generalized notion of substantive due process." See Graham v. Connor, 490 U.S. 386, 395 (1989); Conn v. Gabbert, 526 U.S. 286, 293 (1999) (emphasis added).

[269] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[270] Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937). In *Lawrence v. Texas*, 539 U.S. 558, 572 (2003), the Court noted that "*history and tradition are the starting point, but not in all cases the ending point, of the substantive due process inquiry*" (emphasis added).

[271] Reno v. Flores, 507 U.S. 292, 302 (1993); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

[272] Loving v. Virginia, 388 U.S. 1 (1967).

[273] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[274] Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[275] Griswold v. Connecticut, 381 U.S. 479 (1965).

[276] *Id.*; Eisenstadt v. Baird, 405 U.S. 438 (1972).

[277] Lawrence v. Texas, 539 U.S. 558 (2003).

[278] Rochin v. California, 342 U.S. 165 (1952). This liberty interest in bodily integrity encompasses the right to resist enforced medication. *See* Washington v. Harper, 494 U.S. 210, 221–22 (1990).

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

[280] Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 278–79 (1990).

[281] Collins v. Harker Heights, 503 U.S. 115, 125 (1992). Hence, "beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *See* Dowling v. United States, 493 U.S. 342, 352 (1990).

that assisted suicide is not a fundamental right protected by due process[282] and that an alien juvenile who has no available parent, close relative, or legal guardian, and for whom the government is responsible, has no fundamental right to be placed in the custody of a private custodian rather than of a government-operated or government-selected child care institution.[283]

I. CONSTITUTIONAL RIGHTS OF PARTICULAR CATEGORIES OF PERSONS

1. Aliens[284]

[B76] There are literally millions of aliens within the jurisdiction of the United States. "The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[285] And First Amendment rights are accorded to aliens residing in the country.[286]

[B77] The Constitution grants Congress the power to "establish an uniform Rule of Naturalization" (Article I, Section 8, Clause 4). Drawing upon this broad power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, "Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not, in itself, imply that such disparate treatment is 'invidious.'"[287] By contrast, since states enjoy no such powers, "there

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[282] Washington v. Glucksberg, 521 U.S. 702 (1997).

[283] Reno v. Flores, 507 U.S. 292, 301–305 (1993).

[284] In *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967), the Court recognized that the first sentence of the Fourteenth Amendment, "protect[s] every citizen of this Nation against a congressional forcible destruction of his citizenship," and that every citizen has "a constitutional right to remain a citizen . . . unless he voluntarily relinquishes that citizenship."

Vance v. Terrazas, 444 U.S. 252 (1980), held that, in establishing *loss of citizenship*, under the Immigration and Nationality Act, the government must "prove an intent to surrender United States citizenship," not just the "voluntary commission of an [expatriating] act such as swearing allegiance to a foreign nation." The Court said that Congress does not have any "general power, express or implied, to take away an American citizen's citizenship without his 'assent,'" which means "an intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from proved conduct." *Id.* at 258–60. Further, noting that expatriation proceedings are civil in nature, and do not threaten a loss of liberty, the Court decided that, in such proceedings, the Due Process Clause does not require proof beyond a preponderance of the evidence. Id. at 264–67.

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159–86 (1963), the Court held that deprivation of citizenship cannot be imposed as punishment for the offense of remaining outside the country to avoid military service, without the procedural safeguards granted by the Fifth and Sixth Amendments.

[285] Mathews v. Diaz, 426 U.S. 67, 76–77 (1976), *citing* Wong Yang Sung v. McGrath, 339 U.S. 33, 48–51 (1950).

[286] Bridges v. Wixon, 326 U.S. 135, 148 (1945).

[287] Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).

would be few very—if any—areas in which a State could legitimately distinguish between its citizens and lawfully resident aliens."[288] Illegal aliens, whatever their status under the immigration laws, may claim the benefit of the Equal Protection Clause of the Fourteenth Amendment.[289]

2. Prisoners

[B78] The Court has determined that incarceration does not divest prisoners of all constitutional protections. Inmates retain, for example, the right to marry,[290] certain protections of the First Amendment,[291] the right to be free from racial discrimination,[292] and the right to due process.[293]

[B79] The Court nonetheless has maintained that "the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large."[294] In the First Amendment context, for instance, some rights are inconsistent with the status of a prisoner or "with the legitimate penological objectives of the corrections system."[295] The Court has thus sustained proscriptions of media interviews with individual inmates,[296] prohibitions on the activities of a prisoners' labor union,[297] and restrictions on inmate-to-inmate written correspondence.[298] Moreover, "because the problems of prisons are complex and intractable, and because courts are particularly ill equipped to deal with these problems, . . . [the Court] generally ha[s] deferred to the judgments of prison officials in upholding these regulations against constitutional challenge."[299]

[B80] Reflecting this understanding, in *Turner*, the Court adopted a deferential standard for reviewing prisoners' constitutional claims: "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[300] Under this standard, four factors are relevant.

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[288] *See* Cabell v. Chavez-Salido, 454 U.S. 432, 438 (1982), *citing* Graham v. Richardson, 403 U.S. 365, 372 (1971).

[289] Plyler v. Doe, 457 U.S. 202, 210–16 (1982).

[290] Turner v. Safley, 482 U.S. 78, 95–96 (1987).

[291] Procunier v. Martinez, 416 U.S. 396, 408–09 (1974) (freedom of expression); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (freedom of religion); Johnson v. Avery, 393 U.S. 483 (1969) (right to petition the government for redress of grievances).

[292] Lee v. Washington, 390 U.S. 333 (1968) (*per curiam*).

[293] Wolff v. McDonnell, 418 U.S. 539 (1974).

[294] Shaw v. Murphy, 532 U.S. 223, 229 (2001).

[295] Pell v. Procunier, 417 U.S. 817, 822 (1974).

[296] *Id.* at 833–35.

[297] Jones v. N. Carolina Prisoners' Union, 433 U.S. 119, 133 (1977).

[298] Turner v. Safley, 482 U.S. 78, 93 (1987).

[299] See Shaw v. Murphy, 532 U.S. 223, 229 (2001).

[300] Turner v. Safley, 482 U.S. 78, 89 (1987).

Turner is not applicable to race discrimination and Eighth Amendment cases. In *Johnson v. California*, 543 U.S. 499, 510–11 (2005), the Court stressed that it has "applied *Turner*'s reasonable-relationship test only to rights that are inconsistent with proper incarceration. . . . The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire

First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. . . . Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Moreover, the governmental objective must be a legitimate and neutral one. [The Court has] found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression. . . .

A second factor relevant in determining the reasonableness of a prison restriction is whether there are alternative means of exercising the right that remain open to prison inmates. Where "other avenues" remain available for the exercise of the asserted right, . . . courts should be particularly conscious of the "measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation." . . .

A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order. When accommodation of an asserted right will have a significant "ripple effect" on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials. . . .

Finally, the absence of ready alternatives available to the prison for achieving the governmental objectives is evidence of the reasonableness of a prison regulation. . . . By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns. This is not a "least restrictive alternative" test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. . . . But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.[301]

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criminal justice system. Race discrimination is especially pernicious in the administration of justice. . . . When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers. For similar reasons, we have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the 'deliberate indifference" standard,' rather than *Turner*'s 'reasonably related' standard. This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment." In light of these considerations, the Court concluded that "strict scrutiny" was the proper standard of review for an equal protection challenge to California's policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they entered a new correctional facility.

[301] Turner v. Safley, 482 U.S. 78, 89–91 (1987).

[B81] For example, applying the *Turner* analysis, the Court sustained, in *Overton*, prison regulations that placed certain restrictions on visits with prison inmates. Under these regulations, an inmate could be visited only by qualified members of the clergy and attorneys on official business and by persons placed on an approved list, which might include an unlimited number of immediate family members and ten other individuals the prisoner designated, subject to some restrictions. Minors under the age of 18 might not be placed on the list, unless they were the children, stepchildren, grandchildren, or siblings of the inmate. If the inmate's parental rights were terminated, the child could not be a visitor. A child authorized to visit should be accompanied by an adult who was an immediate family member of the child or inmate or the child's legal guardian. An inmate could not place a former prisoner on the visitor list, unless the former prisoner was an immediate family member of the inmate, and the warden gave his approval. Prisoners who had committed two substance-abuse violations could receive only clergy and attorneys but might apply for reinstatement of visitation privileges after two years. The Court did not imply that "any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners" but did not attempt "to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration," because it thought that the challenged regulations bore a "rational relation to legitimate penological interests." The Court, first, found that, with respect to the restrictions on visitation by children, the regulations bore a rational relation to the state's valid interests "in maintaining internal prison security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury." "The regulations promote[d] internal security, perhaps the most legitimate of penological goals, . . . by reducing the total number of visitors and by limiting the disruption caused by children in particular. Protecting children from harm is also a legitimate goal. . . . The logical connection between this interest and the regulations [wa]s demonstrated by trial testimony that reducing the number of children allowed guards to supervise them better, to ensure their safety and to minimize the disruptions they cause[d] within the visiting areas. As for the regulation requiring children to be accompanied by a family member or legal guardian, it [wa]s reasonable to ensure that the visiting child [wa]s accompanied and supervised by those adults charged with protecting the child's best interests." The contention that excluding minor nieces and nephews and children as to whom parental rights had been terminated bore no rational relationship to these penological interests was rejected, and in all events it would "not suffice to invalidate the regulations as to all noncontact visits." "To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations [we]re reasonable. Visits [we]re allowed between an inmate and those children closest to him or her—children, grandchildren, and siblings. The prohibition on visitation by children as to whom the inmate no longer ha[d] parental rights [wa]s simply a recognition by prison administrators of a status determination made in other official proceedings. [The rule] prohibiting visitation by former inmates [bore] a self-evident connection to the State's interest in maintaining prison security and preventing future crimes. . . . Finally, the restriction on visitation for inmates with two substance-abuse violations, a bar which [might] be removed after two years, serve[d] the legitimate goal of deterring the use of drugs and alcohol within the prisons." As the Court pointed out, "[w]ithdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." Relatedly, the Court agreed that the restriction was "severe," and noted that, "if faced with evidence

that [the] regulation was treated as a *de facto* permanent ban on all visitation for certain inmates, [it] might reach a different conclusion in a challenge to a particular application of the regulation." Having determined that each of the challenged regulations bore a rational relationship to a legitimate penological interest, the Court then considered whether inmates had alternative means of exercising the constitutional right they sought to assert. "Were it shown that no alternative means of communication existed, though it would not be conclusive, it would be some evidence that the regulations [we]re unreasonable. That showing, however, [could] not be made. Inmates [did] have alternative means of associating with those prohibited from visiting. [They could] communicate with those who [might] not visit by sending messages through those who were allowed to visit. Although this option [wa]s not available to inmates barred all visitation after two violations, they and other inmates [could] communicate with persons outside the prison by letter and telephone." Respondents argued that letter-writing was inadequate for illiterate inmates and for communications with young children, and that phone calls were brief and expensive, so that these alternatives were not sufficient. But, as the Court stressed, "*alternatives to visitation need not be ideal; they need only be available*" (emphasis added). There, the alternatives were "of sufficient utility that they [gave] some support to the regulations, particularly in a context where visitation [wa]s limited, not completely withdrawn." Another relevant consideration was "the impact that accommodation of the asserted associational right would have on guards, other inmates, the allocation of prison resources, and the safety of visitors. Accommodating respondents' demands would cause a significant reallocation of the prison system's financial resources and would impair the ability of corrections officers to protect all who [we]re inside the prison's walls. When such consequences are present, [the Court is] 'particularly deferential' to prison administrators' regulatory judgments." Finally, in considering whether the presence of ready alternatives undermined the reasonableness of the regulations, the Court emphasized that "*Turner* does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." Respondents had not suggested alternatives meeting this "high standard" for any of the regulations at issue. The Court disagreed with respondents' suggestion that allowing visitation by nieces and nephews or children for whom parental rights had been terminated was an obvious alternative. "Increasing the number of child visitors in that way surely would have more than a negligible effect on the goals served by the regulation." As to the limitation on visitation by former inmates, respondents argued the restriction could be time limited, but the Court deferred to the state's judgment that "a longer restriction better serve[d] its interest in preventing the criminal activity that could result from these interactions." And although respondents suggested the duration of the restriction for inmates with substance-abuse violations could be shortened or that it could be applied only for the most serious violations, "these alternatives do not go so far toward accommodating the asserted right with so little cost to penological goals that they meet *Turner*'s high standard."[302]

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[302] Overton v. Mazzetta, 539 U.S. 126 (2003).

In *Block v. Rutherford*, 468 U.S. 576 (1984), *a ban on contact visits was upheld* on the ground that "responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility," and the regulation was reasonably related to these security concerns. *Id.* at 586–89.

3. Minors

[B82] "A child, merely on account of his minority, is not beyond the protection of the Constitution;"[303] "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[304] Nevertheless, the state has "somewhat broader authority to regulate the activities of children than of adults."[305] There are "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[306]

[B83] "The Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State."[307] For example, the Court has held that the Fourteenth Amendment's guarantee against the deprivation of liberty without due process of law is applicable to children in juvenile delinquency proceedings.[308] State procedures for involuntarily admitting a child for treatment in a state mental hospital must also satisfy procedural due process.[309] Children have a protected liberty interest in "freedom from institutional restraints," even absent the stigma of being labeled "delinquent," or "mentally ill."[310] Corporal punishment of schoolchildren implicates a constitutionally protected liberty interest.[311] Similarly, children may not be deprived of certain property interests without due process.[312] Nevertheless, "although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for concern, sympathy, and paternal attention."[313] For instance, hearings in juvenile delinquency cases need not necessarily "con-

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303 Bellotti v. Baird, 443 U.S. 622, 633 (1979).

304 *In re* Gault, 387 U.S. 1, 13 (1967). *See also* Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution, and possess constitutional rights.").

305 Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976).

306 Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion of Justice Powell, joined by Burger, C.J., Stewart and Rehnquist, JJ.).

307 *Id.*

308 *In re* Gault, 387 U.S. 1 (1967). *Gault* held that a child in delinquency proceedings must be provided various procedural due process protections (notice of charges, right to counsel, right of confrontation and cross-examination, privilege against self-incrimination), when those proceedings may result in the child's institutional confinement. *See also In re* Winship, 397 U.S. 358 (1970) (proof beyond reasonable doubt standard applies to delinquency proceedings); Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy protection applies to delinquency proceedings).

309 Parham v. J.R., 442 U.S. 584 (1979)

310 Schall v. Martin, 467 U.S. 253, 265 (1984). There the Court upheld a New York statute authorizing pre-trial detention of dangerous juveniles, but only after analyzing the statute at length to ensure that it complied with substantive and procedural due process.

311 Ingraham v. Wright, 430 U.S. 651, 673–74 (1977).

312 Goss v. Lopez, 419 U.S. 565, 573–74 (1975) (students facing temporary suspension from a public school).

313 Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion).

form with all of the requirements of a criminal trial or even of the usual administrative hearing."[314] Thus, juveniles are not constitutionally entitled to trial by jury in delinquency adjudications.[315]

[B84] Second, "the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[316] For example, the Court has sustained a criminal conviction for selling sexually oriented magazines to a minor under the age of 17 in violation of a New York state law,[317] finding that the New York Legislature "rationally could conclude that the sale to children of the magazines in question presented a danger against which they should be guarded."[318] "Although the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice, . . . certain cases illustrate that it may not arbitrarily deprive them of their freedom of action altogether."[319] For example, a state may not require a minor seeking an abortion to obtain the consent of a parent or guardian, without providing an adequate judicial bypass procedure.[320] And a schoolchild's First Amendment freedom of expression entitles him, contrary to school policy, to attend school wearing a black armband as a silent protest against American involvement in the hostilities in another country.[321]

[B85] Third, "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors."[322] But an additional and more important justification for state deference to parental control over children is that "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."[323] This duty must be read "to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."[324] Thus, "it is cardinal that the custody, care and nurture of the child reside first in the parents."[325] "Properly

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[314] *In re* Gault, 387 U.S. 1, 30 (1967).

[315] McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[316] Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion).

[317] Ginsberg v. New York, 390 U.S. 629, 641 (1968).

[318] *See* Bellotti v. Baird, 443 U.S. 622, 636 (1979), *discussing Ginsberg*.

[319] *Id.* at 637, n.15.

[320] Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 511–13 (1990) (*Akron II*).

[321] Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969). The Court noted, *inter alia*, that the conduct at issue did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 509.

However, it is an appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). And public school authorities may censor school-sponsored publications so long as the censorship is reasonably related to legitimate pedagogical concerns. *See* Hazlewood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[322] Bellotti v. Baird, 443 U.S. 622, 637 (1979).

[323] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[324] Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

[325] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

understood, then, the tradition of parental authority is not inconsistent with the tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."[326] Under the Constitution, the state "can properly conclude that parents and others, teachers for example, who have the primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[327] Of course, rights of parenthood are not beyond limitation. "Acting to guard the general interest in youth's wellbeing, the State, as *parens patriae*, may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."[328]

4. Public Employees—Military Personnel

[B86] "The restrictions that the Constitution places upon the Government in its capacity as lawmaker, i.e., as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer."[329] "[A] governmental employer may subject its employees to such special restrictions as are reasonably necessary to promote effective government."[330] The Court has recognized this in many contexts. For example, policemen can be prevented from wearing long hair.[331]

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[326] Bellotti v. Baird, 443 U.S. 622, 638–39 (1979).

[327] Ginsberg v. New York, 390 U.S. 629, 639 (1968).

[328] Prince v. Massachusetts, 321 U.S. 158, 166 (1944). In that case, an adult had permitted a child in her custody to sell religious literature on a public street in violation of a state child labor statute. The child had been permitted to engage in this activity upon her own sincere request. In upholding the adult's conviction under the statute, the Court found that "the interests of society to protect the welfare of children" and to give them "opportunities for growth into free and independent well developed men and citizens" permitted the state to enforce its statute, which concededly would be invalid, if made applicable to adults. *Id.* at 165–67.

[329] Rutan v. Republican Party of Illinois, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting).

[330] Brown v. Glines, 444 U.S. 348, 356, n.13 (1980).

[331] *See* Kelley v. Johnson, 425 U.S. 238 (1976). The Court reasoned as follows: "The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose. Choice of organization, dress, and equipment for law enforcement personnel is entitled to the same sort of presumption of legislative validity as are state choices to promote other aims within the cognizance of the State's police power. . . . Thus, the question is not . . . whether the State can establish a 'genuine public need' for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property. . . . The constitutional issue to be decided . . . is whether petitioner's determination that such regulations should be enacted is so irrational that it may be branded 'arbitrary,' and therefore a deprivation of respondent's 'liberty' interest in freedom to choose his own hairstyle. The overwhelming majority of state and local police of the present day are uniformed. This fact itself testifies to the recognition by those who direct those operations, and by the people of the States and localities who directly or indirectly choose such persons, that similarity in appearance of police officers is desirable. This choice may be based on a desire to make police officers readily recognizable to the members of the public, or a desire for the *esprit de corps* which such similarity is felt to inculcate within the police force itself. Either one is a sufficiently rational justification for regulations so as to defeat respondent's claim based on the liberty guarantee of the Fourteenth Amendment." *Id.* at 247–48.

Private citizens cannot have their property searched without probable cause, but in certain circumstances government employees can.[332] A public employee may be fired if he "speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."[333] Federal and state employees can be dismissed and otherwise punished for partisan political activity.[334] Nevertheless, "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment"[335] and may not be discharged for refusing to support a political party or its candidates, "unless political affiliation is a reasonably appropriate requirement for the job in question."[336]

[B87] "[T]he military is, "by necessity, a specialized society separate from civilian society. . . . While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community, there is simply not the same autonomy as there is in the larger civilian community."[337] "Military personnel must be ready to perform their duty whenever the occasion arises. To ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'"[338] Hence, "the military must possess substantial discretion over its internal discipline,"[339] and "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the [military society] shall be governed than it is when prescribing rules for the [civilian society.]"[340] "Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[341] The Court has adhered to this principle of deference in a variety of contexts where the constitutional rights of servicemen were implicated.[342]

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[332] O'Connor v. Ortega, 480 U.S. 709, 723 (1987) (plurality opinion); *id.* at 732 (Scalia, J., concurring in judgment).

[333] Connick v. Myers, 461 U.S. 138, 147 (1983).

[334] Pub. Workers v. Mitchell, 330 U.S. 75, 101 (1947); United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 616–17 (1973).

[335] Connick v. Myers, 461 U.S. 138, 140 (1983), *citing* Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[336] *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 714, (1996), *citing* Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980).

[337] Parker v. Levy, 417 U.S. 733, 743, 751 (1974).

[338] Brown v. Glines, 444 U.S. 348, 354 (1980), *quoting* Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).

[339] *See* Brown v. Glines, 444 U.S. 348, 357 (1980), *citing* Schlesinger v. Councilman, 420 U.S. 738 (1975); Parker v. Levy, 417 U.S. 733 (1974); Burns v. Wilson, 346 U.S. 137 (1953); Orloff v. Willoughby, 345 U.S. 83 (1953); *In re* Grimley, 137 U.S. 147 (1890).

[340] Parker v. Levy, 417 U.S. 733, 756 (1974). In that case, the Court held that statutory provisions punishing a commissioned officer for "conduct unbecoming an officer and a gentleman," and punishing any serviceman for "all disorders and neglects to the prejudice of good order and discipline in the armed forces" were not unconstitutionally vague.

[341] Goldman v. Weinberger, 475 U.S. 503, 508 (1986).

[342] *Id.* at 509–10 (uniform dress requirements held not violative of the freedom of religion); Chappell v. Wallace, 462 U.S. 296, 300–05 (1983) (enlisted military personnel may not maintain suits to recover damages from superior officers for injuries sustained as a result of vio-

J. LIABILITY FOR CONSTITUTIONAL VIOLATIONS

[B88] It is elementary that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."[343] "[A] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text,"[344] and "cannot be implied."[345] Further, as a matter of principle, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign."[346] "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."[347]

[B89] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." "Although, by its terms, the Amendment applies only to suits against a State by citizens of another State, [the Court's] cases have extended the Amendment's applicability to suits by citizens against their own States."[348] "The ultimate guarantee of the Eleventh Amendment is that non-consenting States may not be sued by private individuals in federal court"[349] or in state court.[350] State sovereign immunity bars suits only in the absence of consent;[351] a state's consent to suit must be "unequivocally expressed."[352] Besides, "sovereign immunity bars suits against States but not against

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lations of constitutional rights in the course of military service); Rostker v. Goldberg, 453 U.S. 57, 64–66, 70–71 (1981) (selective service registration can constitutionally exclude women); Brown v. Glines, 444 U.S. 348, 354, 357, 360 (1980) (Air Force regulations requiring members of that service to obtain approval from their commanders before circulating petitions on Air Force bases are facially valid, since "speech that is protected in the civil population may undermine the effectiveness of response to command," and, therefore, can be excluded from a military base).

In *Solorio v. United States*, 483 U.S. 435 (1987), the Court held that the jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces, and not on the "service-connection" of the offense charged.

343 United States v. Sherwood, 312 U.S. 584, 586 (1941).

344 Lane v. Pena, 518 U.S. 187, 192 (1996).

345 Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990), *quoting* United States v. Mitchell, 445 U.S. 535, 538 (1980).

346 Lane v. Pena, 518 U.S. 187, 192 (1996) (citing cases).

347 *Id.* at 192, *citing* United States v. Nordic Vill., Inc. 503 U.S. 30, 34 (1992).

348 Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356, 363 (2001), *citing, inter alia*, Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996), and Hans v. Louisiana, 134 U.S. 1, 15 (1890).

349 Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356, 363 (2001), *citing* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000).

350 *See* Alden v. Maine, 527 U.S. 706, 730–54 (1999).

351 Generally, a waiver will be found either if the state voluntarily invokes court jurisdiction (*see* Coll. Sav. Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd., 527 U.S. 666, 676 (1999), *citing* Gunter v. Atl. Coast Line R. Co., 200 U.S. 273, 284 (1906)) or else if the state makes a "clear declaration" that it intends to submit itself to court jurisdiction (*see* Coll. Savings Bank, *supra*, at 676, *citing* Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944)).

352 Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984). "Thus, a State does not consent to suit in federal court merely by consenting to suit in the courts of its own

lesser entities," such as municipal corporations, or against a state officer for injunctive or declaratory relief or for money damages, "so long as the relief is sought not from the state treasury but from the officer personally."[353] Moreover, the Court has recognized that "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and 'acts pursuant to a valid grant of constitutional authority.'"[354] "Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I" of the Constitution.[355] Nevertheless, Section 5 of the Fourteenth Amendment does grant Congress the authority to abrogate the states' sovereign immunity.[356]

[B90] In *Bivens*, the Court recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights. There the Court held that a victim of a Fourth Amendment violation by federal officers may bring suit for money damages against the officers in federal court. Relying largely on earlier decisions implying private damages actions into federal statutes, and finding "no special factors counseling hesitation in the absence of affirmative action by Congress," the Court found an implied damages remedy available under the Fourth Amendment.[357]

[B91] In *Davis* and *Carlson*, the Court applied the core holding of *Bivens*, recognizing in limited circumstances a claim for money damages against federal officers who abuse their constitutional authority. In *Davis v. Passman*, the Court recognized an implied damages remedy under the equal protection component of the Due Process Clause of the Fifth Amendment. There the Court "inferred a new right of action chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation."[358] *Carlson* inferred a right of action, under the Eighth Amendment's proscription against

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creation" (Coll. Sav. Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd., 527 U.S. 666, 676 (1999), *citing* Smith v. Reeves, 178 U.S. 436, 441–45 (1900)). "Nor does it consent to suit in federal court merely by stating its intention to 'sue and be sued'" (*see* Coll. Sav. Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd., 527 U.S. 666, 676 (1999), *citing* Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 149–50 (1981) (*per curiam*)), "or even by authorizing suits against it 'in any court of competent jurisdiction'" (*see* Coll. Sav. Bank, *supra*, at 676, *citing* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 577–79 (1946)). The Court has "even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit" (*see* Coll. Sav. Bank, *supra*, at 676, *citing* Beers v. Arkansas, 20 How. 527, 529 (1858)).

353 Alden v. Maine, 527 U.S. 706, 755–57 (1999).

354 Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356, 363 (2001), *citing* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000).

355 Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356, 364 (2001), *citing* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 79 (2000) and Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72–73 (1996).

356 Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998), the Court held that an Indian tribe is not subject to suit in a state court—even for breach of contract involving off-reservation commercial conduct—unless Congress has authorized the suit or the tribe has waived its immunity.

357 Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 395–97 (1971).

358 *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67 (2001), *discussing* Davis v. Passman, 442 U.S. 228, 245 (1979).

cruel and unusual punishment, against individual prison officials where the plaintiff's only alternative was a Federal Tort Claims Act (FTCA) claim against the United States. The Court reasoned that "the threat of suit against the United States was insufficient to deter the unconstitutional acts of individuals . . . [and] also found it 'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability."[359]

[B92] Since *Carlson*, the Court has consistently refused to extend *Bivens* liability to any new context or new category of defendants. *Bush v. Lucas* declined to create a *Bivens* remedy against individual government officials for a First Amendment violation arising in the context of federal employment. "Although the plaintiff had no opportunity to fully remedy the constitutional violation, [the Court] held that administrative review mechanisms crafted by Congress provided meaningful redress and thereby foreclosed the need to fashion a new, judicially crafted cause of action. [Correlatively, the Court] recognized Congress' institutional competence in crafting appropriate relief for aggrieved federal employees as a 'special factor counseling hesitation in the creation of a new remedy.'"[360]

[B93] The Court has reached a similar result in the military context. *Chappell* "reversed a determination that no 'special factors' barred a constitutional damages remedy on behalf of minority servicemen who alleged that, because of their race, their superior officers 'failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity.' [The Court] found 'factors counseling hesitation' in the 'need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice.' [It] observed that the Constitution explicitly confers upon Congress the power, *inter alia*, '[t]o make Rules for the Government and Regulation of the land and naval Forces' (Art. I, § 8, cl. 14), thus showing that 'the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment.' Congress . . . had exercised that authority to 'establis[h] a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure.' [The Court] concluded that, '[t]aken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.'"[361]

[B94] In *Schweiker*, the Court declined to infer a damages action against individual government employees alleged to have violated due process in their handling of Social Security applications. The Court noted that "[t]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation. . . . When the design of a Government program suggests that Congress has provided what it considers ade-

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[359] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001), *discussing* Carlson v. Green, 446 U.S. 14, 19–21 (1980)

[360] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001), *discussing* Bush v. Lucas, 462 U.S. 367, 378, n.14, 380, 386–89 (1983).

[361] *See* United States v. Stanley, 483 U.S. 669, 679 (1987), analyzing Chappell v. Wallace, 462 U.S. 296, 300–04 (1983). *Stanley* disallowed *Bivens* actions by military personnel "whenever the injury arises out of activity incident to service."

quate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." It therefore rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court and concluded that, since the elaborate "continuing disability review" remedial scheme devised by Congress did not include a money damages remedy against officials responsible for unconstitutional conduct leading to the wrongful denial of benefits, such a remedy was unavailable.[362]

[B95] *FDIC v. Meyer* unanimously declined an invitation to extend *Bivens* to permit suit against a federal agency, even though the agency—because Congress had waived sovereign immunity—was otherwise amenable to suit. The Court's opinion emphasized that "the purpose of *Bivens* is to deter *the officer*," not the agency. The Court "reasoned that if given the choice, plaintiffs would sue a federal agency instead of an individual. To the extent aggrieved parties had less incentive to bring a damages claim against individuals, 'the deterrent effects of the *Bivens* remedy would be lost.' Accordingly, to allow a *Bivens* claim against federal agencies 'would mean the evisceration of the *Bivens* remedy, rather than its extension.' [The Court] noted further that 'special factors' counseled hesitation in light of the 'potentially enormous financial burden' that agency liability would entail."[363]

[B96] "Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties. Because government officials are engaged by definition in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it. Such considerations have led to the creation of various forms of immunity from suit for certain government officials. Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, th[e] Court has been cautious in recognizing claims that gov-

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[362] Schweiker v. Chilicky, 487 U.S. 412, 421–25 (1988)

[363] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69–70 (2001), *discussing* Fed. Deposit Ins. Corp. (FDIC) v. Meyer, 510 U.S. 471, 485–86 (1994). *Meyer* "made clear that the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity, . . . are indemnified by the employing agency or entity, . . . or are acting pursuant to an entity's policy." *See* Corr. Servs. Corp., *supra*, at 70, *discussing* Meyer, *supra*, at 473–74, 485–86.

In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), the Court held that *Bivens*' limited holding may not be extended to confer a right of action for damages against private entities acting under color of federal law.

ernment officials should be free of the obligation to answer for their acts in court. Running through th[e] Court's cases, with fair consistency, is a 'functional' approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, th[e] Court examines the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and seeks to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and th[e] Court has recognized a category of 'qualified' immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity."[364]

[B97] "For officials whose special functions or constitutional status requires complete protection from suit, [the Court has] recognized the defense of 'absolute immunity.'"[365] The absolute immunity of legislators, in their legislative functions,[366] and of judges, in their judicial functions,[367] is well settled. The Court's decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials,[368] executive officers engaged in adjudicative functions,[369] and the President of the United States.[370]

[B98] "For executive officials in general, however, [the Court's] cases make plain that qualified or good faith immunity represents the norm."[371] In *Scheuer*, the Court emphasized that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based" and held that a governor and his principal subordinates enjoyed only qualified or good faith immunity.[372] *Butz* extended the approach of *Scheuer* to high federal officials of the Executive Branch, noting that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."[373] In several instances, moreover, the Court has "concluded that no more than a qualified immunity attaches to administrative employment decisions, even if the same official has absolute immunity when performing other functions."[374]

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364 Forrester v. White, 484 U.S. 219, 223–24 (1988).

365 Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

366 *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). *See also* para. I85 (*legislative immunity created by the Speech or Debate Clause*).

367 *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978).

368 Butz v. Economou, 438 U.S. 478, 508–12 (1978).

369 *Id.* at 513–17.

370 Nixon v. Fitzgerald, 457 U.S. 731 (1982). This immunity is based on the President's "unique position in the constitutional scheme." *Id.* at 749. "It does not extend indiscriminately to the President's personal aides . . . or to Cabinet level officers." *See* Forrester v. White, 484 U.S. 219, 225 (1988), *citing* Harlow v. Fitzgerald, 457 U.S. 800 (1982) and Mitchell v. Forsyth, 472 U.S. 511 (1985), respectively.

371 Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

372 Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).

373 Butz v. Economou, 438 U.S. 478, 506 (1978).

374 *See* Hafer v. Melo, 502 U.S. 21, 29 (1991), *citing* Forrester v. White, 484 U.S. 219 (1988)

[B99] Thus, government officials performing discretionary functions generally are granted a qualified immunity and are shielded from liability for civil damages insofar as their conduct does not violate "*clearly established statutory or constitutional rights of which a reasonable person would have known.*"[375] "A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation. . . . Deciding the constitutional question before addressing the qualified immunity question promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."[376] "[I]n effect, the qualified immunity test is simply the adaptation of the 'fair warning' standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes."[377] For a constitutional right to be clearly established, its "contours . . . must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[378] "In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. . . . But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though this conduct has not previously been held unlawful."[379]

K. THE ENFORCEMENT CLAUSE OF THE FOURTEENTH AMENDMENT

[B100] Section 5 of the Fourteenth Amendment provides that Congress may "enforce" by "appropriate legislation" the constitutional guarantee that no state shall deprive any person of life, liberty or property, without due process of law, nor deny any person equal protection of the laws. Section 5 "is an affirmative grant of power to Congress."[380] "It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference."[381] Congress' power "to enforce" the Fourteenth Amendment

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(dismissal of court employee by state judge) (damages action under 42 U.S.C. Section 1983); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (discharge of Air Force employee, allegedly orchestrated by senior White House aides) (*Bivens* action); Davis v. Passman, 442 U.S. 228 (1979) (dismissal of congressional aide) (*Bivens* action).

375 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

376 Wilson v. Layne, 526 U.S. 603, 609 (1999). There the Court also observed that the qualified immunity analysis is identical in suits under 42 U.S.C. Section 1983 and *Bivens*.

377 United States v. Lanier, 520 U.S. 259, 270–71 (1997).

378 Anderson v. Creighton, 483 U. S. 635, 640 (1987).

379 United States v. Lanier, 520 U.S. 259, 271 (1997). "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts." *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002).

380 Kimel v. Florida Bd. of Regents, 528 U.S. 62, 80 (2000).

381 City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

"includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[382] "Nevertheless, Congress cannot "decree the substance of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[383] "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[384]

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[382] *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000), *citing City of Boerne v. Flores*, 521 U.S. 507, 518 (1997), where it was noted that, for example, the Court had "upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, (U.S.Const., Amdt. 15, Sect. 2), as a measure to combat racial discrimination in voting (*see* S. Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)), despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). [The Court has] also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States. S. Carolina v. Katzenbach, *supra* (upholding several provisions of the Voting Rights Act of 1965); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding five-year nationwide ban on literacy tests and similar voting requirements for registering to vote); City of Rome v. United States, 446 U.S. 156, 161 (1980) (upholding seven-year extension of the Voting Rights Act's requirement that certain jurisdictions pre-clear any change to a 'standard, practice, or procedure with respect to voting')."

[383] City of Boerne v. Flores, 521 U.S. 507, 519 (1997). "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. . . . Remedial legislation under § 5 should be adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against." *Id.* at 532.

For instance, in the *Civil Rights Cases*, 109 U.S. 3, 11 (1883), the Court held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the Section 5 enforcement power, since Section 1 of the Fourteenth Amendment has reference to state action exclusively.

[384] City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997). That case involved the Religious Freedom Restoration Act (RFRA) of 1993. Congress enacted RFRA in direct response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Court upheld, against a free exercise challenge, a state law of general applicability criminalizing peyote use, as it applied to denying unemployment benefits to Native American Church members who lost their jobs because of such use. RFRA prohibited "government" from "substantially burden[ing]" a person's exercise of religion even if the burden resulted from a rule of general applicability, unless the government could demonstrate the burden was "in furtherance of a compelling governmental interest" and was "the least restrictive means of furthering" that interest. The Court held that RFRA was not appropriate legislation under Section 5. It first noted that the legislative record contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA's substantive provisions. Rather, Congress had uncovered only "anecdotal evidence" that, standing alone, did not reveal a "widespread pattern of religious discrimination" in the country. Second, RFRA was "so out of proportion to a supposed

remedial or preventive object that it could not be understood as responsive to, or designed to prevent, unconstitutional behavior. It appeare[d], instead, to attempt a substantive change in constitutional protections, proscribing state conduct that the Fourteenth Amendment itself did not prohibit. . . . [Its] [s]weeping coverage ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. [It had] no termination date or termination mechanism. . . . [Moreover,] [r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. . . . [Hence, RFRA was] a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens, [and was] not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion." *Id.* at 531–35.

CHAPTER 3

PROCEDURAL RIGHTS

A. PROCEDURAL DUE PROCESS

1. Introduction—Substantive v. Procedural Due Process

[C1] Under the Due Process Clauses of the Fifth and Fourteenth Amendments, the federal government and the states may not "deprive any person of life, liberty, property without due process of law." "[T]he touchstone of due process is protection of the individual against arbitrary action of government, . . . whether the fault lies in a denial of fundamental procedural fairness, . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective."[1] Hence, the clauses protect individuals against two types of government action. So-called "substantive due process" protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them."[2] "When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner."[3] This requirement has traditionally been referred to as "procedural" due process, which is "meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."[4]

[C2] "Vague laws in any area suffer a constitutional infirmity."[5] "[O]ne of the basic purposes of the Due Process Clauses has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws

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1 County of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998).

2 Daniels v. Williams, 474 U.S. 327, 331 (1986). *The Due Process Clause of the Fourteenth Amendment. incorporates and makes applicable to the states many of the specific protections defined in the Bill of Rights*, such as the Fourth Amendment's guarantee against unreasonable searches and seizures, or the First Amendment's protection of freedom of speech.

With respect to substantive due process, *see, in extenso*, paras. B72 *et seq.*

3 United States v. Salerno, 481 U.S. 739, 746 (1987).

4 Carey v. Piphus, 435 U.S. 247, 259 (1978). In that case, the Court explained that a deprivation of procedural due process is actionable under 42 U.S.C. Section 1983 without regard to whether the same deprivation would have taken place even in the presence of proper procedural safeguards. *Id.* at 266 (even if the deprivation was, in fact, justified, so the plaintiffs did not suffer any "other actual injury" caused by the lack of due process, "the fact remains that they were deprived of their right to procedural due process"). The Court went on to say, however, that, in cases where the deprivation would have occurred anyway, and the lack of due process did not itself cause any injury (such as emotional distress), the plaintiff may recover only nominal damages. *Id.* at 264, 266.

5 Ashton v. Kentucky, 384 U.S. 195, 200 (1966)

of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce."[6]

2. General Principles

a. Deprivation of Protected "Liberty" or "Property" Interests[7]

[C3] It is well settled that the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fifth or the Fourteenth Amendment's protection of liberty and property. In determining whether such liberty or property interests are implicated by a particular government action, courts "must look *not to the weight, but to the nature, of the interest* at stake."[8] The Court has rejected the notion that "*any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause."[9] Consequently, "as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause."[10] Furthermore, as a matter of principle, the due process provisions of the Constitution do not apply to the *indirect* adverse effects of governmental action.[11]

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[6] Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966). At issue in that case was a statute that left to the discretion of the jury whether to assess costs against an acquitted criminal defendant. The statute did not set out any standards to guide the jury's determination. The Court did not hesitate in striking down the statute on vagueness grounds. It reasoned that the utter lack of standards subjected acquitted defendants to "arbitrary and discriminatory impositions of costs." *Id.* at 402. *See, in extenso*, paras. E59 *et seq.* ("*void for vagueness*" doctrine).

[7] *The Court has not resolved the questions of when "life" begins or ends.* However, in *Roe v. Wade*, 410 U.S. 113, 159 (1973), the Court held that an abortion is not "the termination of life entitled to Fourteenth Amendment protection."

[8] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571 (1972) (emphasis added).

[9] *See* Meachum v. Fano, 427 U.S. 215, 224 (1976).

[10] Goss v. Lopez, 419 U.S. 565, 576 (1975). There the Court held that a ten-day suspension from school is not *de minimis*.

[11] O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 787–89 (1980). In that case, the Court, after making "the simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally," concluded that "the fact that the decertification of a [qualified skilled nursing] home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm" and "did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." At the same time the Court noted:

> We, of course, need not and do not hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action. Conceivably, for example, if the Government were acting against one person for the purpose of punishing or restraining another, the indirectly affected individual might have a constitutional right to some sort of hearing. But in this case, the Government is enforcing its regulations against the home for the benefit of the patients as a whole, and the home itself has a strong financial incentive to contest its enforcement decision; under these circumstances, the parties suffering an indirect adverse effect clearly have no constitutional right to participate in the enforcement proceedings.

[C4] "Liberty" and "property" are among "the great constitutional concepts purposely left to gather meaning from experience [and] relate to the whole domain of social and economic fact."[12] Nevertheless, "[t]he types of interests that constitute 'liberty' and 'property' for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than an 'abstract need or desire,' . . . and must be based on more than a 'unilateral hope.' . . . Rather, an individual claiming a protected interest must have a *legitimate claim of entitlement* to it."[13] "[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion."[14]

[C5] Protected liberty interests may arise from two sources—the Due Process Clauses themselves and the laws of the states.[15] While the Court has not attempted to define with exactness the liberty guaranteed by these clauses, "the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to engage in any of the common occupations of life, to marry, establish a home and bring up children, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[16] "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."[17] It also embodies, for example, the freedom from bodily punishment[18] and a person's interest in being free from the arbitrary administration of anti-psychotic drugs.[19] Moreover, state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment. For instance, although there is no constitutional right to parole, once a state grants a prisoner the conditional liberty

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Id. at 789, n.22.

See also Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (no property interest, for due process purposes, in police enforcement of a restraining order, considering, *inter alia*, that "the alleged property interest here arises *incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed—to wit, arresting people who they have probable cause to believe have committed a criminal offense").

[12] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571 (1972). For that reason, the Court has rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights. In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that procedural due process protections did not apply to government employment because it was merely a privilege, and not a right. Bailey v. Richardson, 86 U.S. App. D.C. 248, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). The basis of this holding was thoroughly undermined in the ensuing years. For example, the Court found constitutional restraints applicable to disqualification for unemployment compensation (*see* Sherbert v. Verner, 374 U.S. 398 (1963)); denial of a tax exemption (*see* Speiser v. Randall, 357 U.S. 513 (1958)); and termination of welfare benefits (*see* Goldberg v. Kelly, 397 U.S. 254 (1970)).

[13] Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989) (emphasis added).

[14] *See* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005), *citing* Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 462–63 (1989).

[15] Hewitt v. Helms, 459 U.S. 460, 466 (1983).

[16] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972), *quoting* Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also supra*, paras. B72 *et seq.* (*"substantive" due process*).

[17] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972).

[18] Ingraham v. Wright, 430 U.S. 651, 673–74 (1977) (students subjected to disciplinary corporal punishment).

[19] Washington v. Harper, 494 U.S. 210, 221–22 (1990).

properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revoke parole.[20]

[C6] Likewise, the Court has made clear that "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."[21] In *Roth*, the Court stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. . . . Property interests . . . 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.[22]

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[20] *See* Vitek v. Jones, 445 U.S. 480, 488 (1980), *citing* Morrissey v. Brewer, 408 U.S. 471 (1972).

Yet, a person is not deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 575 (1972).

This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer, when there is no public disclosure of the reasons for the discharge, which might impair the employee's interest in his good name. *See* Bishop v. Wood, 426 U.S. 341, 348 (1976).

In *Sandin v. Conner*, 515 U.S. 472, 484 (1995), the Court rejected the proposition that that any state action taken for a punitive reason encroaches upon a liberty interest under the Due Process Clause, even in the absence of any state regulation.

[21] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–72 (1972).

[22] *Id.* at 577.

The Court has *rejected the position that a property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation.* As noted in *Cleveland Board of Educcation v. Loudermill*, 470 U.S. 532, 540 (1985), this view "has its genesis in the plurality opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974). *Arnett* involved a challenge by a former federal employee to the procedures by which he was dismissed. The plurality reasoned that, where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated: 'The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause. . . . [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.' *Id.* at 152–54. This view garnered three votes in *Arnett*, but was specifically rejected by the other six Justices."

Later cases clearly rejected the above theory. In *Vitek v. Jones*, 445 U.S. 480, 491 (1980), the Court pointed out that "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 pre-conditions to adverse official action." This conclusion was reiterated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982), where the Court reversed the lower court's holding that, because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement. Finally, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985), the Court stressed that

"The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"[23] Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating to the whole domain of social and economic fact.[24]

b. Procedural Requirements

i. Introduction—The *Mathews* Balancing Test

[C7] It is well established that due process, unlike some legal rules, "is not a technical conception with a fixed content unrelated to time, place and circumstances."[25] "[D]ue process is flexible, and calls for such procedural protections as the particular

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> the "bitter with the sweet" approach misconceives the constitutional guarantee. . . . The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty.

[23] Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982), *citing* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11–12 (1978); Goss v. Lopez, 419 U.S. 565, 573–74 (1975); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576–78 (1972). For example, the *Roth* Court found that a teacher had no property interest in a renewal of his one-year contract despite the fact that most teachers hired on a year-to-year basis by the university were rehired. *Id.* at 578, n.16. The Court concluded that the teacher had no legitimate entitlement to continued employment, because the discretion of the university officials to renew or not renew such a contract was subject to no "cause" limitations.

In *Perry v. Sindermann*, 408 U.S. 593 (1972), a teacher who had held his position for a number of years but was not tenured under contract alleged that he had *de facto* tenure under contract law due to the existence of rules or understandings with the college which employed him. *Id.* at 602. The Court stated that proof of these allegations would establish the teacher's legitimate claim of entitlement to continued employment absent sufficient cause for discharge. In these circumstances, the teacher would have a property interest safeguarded by due process. *Id.* at 603.

[24] *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (utility service); Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio, 301 U.S. 292 (1937) (ordered refund of previously collected rate charges); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Mathews v. Eldridge, 424 U.S. 319 (1976) (disability benefits); Goss v. Lopez, 419 U.S. 565 (1975) (high school education); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950) (cause of action); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (cause of action and right to use adjudicatory procedures established by a state's Fair Employment Practices Act); Connell v. Higginbotham, 403 U.S. 207 (1971) (government employment); Brock v. Roadway Express, Inc., 481 U.S. 252, 263 (1987) (employer's interest in controlling the makeup of its workforce).

For example, the welfare recipients in *Goldberg v. Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But the Court held that they had a right to a hearing at which they might attempt to do so.

[25] Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 895 (1961).

situation demands."[26] *Mathews v. Eldridge* announced that 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 an erroneous deprivation of such interest through the procedures used, and the 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 requirement would entail.[27]

ii. Notice

[C8] "The fundamental requisite of due process of law is the opportunity to be heard. . . . This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. . . . [Hence,] [a]n elementary and fundamental requirement of due process in any adjudicative 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. . . . The notice must be of such nature as reasonably to convey the required information, . . . and it must afford a reasonable time for those interested to make their appearance. . . . But if, with due regard for the practicalities and peculiarities of the case, these conditions are reasonably met, the constitutional requirements are satisfied. The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."[28]

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[26] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[27] Mathews v. Eldridge, 424 U.S. 319, 335 (1976). As to the second part of the inquiry, the Court noted that procedural due process rules are "shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Id.* at 344.

The Court has not viewed *Mathews* as announcing an all-embracing test for deciding due process claims. For example, when confronted with questions regarding the adequacy of the method used to give *notice,* the Court has regularly turned to *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice must be "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"). *See* Dusenbery v. United States, 534 U.S. 161, 168 (2002) (collecting cases).

The four-factor balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972) (*see* para. C167), developed to determine when government delay has abridged the right to a speedy trial, provides the relevant framework for determining whether the government's delay in filing a *forfeiture action* is reasonable. *See* United States v. $8,850, 461 U.S. 555, 562–65 (1983).

[28] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950).

The right to a hearing embraces a "*reasonable opportunity to know the claims of the opposing party* and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a *quasi*-judicial proceeding aimed at the control of their activities are *entitled to be fairly advised of what the Government proposes* and to be heard upon its proposals before it issues its final command." *See* Morgan v. United States, 304 U.S. 1, 18–19 (1938) (emphasis added).

Section 6(j) of the Selective Service Act of 1948 provided that "[t]he Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith" of the claimed conscientious objections of any person claiming exemption from combatant train-

[C9] In *Mullane*, the Court considered the constitutional sufficiency of notice given to the beneficiaries of a common trust fund of a judicial settlement of accounts by the trustee of the fund. The Court held that the notice by publication authorized by the relevant New York statute was not sufficient, since it was not reasonably calculated to

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ing and service because of such objections. In *United States v. Nugent*, 346 U.S. 1, 6 (1953), the Court held that "the Department of Justice satisfies its duties under § 6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with *a fair resume of any adverse evidence in the investigator's report*." (Emphasis added.)

Similarly, in *Gonzales v. United States*, 348 U.S. 407, 415 (1955), where petitioner had been denied conscientious objector exemption, the Court noted: "Just as the right to a hearing means the right to a meaningful hearing, so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, *one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered*." (Emphasis added.)

In *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264, 269 (1987), a case that involved a statute forbidding the discharge of employees in the commercial motor transportation industry in retaliation for refusing to operate motor vehicles that did not comply with applicable safety standards or for filing complaints alleging such non-compliance, five members of the Court found that minimum due process for the employer in this context required, *inter alia, notice of the employee's allegations, and notice of the substance of the relevant supporting evidence.*

The due process standards of *Mullane apply to an "adjudication" that is to be accorded finality.* They *do not apply in the context of a purely investigatory, fact finding agency, which does not "adjudicate" or "issue orders." See* Hannah v. Larche, 363 U.S. 420 (1960). The appellants in that case were persons subpoenaed to appear before the Civil Rights Commission in connection with complaints about deprivations of voting rights. The Court held that persons whose conduct was under investigation by the Commission were not entitled, by virtue of the Due Process Clause, to know the specific charges that were being investigated, as well as the identity of the complainants, and did not have the right to cross-examine those complainants and other witnesses. In so concluding, the Court noted, *inter alia*, that "the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Factfinding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable." *Id.* at 443.

The Court also has made the basic *distinction between rulemaking and adjudication.* "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283 (1984). In *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915), the Court stated: "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."

In *Londoner v. Denver*, 210 U.S. 373 (1908), the Court held that due process had not been accorded a landowner who objected to the amount assessed against his land as its share of the benefit resulting from the paving of a street. Local procedure had accorded him the right to file a written complaint and objection but not to be heard orally. The Court held that "where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of mak-

apprise the beneficiaries of the pendency of the judicial proceeding. The notice was deficient "not because, in fact, it fail[ed] to reach everyone, but because, under the circumstances, it [wa]s not reasonably calculated to reach those who could easily be informed by other means at hand." Personal service of written notice, the *Mullane* Court acknowledged, is "the classic form of notice always adequate in any type of proceed-

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ing its assessment and apportionment, due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing." *Id.* at 385. In *Bi-Metallic, supra*, at 446, the Court distinguished *Londoner* by stating that there, a small number of persons "were exceptionally affected, in each case upon individual grounds."

Statutory notice. The Court has stressed that "all citizens are presumptively charged with knowledge of the law." *See, e.g.*, Atkins v. Parker, 472 U.S. 115, 130 (1985), *citing* N. Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925). It is well settled that "laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," but it has "never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights. . . . Generally, *a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply*. [In this context,] the Court shows the greatest deference to the judgment of state legislatures. A legislative body is in a far better position than a court to form a correct judgment concerning the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice." *See* Texaco, Inc. v. Short, 454 U.S. 516, 532, 535–36 (1982) (emphasis added). There, the Court upheld a state statute pursuant to which a severed mineral interest that had not been used for a period of 20 years automatically lapsed and reverted to the current surface owner of the property, unless the mineral owner filed a statement of claim in the county recorder's office within two years of the statute's passage. In so doing, the Court noted, *inter alia* that (1) the two-year grace period foreclosed any argument that the statute was invalid, because mineral owners might not have had an opportunity to become familiar with its terms; (2) the reasoning in *Mullane* was applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate had or had not occurred but not to the self-executing feature of the statute.

As a matter of principle, "notice of remedies and procedures is [not] required." City of West Covina v. Perkins, 525 U.S. 234, 242 (1999) (emphasis added). "[W]hen law enforcement agents seize property pursuant to warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can ascertain who was responsible for his loss, and pursue available remedies for the return of its property. No similar rationale justifies requiring individualized notice of state law remedies which are established by published, generally available state statutes and case law. Once the property owner is informed that his property has been seized, he can turn to these public sources to learn about the remedial procedures available to him." Hence, the Constitution does not require a state or its local entities to give detailed and specific instructions or advice to owners who seek return of property lawfully seized but no longer needed for police investigation or criminal prosecution. *Id.* at 240–242.

Nevertheless, "notice of the procedures for protecting one's property interests may be required when those procedures are arcane and are not set forth in documents accessible to the public." City of W. Covina v. Perkins, 525 U.S. 234, 242 (1999). In *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), the Court held that "a public utility must make available to its customers the opportunity to discuss a billing dispute with a utility employee who has authority to resolve the matter before terminating utility service for nonpayment. The Court also held that due process required the utility to inform the customer not only of the planned termination, but also of the availability and general contours of the internal administrative pro-

ing."[29] But that classic form, the Court next developed, "has not in all circumstances been regarded as indispensable to the process due residents, and it has more often been held unnecessary as to nonresidents." The statutory notice by publication was sufficient as to any beneficiaries whose interests or addresses were unknown to the trustee, since there were no other means of giving them notice that would be both practicable and more effective. But as to known beneficiaries of known places of residence, notice by publication would not do. Personal service on the large number of known resident or non-resident beneficiaries, however, would "seriously interfere with the proper administration of the fund" (delay as well as expense rendered such service impractical). For that group, the Court indicated, ordinary mail to the record addresses, which might be sent with periodic income remittances, was the minimal due process requirement.[30] In a series of cases following *Mullane*, the Court similarly condemned notice by publication or posting as not reasonably calculated to inform persons with known interests in a proceeding.[31] In these cases, the Court identified mail service as a satisfactory supplement to statutory provisions for publication or posting.[32]

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cedure for resolving the accounting dispute. In requiring notice of the administrative procedures, the Court relied not on any general principle that the government must provide notice of the procedures for protecting one's property interests but on the fact that the administrative procedures at issue were not described in any publicly available document." See City of W. Covina v. Perkins, 525 U.S. 234, 241–42 (1999), *discussing* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13–15 (1978).

[29] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). In *Covey v. Town of Somers*, 351 U.S. 141, 146–47 (1956), the Court held that, in the context of a foreclosure action by the town, notice to a person known by the town to be an incompetent, who was without the protection of a guardian, was inadequate.

[30] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–19 (1950). The risk that notice would not reach even all known beneficiaries, the Court reasoned, was justifiable, for the common trust "presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all." *Id.* at 319.

[31] *See* Dusenbery v. United States, 534 U.S. 161, 177 (2002) (dissenting opinion of Justice Ginsburg), *citing* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988) (notice by publication inadequate as to estate creditors whose identities were known or ascertainable by reasonably diligent efforts); Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (notice by publication and posting inadequate to inform real property mortgagee of a proceeding to sell the mortgaged property for non-payment of taxes); Greene v. Lindsey, 456 U.S. 444 (1982) (posting summons on door of a tenant's apartment provided inadequate notice of eviction proceedings, given that "notices posted on apartment doors in the area where these tenants lived were not infrequently removed by children or other tenants before they could have their intended effect"); Schroeder v. City of New York, 371 U.S. 208 (1962) (publication plus signs posted on trees inadequate to notify property owners of condemnation proceedings).

[32] *See* Dusenbery v. United States, 534 U.S. 161, 177 (2002) (dissenting opinion of Justice Ginsburg). In *Dusenbery*, a five-member majority held that, when the government seeks to provide notice to a federal inmate of its intention to forfeit property in which the inmate appears to have an interest, it may send such notice by certified mail addressed to the prisoner. In so doing, the Court rejected the argument that the Due Process Clause required actual receipt of the notice in such a case.

iii. Hearing [33]

[C10] The fundamental requirement of due process is "the opportunity to be heard at a meaningful time and in a meaningful manner."[34] The Court has acknowledged that "the timing and nature of the required hearing 'will depend on appropriate accommodation of the competing interests involved.' . . . These include the importance of the private interest and the length [and] finality of the deprivation; . . . the likelihood of governmental error; . . . and the magnitude of the governmental interests involved."[35]

[C11] Balancing the competing interests involved, the Court usually has held that the Constitution requires some kind of a hearing *before* the government deprives a person of liberty or property;[36] "[t]he demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."[37] Nevertheless, the Court has rejected the proposition that due process always requires the government to provide a hearing prior to the initial deprivation of protected interests. "[T]he necessity of quick action by the State or the impracticality of

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[33] *See also* para. C8 (*notice*).

[34] *See, e.g.*, Armstrong v. Manzo, 380 U.S. 545, 552 (1965); City of Los Angeles v. David, 538 U.S. 715 (2003).

Due process does not entitle a person to a hearing to establish a fact that is not material under the relevant statutes. *See* Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7 (2003).

[35] Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982).

"[T]he right of *oral argument* as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." *See* Fed. Communications Comm'n v. WJR, 337 U.S. 265, 276 (1949) (emphasis added).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), a case that concerned termination of welfare benefits, the Court said: "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore, a recipient must be allowed to state his position orally." *Id.* at 268–69.

[36] *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (hearing required before termination of employment); Parham v. J.R., 442 U.S. 584, 606–07 (1979) (determination by neutral physician whether statutory admission standard is met required before confinement of child in mental hospital); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978) (hearing required before cutting off utility service); Goss v. Lopez, 419 U.S. 565, 579 (1975) (informal hearing required before suspension of students from public school); Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974) (hearing required before forfeiture of prisoner's good-time credits); Fuentes v. Shevin, 407 U.S. 67, 80–84 (1972) (hearing required before issuance of writ allowing repossession of property); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (hearing required before termination of welfare benefits).

[37] Opp Cotton Mills v. Adm'r, 312 U.S. 126, 152–53 (1941).

providing any . . . predeprivation process," may mean that a post-deprivation remedy is constitutionally adequate.[38] "[D]eprivation of property to protect the public health and safety is one of the oldest examples of permissible summary action."[39] Moreover, "where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required.[40] The Court, thus, has recognized on many occasions that a statutory provision for a post-deprivation administrative hearing, or the existence of a judicial remedy for erroneous deprivation, satisfies due process.[41]

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[38] Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982), *quoting* Parratt v. Taylor, 451 U.S. 527, 539 (1981). *See also* Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 240 (1988) ("[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation").

[39] *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 300 (1981). *See, e.g.*, North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (upholding the right of a state to seize and destroy unwholesome food without a pre-seizure hearing); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (upholding the summary seizure and destruction of misbranded drugs without a pre-seizure hearing).

[40] Zinermon v. Burch, 494 U.S. 113, 128 (1990), *quoting* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978) and *citing* Ingraham v. Wright, 430 U.S. 651, 682 (1977) (hearing not required before corporal punishment of junior high school students).

[41] *See, e.g.*, Fahey v. Mallonee, 332 U.S. 245 (1947) (immediate seizure of property without a prior hearing when substantial questions are raised about the competence of a bank's management); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974) (the government may seize a yacht subject to civil forfeiture without affording prior notice or hearing, for a yacht is the "sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given"); Mitchell v. W.T. Grant Co., 416 U.S. 600, 619–20 (1971) (hearing not required before issuance of writ to sequester debtor's property); Barry v. Barchi, 443 U.S. 55, 64–66 (1979) (upholding a 15-day suspension, pending a prompt judicial or administrative hearing, of a horse trainer's racing license, upon a probable cause showing that his horse was drugged before a race); Haig v. Agee, 453 U.S. 280 (1981) (in case of revocation of a passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or foreign policy of the United States, due process calls for no more than a statement of reasons and an opportunity for a prompt post-revocation hearing); Zadvydas v. Davis, 533 U.S. 678, 692 (2001) ("under certain circumstances, the constitutional requirement of due process is a requirement of judicial process"); Bowles v. Willingham, 321 U.S. 503 (1944) (rent control orders, during wartime, without providing a hearing to landlords before the order or regulation fixing rents became effective; judicial review of the orders satisfied due process); Hudson v. Palmer, 468 U.S. 517 (1984) (there the Court held that, in case of intentional destruction of an inmate's property, the state's post-deprivation tort remedies provided the prisoner with all the process that was due him, noting that "when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply impracticable, since the state cannot know when such deprivations will occur"). But *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (in case a state terminates a complainant's cause of action, under its Fair Employment Practices Act, because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure, the availability of a post-termination tort action does not provide due process; in such a case, the complainant is entitled to have the state Fair Employment Practices Commission consider the merits of his charge).

[C12] The Due Process Clause does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations. Thus, even though legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error, the principle established by the Court's decisions is that "something less than an *evidentiary* hearing is sufficient prior to adverse administrative action. . . . And, when prompt post-deprivation review is available for correction of administrative error, [the Court has] generally required no more than that the pre-deprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts underlying the official action are as a responsible governmental official warrants them to be,"[42] and justify the proposed action. Nevertheless, depending on the circumstances, and the interests at stake, a pre-deprivation hearing closely approximating a judicial trial may be constitutionally required.[43]

iv. Right to (Retained or Appointed) Counsel[44]

[C13] "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[45] For example, at a hearing regarding termination of welfare benefits, the recipient must be allowed to retain an attorney, who "can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient."[46] By contrast, prison inmates do not have a right to either retained or appointed counsel in disciplinary hearings, mainly because the insertion of counsel into the prison discipli-

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Since the Due Process Clause requires provision of a hearing "at a meaningful time," at some point, a delay in the post-termination hearing may become a constitutional violation. *See,* in particular, Barry v. Barchi, 443 U.S. 55, 66 (1979).

42 Mackey v. Montrym, 443 U.S. 1, 13 (1979).

43 *Compare, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 266–71 (1970) (suspension of welfare benefits invalid if not preceded by an evidentiary hearing giving the recipient an opportunity to confront witnesses and present evidence and argument orally) *with* Mathews v. Eldridge, 424 U.S. 319, 343–44 (1976) (an evidentiary hearing is not required prior to the termination of disability benefits, the determination of disability, based largely on written medical assessments, is more sharply focused and easily documented than the typical determination of welfare entitlement).

Confrontation and cross-examination: In *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), the Court noted that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." However, such a requirement may not be appropriate in certain situations. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 567–69 (1974) (an inmate has no constitutional right to confrontation and cross-examination in prison disciplinary proceedings, in view of the interest of the state in avoiding prison disruption).

Statement of evidence and reasoning relied on: The Court has held that, in certain contexts, due process requires a written statement by the fact finders as to the evidence relied on and reasons for their decision. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 489 (1972) (parole revocation); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (termination of public assistance payments). *See also* para. C8, n.28. The decision should rest "solely on the legal rules and evidence adduced at the hearing." Goldberg v. Kelly, *supra*, at 271.

44 *See also* paras. C64, C65, C68 (*indigents' right to appellate counsel*); paras. C79, C87 (*right to counsel during custodial interrogation*); paras. C92 *et seq.* (*Sixth Amendment right to counsel*).

45 Powell v. Alabama, 287 U.S. 45, 669 (1932).

46 Goldberg v. Kelly, 397 U.S. 254, 270–71 (1970). The Court added that it did not anticipate that this assistance would unduly prolong or otherwise encumber the hearing.

nary process "would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals."[47]

[C14] The Court has drawn from its decisions "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[48] Thus, *Argersinger* established that counsel must be provided before any indigent may be sentenced to prison, even where the crime is petty and the prison term brief.[49] By contrast, the government is not required to provide counsel at a hearing regarding termination of welfare benefits.[50]

[C15] However, "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel."[51] This is "demonstrated by the Court's announcement in *In re Gault*, that 'the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed,' the juvenile has a right to appointed counsel even though those proceedings may be styled 'civil,' and not 'criminal.'"[52] Similarly, four of the five Justices, who reached the merits in *Vitek*, concluded that an indigent prisoner is entitled to appointed counsel before being involuntarily transferred for treatment to a state mental hospital.[53]

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47 Wolff v. McDonnell, 418 U.S. 539, 570 (1974).

In *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), the Court upheld against due process attack a statutory $10 *limitation on attorney's fees* payable by veterans seeking disability or death benefits in proceedings before the Veterans' Administration. The Court determined that the government had a legitimate interest in administering benefits in an informal and non-adversarial fashion, and that invalidation of the fee limitation would seriously frustrate Congress' principal goal of wanting the veteran to get the entirety of the award. The Court thus required those challenging the law to make "an extraordinarily strong showing of probability of error under this system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denied claimants due process of law." *Id.* at 326. No such showing was made out on the record of the case. In light of the government interests at stake, the evidence before the district court as to the success rates in claims handled with or without lawyers showed no such great disparity as to warrant the inference that the fee limitation violated the Due Process Clause of the Fifth Amendment. And what evidence there was regarding complex cases fell far short of the kind that would warrant upsetting Congress' judgment.

United States Department of Labor v. Triplett, 494 U.S. 715 (1990), involved a provision of the Black Lung Benefits Act of 1972 that prohibited attorneys from receiving fees for representing claimants except as approved by the Department of Labor. In implementing this provision, the Department promulgated approval procedures that invalidated all contractual fee arrangements. The Court held that the fee limitation scheme did not violate due process, because the record of the case did not establish that claimants could not obtain representation and that this unavailability of attorneys was attributable to the government's fee regime.

48 Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 26–27 (1981).

49 Argersinger v. Hamlin, 407 U.S. 25 (1972).

50 Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

51 Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 25 (1981).

52 *Id.* at 25, *discussing In re* Gault, 387 U.S. 1, 41 (1967).

53 Vitek v. Jones, 445 U.S. 480, 496–97 (1980). The fifth Justice declined to exclude the possibility that the required assistance may be rendered by licensed psychiatrists or other mental health professionals or by competent laymen in some cases. *Id.* at 500.

[C16] "Significantly, as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."[54] In *Gagnon v. Scarpelli*, the Court gauged the due process rights of a previously sentenced probationer at a probation revocation hearing. In *Morrissey*, which involved an analogous hearing to revoke parole, the Court had said: "revocation deprives an individual not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."[55] Relying on that discussion, the Court in *Scarpelli* "declined to hold that indigent probationers have, *per se*, a right to counsel at revocation hearings, and instead left the decision whether counsel should be appointed to be made on a case-by-case basis."[56] In *Lassiter*, the Court held that parental termination cases "are most appropriately ranked with probation-revocation hearings: While the Court declined to recognize an automatic right to appointed counsel, it said that an appointment would be due when warranted by the character and difficulty of the case."[57]

[C17] Moreover, "the Court has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not result in the defendant's loss of personal liberty."[58] The Court in *Scott v. Illinois* interpreted the central premise of *Argersinger* to be "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment," and the Court endorsed that premise as "eminently sound and warrant[ing] adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." The Court thus held that "the Sixth and Fourteenth Amendments to the Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[59]

v. Standard of Proof

[C18] The function of a standard of proof, as that concept is embodied in the Due Process Clause, "is to instruct the fact finder concerning the degree of confidence society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. . . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."[60]

[C19] Generally speaking, the evolution of this area of the law has produced, across a continuum, three standards or levels of proof for different types of cases. "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere 'preponderance of the evidence.' The litigants thus share the risk of error in roughly equal fashion."[61] "In a criminal case, on the other

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54 Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 26 (1981).

55 Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

56 *See* Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 26 (1981), *discussing* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

57 *See* M. L. B. v. S. L. J., 519 U.S. 102, 117 (1996), *discussing* Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 31–32 (1981). *See, in extenso*, para. F31.

58 Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 26 (1981).

59 Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

60 Addington v. Texas, 441 U.S. 418, 423 (1979).

61 *Id.* at 423. The burden of showing something by a preponderance of evidence simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the fact's existence.

hand, the interests of the defendant are of such magnitude that, historically and without any explicit constitutional requirement, they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused 'beyond a reasonable doubt.'"[62] The Court has mandated an intermediate standard of proof—"clear and convincing evidence"[63]—when "the individual interests at stake . . . are both particularly important and more substantial than mere loss of money."[64] Thus, such a standard has been required in deportation proceedings,[65] in denaturalization proceedings,[66] in civil commitment proceedings,[67] and in proceedings for the termination of parental rights.[68] Further, this level of proof, has traditionally been imposed in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.[69]

vi. Legislative Presumptions[70]

[C20] A legislative presumption of one fact from evidence of another does not constitute a denial of due process of law or a denial of the equal protection of the law as long as there is "some rational connection between the fact proved and the ultimate fact presumed, and the inference of one fact from proof of another [is] not so unrea-

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[62] *Id.* at 423–24, *citing In re* Winship, 397 U.S. 358 (1970). *See also* para. C123.

[63] Clear and convincing evidence is that measure or degree of proof that will produce, in the mind of the trier of facts, a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.

[64] Cooper v. Oklahoma, 517 U.S. 348, 363 (1996), *quoting* Santosky v. Kramer, 455 U.S. 745, 756 (1982).

[65] Woodby v. INS, 385 U.S. 276, 285 (1966).

[66] Chaunt v. United States, 364 U.S. 350, 353 (1960); Schneiderman v. United States, 320 U.S. 118, 125, 159 (1943).

[67] Addington v. Texas, 441 U.S. 418, 425–33 (1979).

[68] Santosky v. Kramer, 455 U.S. 745, 758–68 (1982).

[69] Addington v. Texas, 441 U.S. 418, 424 (1979). *See also* Woodby v. INS, 385 U.S. 276, 285, n.18 (1966).

In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the Court held that the Due Process Clause does not prohibit a state from requiring a third party, who seeks to *terminate life-sustaining treatment*, to demonstrate, by clear and convincing evidence, that the incompetent person receiving such treatment would wish that step to be taken. The Court reasoned that the heightened standard of proof was permissible, because the decisionmaker was a surrogate for the incompetent individual, and because the consequences of an erroneous decision were irreversible. *Id.* at 280–83.

In *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), the Court upheld an Ohio statute that required an unmarried, unemancipated minor woman, who sought to obtain an *abortion without notifying a parent*, to prove, by clear and convincing evidence, that judicial bypass of the notification requirement was appropriate in her case. The Court approved the heightened standard of proof in that case largely because the proceeding at issue was *ex parte*. *Id.* at 515–16.

In *Cooper v. Oklahoma*, 517 U.S. 348 (1996), the Court held that a state statute under which the defendant in a criminal prosecution is presumed to be *competent to stand trial*, unless he proves his incompetence by clear and convincing evidence, violates due process and that a defendant may not be put to trial even though it is more likely than not that he is incompetent.

[70] *See also* paras. C124 *et seq.* (*presumptions in the criminal context*).

sonable as to be a purely arbitrary mandate."[71] However, statutes creating "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments."[72]

[C21] *Bell v. Burson* involved a Georgia statute, which provided that, if an uninsured motorist was involved in an accident and could not post security for the amount of damages claimed, his driver's license must be suspended without any hearing on the question of fault or responsibility. The Court held that, "since the State purported to be concerned with fault in suspending a driver's license, it could not, consistent with procedural due process, conclusively presume fault from the fact that the uninsured motorist was involved in an accident, and could not, therefore, suspend his driver's license without a hearing on that crucial factor."[73]

[C22] Likewise, *Stanley* struck down, as violative of the Due Process Clause of the Fourteenth Amendment, Illinois' irrebuttable statutory presumption that all unmarried fathers were unqualified to raise their children. Because of that presumption, the statute required the state, upon the death of the mother, to take custody of all such illegitimate children, without providing any hearing on the father's parental fitness. The Court held "that the State could not conclusively presume that any individual unmarried father was unfit to raise his children; rather, it was required by the Due Process Clause to provide a hearing on that issue."[74]

[C23] In *Vlandis*, a statutory definition of "residents" for purposes of fixing tuition to be paid by students in a state university system was held invalid. The Court held that, where a state "purport[s] to be concerned with residency, it might not, at the same time, deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue."[75]

[C24] *Murry* involved a conclusive presumption contained in a federal statute providing that "[a]ny household which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household, shall be ineligible to participate in any food stamp program . . . during the tax period such dependency is claimed and for a period of one year after the expiration of such tax period." This provision had been generated by congressional concern over non-needy households participating in the food stamp program and abuses of the program by college students and children of wealthy parents. The Court invalidated the provision, as violative of due process, because "the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax deducting parent lives, and rests on an irrebuttable presumption often contrary to fact."[76]

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71 Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910).

72 Vlandis v. Kline, 412 U.S. 441, 446 (1973).

73 *Id.* at 446–47, *discussing* Bell v. Burson, 402 U.S. 535 (1971).

74 *Id.* at 447, *discussing* Stanley v. Illinois, 405 U.S. 645 (1972). A four-Justice majority concluded, in *Stanley*, that the denial to unwed fathers of the hearing on fitness accorded to all other parents whose custody of their children was challenged by the state constituted a denial of equal protection of the laws. *Id.* at 658. However, in *Caban v. Mohammed*, 441 U.S. 380, 385, n.3 (1979), the Court explicitly described *Stanley* as a case involving procedural due process.

75 Weinberger v. Salfi, 422 U.S. 749, 771 (1975), *discussing* Vlandis v. Kline, 412 U.S. 441, 452 (1973).

76 United States Dep't of Agric. v. Murry, 413 U.S. 508, 514 (1973)

[C25] In *LaFleur*, the Court held invalid school board regulations requiring pregnant school teachers to take unpaid maternity leave commencing four to five months before the expected birth. The regulations were violative of due process, since they created a conclusive presumption that every teacher who was four or five months pregnant was physically incapable of continuing her duties, whereas medical experts agreed that "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter."[77]

[C26] Nevertheless, *Michael H. v. Gerald D.* held, without a majority opinion, that a putative natural father was not entitled to rebut a state law presumption that a child born in a marriage was a child of the marriage.[78] A four-member plurality noted: "A conclusive presumption does, of course, foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate. But the same can be said of any legal rule that establishes general classifications, whether framed in terms of a presumption or not. In this respect, there is no difference between a rule which says that the marital husband shall be irrebuttably presumed to be the father and a rule which says that the adulterous natural father shall not be recognized as the legal father. Both, rules deny someone in Michael's situation a hearing on whether, in the particular circumstances of his case, California's policies would best be served by giving him parental rights. Thus, as many commentators have observed, . . . our 'irrebuttable presumption' cases must ultimately be analyzed as calling into question not the adequacy of procedures, but—like our cases involving classifications framed in other terms . . .—the adequacy of the 'fit' between the classification and the policy that the classification serves."[79] By contrast, five Justices agreed that the flaw inhering in a conclusive presumption terminating a constitutionally protected interest without any hearing whatsoever is a procedural one.[80]

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[77] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645 (1974).

[78] Michael H. v. Gerald D., 491 U.S. 110 (1989). *See, in extenso*, para. F26.

[79] *Id.* at 120–21 (opinion of Justice Scalia, in which Rehnquist, C.J., O'Connor and Kennedy, JJ., joined). For example, in *Carrington v. Rash*, 380 U.S. 89 (1965), the Court held that a permanent irrebuttable presumption of non-residence violated the Equal Protection Clause of the Fourteenth Amendment. That case involved a provision of the Texas Constitution that prohibited any member of the armed forces, who entered the service as a resident of another state and then moved his home to Texas during the course of his military duty, from ever satisfying the residence requirement for voting in Texas elections, so long as he remained a member of the armed forces. The effect of that provision was to create a conclusive presumption that all servicemen who moved to Texas during their military service, even if they became *bona fide* residents of Texas, nonetheless remained non-residents for purposes of voting. The Court held that "[b]y forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." *Id.* at 96.

[80] Michael H. v. Gerald D., 491 U.S. 110, 153 (1989) (dissenting opinion of Brennan, J., with whom Marshall and Blackmun, JJ., joined); *id.* at 163 (White, J., dissenting); *id.* at 132 (Stevens, J., concurring in judgment). Justice Brennan found disturbing the plurality's "failure to recognize that the defect from which conclusive presumptions suffer is a procedural one: the State has declared a certain fact relevant, indeed controlling, yet has denied a particular class of litigants a hearing to establish that fact. This is precisely the kind of flaw that procedural due process is designed to correct."

vii. Impartial Decisionmaker

[C27] "Before one may be deprived of a protected interest, whether in a criminal or civil setting, . . . one is entitled as a matter of due process of law to an adjudicator who is not in a situation 'which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true.'"[81] "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, generating the feeling . . . that justice has been done, . . . 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."[82] "Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator."[83]

[C28] The requirement of impartiality in the judicial context has been guarded by the Court on various occasions, usually involving financial interest or personal hostility.[84] Most

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[81] Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 617–18 (1993), *quoting* Ward v. Vill. of Monroeville, 409 U.S. 57, 60 (1972).

[82] Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

[83] Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 618 (1993), *citing* Ward v. Vill. of Monroeville, 409 U.S. 57, 61 (1972).

[84] *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822–25 (1986) (judge violated due process by sitting in a case in the outcome of which he had a direct, personal, substantial, pecuniary interest); Tumey v. Ohio, 273 U.S. 510, 523, 531–34 (1927) (reversing convictions rendered by the mayor of a town when the mayor's salary was paid in part by fees and costs levied by him acting in a judicial capacity); Ward v. Vill. of Monroeville, 409 U.S. 57, 58–62 (1972) (invalidating a procedure by which sums produced from a mayor's court accounted for a substantial portion of municipal revenues, even though the mayor's salary was not augmented by those sums, for the mayor's executive responsibilities for village finances might make him partisan to maintain the high level of contribution from the mayor's court); Connally v. Georgia, 429 U.S. 245 (1977) (*per curiam*) (invalidating a system in which justices of the peace were paid for issuance, but not for non-issuance, of search warrants); Johnson v. Mississippi, 403 U.S. 212, 215–16 (1971) (*per curiam*) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); Taylor v. Hayes, 418 U.S. 488 (1974) (in the context of contempt before a judge, where "marked personal feelings were present on both sides," and the marks of "unseemly conduct [had] left personal stings," criminal contempt proceedings should be held before a judge other than the one reviled by the contemnor); Bracy v. Gramley, 520 U.S. 899, 905 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him).

"Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction." *See* Withrow v. Larkin, 421 U.S. 35, 56 (1975).

In *Weiss v. United States*, 510 U.S. 163, 176–81 (1994), the Court rejected the contention that a *military judge* who does not have a fixed term of office lacks the independence necessary

of the law concerning disqualification of judges because of interest and possible bias applies with equal force to administrative adjudicators.[85]

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to ensure impartiality. The Court held that the applicable provisions of the Uniform Code of Military Justice (UCMJ), and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserved judicial impartiality, noting that the UCMJ (1) placed military judges under the authority of the appropriate Judge Advocate General, rather than under the authority of the convening officer; (2) protected against command influence by precluding a convening officer or any commanding officer from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties; (3) prohibited convening officers from censuring, reprimanding, or admonishing a military judge with respect to the findings or sentence adjudged by the court or with respect to any other exercise of its or his functions in the conduct of the proceeding; (4) provided that a military judge, either trial or appellate, should refrain from adjudicating a case in which he had previously participated and allowed a defendant to challenge both a court-martial member and a court-martial judge for cause; (5) allowed a defendant to learn the identity of the military judge before choosing whether to be tried by the judge alone, or by the judge and court-martial members. Moreover, the Court stressed the fact that the entire system was overseen by the Court of Military Appeals, which was composed entirely of civilian judges serving for fixed terms of 15 years. This court had demonstrated its vigilance in checking any attempts to exert improper influence over military judges, holding, for example, that the Judge Advocate General of the Navy, or his designee, could not rate a military judge based on the appropriateness of the judge's sentences at courts-martial, and that a Judge Advocate General could not decertify or transfer a military judge based on the General's opinion of the appropriateness of the judge's findings and sentences.

With respect to the (more relaxed) requirement of a *disinterested criminal prosecutor, see Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980), and *Young v. United States* ex rel. *Vuitton et Fils S.A.*, 481 U.S. 787, 802–09 (1987) (counsel for a party that is the beneficiary of a court order may not be appointed to undertake criminal contempt prosecutions for alleged violations of that order).

[85] *See* Gibson v Berryhill, 411 U.S. 564, 579 (1973). In that case, the Court forbade a state administrative board consisting of optometrists in private practice from hearing charges filed against licensed optometrists competing with board members.

In *Morrissey v. Brewer*, 408 U.S. 471, 485–86 (1972), the Court prohibited a parole officer (who acts as counselor for and confidant of the parolee, and, on the basis of preliminary information, decides to arrest the parolee) from making the determination whether reasonable grounds exist for the revocation of parole, noting that "the *officer directly involved in making recommendations cannot always have complete objectivity in evaluating them*" (emphasis added).

Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. Combination of investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias in administrative adjudication. See Withrow v. Larkin, 421 U.S. 35 (1975), where the Court said:

> It is . . . very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure . . . does not violate due process of law. We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around. . . .
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> Here, the Board stayed within the accepted bounds of due process. Having investigated, it issued findings and conclusions asserting the commission of certain acts, and ultimately concluding that there was probable cause to believe that appellee had violated the statutes.

3. Particular Applications

a. Takings of Property

[C29] "[P]roperty may not be taken for public use without reasonable notice of the proceedings authorized for its taking and without reasonable opportunity to be heard

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> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. Here, if the Board now proceeded after an adversary hearing to determine that appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing.
>
> The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem, and that they relate to the same issues, does not result in a procedural due process violation. Clearly, if the initial view of the facts based on the evidence derived from non-adversarial processes, as a practical or legal matter, foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised. But, in our view, that is not this case.
>
> That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation does not, of course, preclude a court from determining, from the special facts and circumstances present in the case before it, that the risk of unfairness is intolerably high.

Id. at 56–58.

"*Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute,* in the absence of a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances." *See* Hortonville Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976) (emphasis added). In that case, the Court found that School Board members, could, consistent with the Due Process Clause of the Fourteenth Amendment, dismiss teachers engaged in a strike prohibited by state law. More specifically, the Court held that the Board's prior role as collective bargaining agent for the school district did not disqualify it to decide that the public interest in maintaining uninterrupted classroom work required that teachers striking in violation of state law be discharged, noting that that the Board members did not have the kind of personal or financial stake in the decision that might create a conflict of interest, and there was nothing in the record to support charges of personal animosity. *Id.* at 491–93.

"Where an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to conduct a *de novo* review of all factual and legal issues." *See* Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 618 (1993), *citing* Marshall v. Jerrico, Inc., 446 U.S. 238 (1980). In *Jerrico*, the Court emphasized the *distinction between adjudication and enforcement.* The Court was faced with a federal agency administrator who determined violations of a child labor law and assessed penalties under the statute. Sums collected as civil penalties were returned to the Employment Standards Administration (ESA) of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties. The Court concluded that the administrator could not be held to the high standards required of those "whose duty

as to substantial matters of right affected by the taking."[86] Thirty days' notice by publication of the condemnation of the land for a public highway has been thought to be sufficient.[87] But notice of condemnation proceedings published in a local newspaper is an inadequate means of informing a landowner "whose name was known to the city and was on the official records."[88] Similarly, publication in a newspaper and posted notices

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it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding." *Id.* at 250. Of the administrator there, the Court said: "He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff. . . . It is the administrative law judge, not the assistant regional administrator, who performs the function of adjudicating child labor violations." *Id.* at 247–48. The Court went on to note:

> Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, . . . and similar considerations have been found applicable to administrative prosecutors as well. Prosecutors need not be entirely neutral and detached. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. . . .
>
> We do not suggest . . . that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. In appropriate circumstances, the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. . . . Moreover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. . . . *A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision, and, in some contexts, raise serious constitutional questions. . . . But the strict requirements of neutrality cannot be the same for administrative prosecutors as for judges.*

Id. at 248–50 (emphasis added). Further, the Court found that it was unnecessary in that case to determine with precision what limit there might be on a financial or personal interest of one who performed a prosecutorial function, for "the influence alleged to impose bias is exceptionally remote. No governmental official stands to profit economically from vigorous enforcement of child labor provisions. . . . Nor is there a realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts. . . . [It] is plain that the enforcing agent is in no sense financially dependent on the maintenance of a high level of penalties. Furthermore, since it is the national office of the ESA, and not any assistant regional administrator, that decides how to allocate civil penalties, such administrators have no assurance that the penalties they assess will be returned to their offices at all." *Id.* at 250–51.

"There is a presumption of honesty and integrity in those serving as administrative adjudicators. . . . Without a showing to the contrary, state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *See* Withrow v. Larkin, 421 U.S. 35, 47, 55 (1975).

86 North Laramie Land Co. v. Hoffman, 268 U.S. 276, 282–83 (1925). By contrast, "the necessity and expediency of the taking of property for public use are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." *Id.* at 284.

87 *Id.* at 283–84.

88 Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956).

are inadequate to apprise a property owner of condemnation proceedings when "his name and address were readily ascertainable from both deed records and tax rolls."[89]

[C30] The estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury.[90] It is thus settled that "there is no constitutional right to a jury in eminent domain proceedings."[91] But with respect to a regulatory takings claim under 42 U.S.C. Section 1983, which provides relief for invasions of rights protected under federal law, the Court has held that in actions at law otherwise within the purview of the Seventh Amendment, the issue whether a landowner has been deprived of all economically viable use of his property is for the jury, since it is predominantly factual. Further, although the question whether a land use decision substantially advances legitimate public interests is probably best understood as a mixed question of fact and law, the narrow question whether, when viewed in light of the context and history of the development application process, a city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications is "essentially fact-bound in nature," and thus may be properly submitted to a jury.[92]

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89 Schroeder v. New York City, 371 U.S. 208, 210 (1962).

90 Bauman v. Ross, 167 U.S. 548, 593 (1897).

91 United States v. Reynolds, 397 U.S. 14, 18 (1970). Similarly, the Due Process Clause of the Fourteenth Amendment does not require a jury trial in state condemnation proceedings. *See, e.g.*, Dohany v. Rogers, 281 U.S. 362, 369 (1930).

Where a commission is appointed under federal statute to determine the issue of just compensation in eminent domain proceedings, "there is danger that commissioners, unlike juries, may use their own expertise, and not act as a deliberative body applying constitutional standards. A jury, until it retires, sits under the direct supervision of the judge, who rules on the admissibility of evidence, who sees that witnesses are properly qualified as experts, and who polices the entire hearing, keeping it within bounds. Then, in due course, the judge instructs the jury on the law, answering any inquiries its members may have on the law. The jury is under surveillance from start to finish, and subject to judicial control. Hence, its general verdict that the land is worth so many dollars is not overturned for lack of particularized findings. A judge who uses commissioners, however, establishes a tribunal that may become free-wheeling, taking the law from itself, unless subject to close supervision. The first responsibility of the District Court, apart from the selection of responsible commissioners, is careful instruction of them on the law. But the instructions should explain with some particularity the qualifications of expert witnesses, the weight to be given other opinion evidence, competent evidence of value, the best evidence of value, illustrative examples of severance damages, and the like. The commissioners should be instructed as to the manner of the hearing and the method of conducting it, of the right to view the property, and of the limited purpose of viewing. They should be instructed on the kind of evidence that is inadmissible, and the manner of ruling on it. . . . [They are also] required to state not only the end result of their inquiry, but the process by which they reached it," by revealing the reasoning they use in deciding on a particular award. *See* United States v. Merz, 376 U.S. 192, 197–99 (1964).

92 Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720–21 (1999). This Seventh Amendment holding was limited in various respects. The Court noted that it did not address the jury's role in an ordinary inverse condemnation suit. The action in that case had been brought under 42 U.S.C. Section 1983, "a context in which the jury's role in vindicating constitutional rights has long been recognized by the federal courts. A federal court, moreover, cannot entertain a takings claim under [42 U.S.C. Section] 1983 unless or until the complaining landowner has been denied an adequate post-deprivation remedy." The Court, thus, did not attempt "a precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate governmental interests." *Id.* at 721–22.

b. Pre-Judgment Attachments—Civil Forfeitures

[C31] Beginning with *Sniadach*, the Court "has consistently held that constitutional requirements of due process apply to garnishment and pre-judgment attachment procedures whenever officers of the State act jointly with a creditor in securing the property in dispute."[93] In *Sniadach*, "the Court struck down a Wisconsin statute that permitted a creditor to effect pre-judgment garnishment of wages without notice and prior hearing to the wage earner."[94] *Fuentes* likewise "found a Due Process violation in state replevin provisions that permitted a secured installment seller to repossess the goods sold, through an *ex parte* application to a court clerk and the posting of a bond."[95] In *North Georgia Finishing*, "the Court again invalidated an *ex parte* garnishment statute that not only failed to provide for notice and prior hearing, but that also failed to require a bond, a detailed affidavit setting out the claim, the determination of a magistrate, or a prompt post-deprivation hearing."[96] Conversely, in *Mitchell v. W. T. Grant*, the Court upheld a Louisiana *ex parte* procedure allowing a lienholder to have disputed goods sequestered. *Mitchell*, however, carefully noted that *Fuentes* had been decided against a sufficiently different factual and legal background. "Those differences included Louisiana's provision of an immediate post-deprivation hearing along with the option of damages; the requirement that a judge, rather than a clerk, determine that there is a clear showing of entitlement to the writ; the necessity for a detailed affidavit; and an emphasis on the lienholder's interest in preventing waste or alienation of the encumbered property."[97]

[C32] *Doehr* involved a state statute authorizing pre-judgment attachment of real estate, without prior notice or hearing, upon the plaintiff's verification that there was probable cause to sustain the validity of his claim. Petitioner DiGiovanni applied to the state superior court for such an attachment on respondent Doehr's home in conjunction with a civil action for assault and battery that he was seeking to institute against Doehr in the same court. The judge found probable cause and ordered the attachment. Application of the *Mathews* factors demonstrated that the statute, as applied to that case, violated due process. First, the interests affected were significant for the property owner, "since attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity

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93 Lugar v. Edmondson Oil Co., 457 U.S. 922, 932–33 (1982).

94 *See* Connecticut v. Doehr, 501 U.S. 1, 9 (1991), *discussing* Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969).

95 *See* Connecticut v. Doehr, 501 U.S. 1, 9 (1991), *discussing* Fuentes v. Shevin, 407 U.S. 67 (1972). *Fuentes* involved kitchen appliances and household furniture. Under the challenged statute, the officer seizing the property should keep it for three days. During that period, the defendant could reclaim possession by posting his own security bond for double the property's value, in default of which the property was transferred to the applicant for the writ, pending a final judgment in the underlying repossession action. That the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause. As the Court noted "The Fourteenth Amendment draws no bright lines around three-day, ten-day, or 50-day deprivations of property." *Id.* at 86. Because the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment.

96 *See* Connecticut v. Doehr, 501 U.S. 1, 10 (1991), *discussing* N. Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601, 606–08 (1975).

97 *See* Connecticut v. Doehr, 501 U.S. 1, 10 (1991), *discussing* Mitchell v. W. T. Grant Co., 416 U.S. 600, 615–18 (1974).

loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause. . . . [And] even the temporary or partial impairments to property rights that such encumbrances entail are sufficient to merit due process protection." Second, the statute presented too great a risk of erroneous deprivation under any of the suggested interpretations of the "probable cause" requirement. "Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or, in the case of a mere good faith standard, even when the complaint failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these situations is self-evident, and too great to satisfy the requirements of due process absent any countervailing consideration." Moreover, "[e]ven if the provision requires the plaintiff to demonstrate, and the judge to find, probable cause to believe that judgment will be rendered in favor of the plaintiff, the risk of error was substantial in this case. [T]he judge could make no realistic assessment concerning the likelihood of an action's success based upon the one-sided, self-serving, and conclusory submissions [in the complaint]. . . . Unlike determining the existence of a debt or delinquent payments, the issue does not concern ordinarily uncomplicated matters that lend themselves to documentary proof." The state pointed out that its statute provided an expeditious post-attachment adversary hearing, notice for such a hearing, judicial review of an adverse decision, and a double damages action if the original suit was commenced without probable cause. "Similar considerations were present in *Mitchell*, where [the Court] upheld Louisiana's sequestration statute despite the lack of predeprivation notice and hearing. But in *Mitchell*, the plaintiff had a vendor's lien to protect, the risk of error was minimal because the likelihood of recovery involved uncomplicated matters that lent themselves to documentary proof . . . and plaintiff was required to put up a bond. None of these factors diminishing the need for a predeprivation hearing is present in this case. It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented." Finally, the Court concluded "that the interests in favor of an *ex parte* attachment, particularly the interests of the plaintiff, are too minimal to supply such a consideration here. Plaintiff had no existing interest in Doehr's real estate when he sought the attachment. His only interest in attaching the property was to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action. Yet there was no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment. Our cases have recognized such a properly supported claim would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected. . . . Absent such allegations, however, the plaintiff's interest in attaching the property does not justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery."[98]

[C33] The Court also has examined the constitutionality, under due process principles, of *ex parte* seizures of forfeitable property. *Calero-Toledo* held that Puerto Rico could

[98] Connecticut v. Doehr, 501 U.S. 1, 11–16 (1991). Although a majority of the Court did not reach the issue, four Justices held that due process "also requires the plaintiff to post a bond or other security in addition to requiring a hearing and showing of some exigency." *Id.* at 18.

seize a yacht subject to civil forfeiture (pursuant to Puerto Rican statutes providing for forfeiture of vessels used for unlawful purposes, even if the owner was neither involved in nor aware of the act of the lessee of the vessel which resulted in the forfeiture), without affording prior notice or hearing. "Central to [the Court's] analysis was the fact that a yacht was the 'sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.' . . . The ease with which an owner could frustrate the Government's interests in the forfeitable property created a special need for very prompt action that justified the postponement of notice and hearing until after the seizure."[99]

[C34] Conversely, *Good* held that the government must afford the owner of a house, subject to forfeiture as property used to commit or to facilitate commission of a federal drug offense, notice and a hearing before seizing the property. One's "right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance. . . . The seizure deprived Good of valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents. . . . The practice of *ex parte* seizure, moreover, creates an unacceptable risk of error. [Besides,] real property, . . . by its very nature, can be neither moved nor concealed. . . . If there is evidence, in a particular case, that an owner is likely to destroy his property when advised of the pending action, the Government may obtain an *ex parte* restraining order, or other appropriate relief, upon a proper showing in district court."[100]

c. Damage to a Person's Reputation

[C35] Government action that defames a person's reputation might infringe his constitutionally protected liberty.[101] "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential," according to the Due Process Clause.[102] An official characterization of an individual as "a person who by excessive drinking produces certain conditions or exhibits specified traits, such as exposing himself or family to want

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[99] *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 52 (1993), *discussing* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678–79 (1974). In *Calero-Toledo*, the Court gave another two reasons for upholding the summary forfeiture at issue: "fostering the public interest in preventing continued illicit use of the property," and the fact that "the seizure is not initiated by self-interested private parties." *Id.* at 679.

[100] United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–58 (1993). In *Degen v. United States*, 517 U.S. 820 (1996), the Court held that a district court may not strike the filings of a claimant in a forfeiture suit and grant summary judgment against him for failing to appear in a related criminal prosecution.

[101] In relation to private defamatory actions and First Amendment protection, the Court has acknowledged the "important social values which underlie the law of defamation" and recognized that "society has a pervasive and strong interest in preventing and redressing attacks upon reputation," (*see* Milkovich v. Lorain Journal Co., 497 U.S. 1, 22 (1990)), since the right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than "the basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty" (*see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974)).

[102] Wisconsin v. Constantineau, 400 U.S. 433, 436–37 (1971). *See also* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 573 (1972).

or becoming dangerous to the peace of the community," which is made public, through "posting," pursuant to a state statute allowing the prohibition of sale of intoxicating liquors to such persons, produces such a stigma or badge of disgrace, that procedural due process requires the previous guarantees.[103]

[C36] However, the Court has pointed out that "mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest."[104] In *Paul v. Davis*, a photograph of respondent bearing his name was included in a "flyer" of "active shoplifters," after he had been arrested on a shoplifting charge. At the time the flyer was circulated, Davis was employed as a photographer by two newspapers. The executive director of photography for these two newspapers informed respondent that, although he would not be fired, he "had best not find himself in a similar situation" in the future. After the charge against Davis had been dismissed, he brought this action under 42 U.S.C. Section 1983 against the police chiefs, who had distributed the flyer to area merchants, alleging that their action under color of law deprived him of his constitutional rights. A five-member majority of the Court rejected his claim, holding that "reputation alone, apart from some *more tangible interests* such as employment, is [n]either 'liberty' [n]or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause."[105] Such interests appear to involve "a right or status previously recognized by state law that was distinctly altered or extinguished,"[106] like children's right to attend public school, one's right to purchase or obtain liquor in common with the rest of citizenry, or a public employee's right not to lose his job. On the contrary one's future employment prospects do not constitute such tangible interest.[107]

[C37] The Court has also dealt with the question of injury to the reputation of individuals under administrative investigation into possible violations of the law in fields such as labor-management relations or stock market exchanges. The Court has ruled that there the Due Process Clause does not come into play, even if those being investigated are subject to public opprobrium, as long as the administrative agency has a "purely investigative and factfinding" function and, thus, does not adjudicate, does not hold trials or determine anyone's civil or criminal liability, does not issue orders, nor does it indict, punish, or impose any legal sanctions and, in short, "does not and cannot take any affirmative action which will affect an individual's legal rights," but "the only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action."[108] The Due Process Clause is not implicated under such circumstances, because an administrative investigation adjudicates no legal rights.[109]

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[103] Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

[104] *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 6–7 (2003), referring to the Court's holding in *Paul v. Davis*, 424 U.S. 693 (1976). *See also* Siegert v. Gilley, 500 U.S. 226 (1991).

[105] Paul v. Davis, 424 U.S. 693, 701 (1976) (emphasis added).

[106] *Id.* at 711.

[107] *Siegert v. Gilley*, 500 U.S. 226, 233–34 (1991), involving petitioner's inability to obtain appropriate employment, because he was denied credentials by the federal hospital at which he was working.

[108] Hannah v. Larche, 363 U.S. 420, 441 (1960). The Court noted that any adverse consequences to those being investigated, were purely conjectural, and, in any case, were merely collateral, and "not the result of any affirmative determinations made by the Commission." *Id.* at 443.

[109] Sec. & Exch. Comm'n v. Jerry T. O' Brien, Inc., 467 U.S. 735, 742 (1984).

Nevertheless, due process comes into play if the executive investigative agency "is concerned only with exposing violations of criminal laws by specific individuals," is empowered "to find named individuals guilty . . . and to brand them as criminals in public," and, in short, "exercises a function very much akin to making an official adjudication of criminal culpability."[110]

d. Deprivation of Public or Private Employment—Exclusion from a Professional Activity

[C38] Public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure[111] and cannot be fired without due process, which requires existence of some pre-termination opportunity to respond.[112] In *Arnett*, six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based, could respond orally and in writing and present rebuttal affidavits, and was entitled to an evidentiary trial-type hearing at the appeal stage of the proceeding."[113] And *Loudermill* held that "a public employee dismissable only for cause was entitled to a limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing within a reasonable period of time."[114] Stressing that the pre-termination hearing "should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," the Court decided, in view of "the government's interest in quickly removing an unsatisfactory employee," that pre-termination process need only include "oral or written notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story."[115]

[C39] In *Gilbert v. Homar*, the Court held that a state does not violate the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending, without pay, a tenured policeman who has been arrested by state police and charged with a drug felony. Regarding the first of the *Mathews* factors, the Court

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110 Jenkins v. McKeithen, 395 U.S. 411, 427–28 (1969). There three members of the Court, in their plurality opinion, found the Act involved unconstitutional as severely limiting the right of a person being investigated to confront and cross-examine the witnesses against him, where as two members of the Court, concurring in the judgment, considered that the statute in question had established a scheme for a nonjudicial tribunal to charge, try, convict, and punish people without any of the procedural safeguards that the Bill of Rights provides.

111 *See, in extenso*, para. C6.

112 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).

113 Arnett v. Kennedy, 416 U.S. 134 (1974).

114 *See* Gilbert v. Homar, 520 U.S. 924, 929 (1997), *discussing* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

115 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545–46 (1985). The Court's holding rested in part on the provisions in state law for a full post-termination hearing. Loudermill asserted, as a separate constitutional violation, that his administrative proceedings had taken too long. The Court accepted that "at some point, a delay in the post-termination hearing would become a constitutional violation," but rejected the complaint, noting that a nine-month adjudication is not unconstitutionally lengthy *per se*, and that Loudermill offered no indication that his wait had been unreasonably prolonged, other than the fact that it had taken nine months. *Id.* at 546–47.

noted that, "[s]o long as a suspended employee receives a sufficiently prompt post-suspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all." "On the other side of the balance, the State has a significant interest in immediately suspending employees charged with felonies who occupy positions of public trust and visibility, such as police officers." Relatedly, the Constitution does not require the government "to give an employee charged with a felony paid leave at taxpayer expense." The remaining *Mathews* factor was the most important in that case: the purpose of a pre-suspension hearing—to assure that there are reasonable grounds to support the suspension without pay—"had already been assured by the arrest and the filing of charges."[116]

[C40] In *McElroy*, the Court held that no hearing should be provided to a cook employed by a private concessionaire of the Navy before the government revoked her security clearance. The summary exclusion of a civilian cook from a naval gun factory was within the "unfettered control" of the federal government in order "to manage the internal operation of an important federal military establishment."[117]

[C41] In *Barchi*, a horse trainer's license was suspended for 15 days after a horse he trained was discovered to have had drugs in its system during a race. The state regulatory scheme raised a rebuttable presumption that the trainer either administered the drug or was negligent in protecting against such an occurrence. In considering the administrative scheme, the Court first concluded that the state acted within the bounds of due process in suspending the trainer without a pre-suspension hearing. Although the magnitude of a trainer's interest in avoiding suspension was substantial, the state also had "an important interest in assuring the integrity of racing carried on under its auspices. In these circumstances, . . . the State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging. In such circumstances, the State's interest in preserving the integrity of the sport and in protecting the public from harm becomes most acute. At the same time, there is substantial assurance that the trainer's interest is not being baselessly compromised." In the case at hand, "[a]s proof that Barchi's horse had been drugged, the State adduced the assertion of its testing official, who had purported to examine Barchi's horse pursuant to prescribed testing procedures. . . . At the interim suspension stage, an expert's affirmance, although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements. As for the trainer's culpability, the inference, predicated on the fact of drugging, that the trainer had been at least negligent was accepted by the Court as defensible. However, the Court concluded that the scheme violated due process, because it did not assure a prompt post-suspension hearing, "one that would proceed and be concluded without appreciable delay."[118]

[C42] *Mallen* concerned the constitutionality of a statutory provision that authorized the Federal Deposit Insurance Corporation (FDIC) to suspend from office an indicted

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[116] Gilbert v. Homar, 520 U.S. 924, 932–34 (1997). That there might have been discretion not to suspend did not mean that Homar had to be given the opportunity to persuade officials of his innocence before the making of the decision. *Id.* at 934–35.

[117] Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 896 (1961).

[118] Barry v. Barchi, 443 U.S. 55, 63–66 (1979).

official of a federally insured bank. The Court held that the bank official was not entitled to a pre-suspension hearing, since the important governmental interest in protecting depositors and maintaining public confidence in the banking institutions, coupled with the fact that a grand jury had determined that there was probable cause to believe that the official had committed a felony, justified prompt action before a suspension hearing was held. Further, the bank official was accorded due process by a notice and hearing procedure that would render a decision within 90 days of the suspension.[119]

e. Suspension of a Driver's License[120]

[C43] At issue in *Love* was a statute permitting the summary revocation of the license of a repeat traffic offender on the strength of a cumulative record of traffic convictions and suspensions. The Court stressed that the appellee had not contested the factual basis for his license revocation, and had not contested the procedures followed in securing his previous convictions. Instead, the *Love* appellee had merely asserted a right to appear in person in advance to ask for leniency. Under these circumstances, the Court held that summary suspension was permissible, for the "appellee had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the decision was based."[121]

[C44] *Mackey v. Montrym* held that the Massachusetts statute mandating suspension of a driver's license because of his refusal to take a breath-analysis test, upon arrest for driving under the influence of intoxicating liquor, did not violate the Due Process Clause

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[119] Fed. Deposit Ins. Corp. v. Mallen v. Mallen, 486 U.S. 230, 243–47 (1988). The fact that the criminal proceedings might be concluded more promptly than the FDIC proceeding was irrelevant to the due process determination, since an acquittal would require that the suspension order be vacated, while a conviction would merely strengthen the case for maintaining the suspension. *Id.* at 247.

Brock v. Roadway Express, Inc., 481 U.S. 252 (1987), involved a federal statute protecting employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that did not comply with applicable state and federal safety regulations or for filing complaints alleging such non-compliance. The statute provided for an initial investigation of an employee's discharge by the Secretary of Labor and, upon a finding of reasonable cause to believe that the employee had been discharged in violation of the Act, required the Secretary to issue an order directing the employer to reinstate the employee. The employer could then request an evidentiary hearing and a final decision from the Secretary, but this request did not operate to stay the preliminary order of reinstatement. The Court held that (1) the statute unconstitutionally deprived the employer of Fifth Amendment procedural due process by failing to provide him with the substance of the evidence supporting the employee's complaint; and (2) minimum due process in this context did not require employer confrontation and cross-examination of witnesses before preliminary reinstatement, where a prompt post-reinstatement evidentiary hearing was available. Four Justices held that due process required that the employer have a pre-reinstatement opportunity to submit a written response and an opportunity to meet with the investigator and present statements from rebuttal witnesses.

[120] *See also* para. C21.

[121] Dixon v. Love, 431 U.S. 105, 113–14 (1977). The Court accepted the possibility of clerical error, but noted that written objection would bring a matter of that kind to the attention of the Secretary of State, who had the authority to suspend a driver's license.

of the Fourteenth Amendment. In undertaking the first step of the *Mathews* balancing process, the Court's concern centered on the duration of the deprivation of the driver's property interest in continued possession and use of his license. Under the Massachusetts statute, the license of a driver who refused to submit to a breath-analysis test was suspended pending the outcome of a hearing that he was entitled to demand, and the suspension was authorized for a maximum of only 90 days. As to the second stage of the *Mathews* inquiry, the Court found that the risk of erroneous observation or deliberate misrepresentation by the reporting police officer of the facts forming the basis for the suspension was insubstantial. Moreover, it was significant that Montrym did not dispute that probable cause existed for his arrest, or that he had initially refused to take the breath-analysis test at the arresting officer's request. Finally, the compelling interest in highway safety justified Massachusetts in making a summary suspension effective pending the outcome of the available prompt post-suspension hearing. Such interest was substantially served in several ways by the summary suspension. "First, the very existence of the summary sanction of the statute serve[d] as a deterrent to drunken driving. Second, it provide[d] strong inducement to take the breath-analysis test, and thus effectuate[d] the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings. Third, in promptly removing such drivers from the road, the summary sanction of the statute contribute[d] to the safety of public highways. . . . A pre-suspension hearing would substantially undermine the state interest in public safety by giving drivers significant incentive to refuse the breath-analysis test and demand a pre-suspension hearing as a dilatory tactic. Moreover, the incentive to delay arising from the availability of a pre-suspension hearing would generate a sharp increase in the number of hearings sought, and therefore impose a substantial fiscal and administrative burden on the Commonwealth."[122]

f. Suspension or Dismissal of Students from Public Schools

[C45] Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and "due process requires, in connection with a suspension of ten days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school. There need be no delay between the time 'notice' is given and

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[122] Mackey v. Montrym, 443 U.S. 1, 12–19 (1979).

Illinois v. Batchelder, 463 U.S. 1112 (1983) (*per curiam*) involved a state statute, under which, if a driver, arrested for driving while intoxicated, refused to take a breath-analysis test, the arresting officer filed with the clerk of the appropriate circuit court an affidavit that included the statement that the officer had "reasonable cause to believe the person was driving the motor vehicle while under the influence of intoxicating liquor." The clerk should then notify the arrestee that his license would be suspended unless he requested a hearing within a specified time. The Court held that the Constitution did not require arresting officers to recite in an affidavit the specific and concrete evidentiary matters constituting "the underlying circumstances which provided him with a reasonable belief that the arrested person was driving under the influence of intoxicating liquor." The driver's right to a hearing, before he might be deprived of his license for failing to submit to a breath-analysis test, accorded him all of, and probably more than, the process that the federal Constitution assured.

the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. . . . Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. [H]owever, . . . there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable."[123]

[C46] In *Horowitz*, respondent, a student at a state medical school, after being fully informed of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment, was dismissed by the school during her final year of study for failure to meet academic standards. The Court stressed that "[a]cademic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact finding proceedings to which [it] has traditionally attached a full hearing requirement. In *Goss*, the school's decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could, under such circumstances provide a meaningful hedge against erroneous action. The decision to dismiss respondent, by comparison, rested on an academic judgment which is, by its nature, more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information, and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." Under these circumstances, the Court declined "to ignore the historic judgment of educators, and thereby formalize the academic dismissal process by requiring a hearing. The educational process is not, by nature, adversary; instead, it centers around a continuing relationship between faculty and students, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent substitute. In *Goss*, the Court concluded that the value of some form of hearing in a disciplinary context outweighs any resulting harm to the academic environment. Influencing this conclusion was clearly the belief that disciplinary proceedings, in which the teacher must decide whether to punish a student for disruptive or insubordinate behavior, may automatically bring an adversary flavor to the normal student-teacher relationship. The same conclusion does not follow in the academic context." The Court thus held that "a hearing may be useless or harmful in finding out the truth as to scholarship."[124]

g. Termination of Welfare or Disability Benefits[125]

[C47] *Goldberg* held that a state that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior

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123 Goss v. Lopez, 419 U.S. 565, 581–83 (1975).

124 Bd. of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78, 89–90 (1978).

125 The procedural component of the Due Process Clause does not "impose a constitu-

to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . Thus, the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.
>
> Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to promote the general welfare. . . . The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end. . . .
>
> The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. . . . Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. . . .
>
> [Nevertheless,] the pre-termination hearing need not take the form of a judicial or quasi-judicial trial. . . . [T]he statutory "fair hearing" will provide the recipient with a full administrative review. Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. [In addition,] both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, they are used to dealing with one another informally, and some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to certain procedural safeguards, adapted

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tional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *See* Atkins v. Parker, 472 U.S. 115, 129 (1985), *quoting* Richardson v. Belcher, 404 U.S. 78, 81 (1971).

> to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. . . .
>
> [Due process thus requires] that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases. . . .
>
> Further, the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.
>
> Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. . . . To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, . . . though his statement need not amount to a full opinion, or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. . . . [P]rior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decisionmaker. He should not, however, have participated in making the determination under review.[126]

[C48] In *Mathews v. Eldridge*, the Court found that the needs of Social Security disability recipients were not of comparable urgency, and, moreover, that existing pre-termination procedures, based largely on written medical assessments, were likely to be more objective and evenhanded than typical welfare entitlement decisions. In view of "the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level." Moreover, "a medical assessment of the worker's physical or mental condition is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decision making process. . . . By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists, concerning a subject whom they have personally examined. . . . To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in *Goldberg*." And requiring an evidentiary hearing upon demand in all cases prior to the termination of disability benefits would entail a substantial addi-

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126 Goldberg v. Kelly, 397 U.S. 254, 264–71 (1970).

tional cost in terms of money and administrative burden. Under these considerations, the Court concluded that an evidentiary hearing is not required prior to the termination of disability benefits.[127]

h. Right to Notice and Hearing in the Civil Trial Context

[C49] "[T]he Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."[128] The Court has read the "property" component of the Fifth Amendment's Due Process Clause to impose constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.[129] Similarly, "the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed rights.'[130] Indeed, due process requires that, "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[131]

[C50] *Mullane* confronted a challenge to a state law that provided for the judicial settlement of common trust fund accounts by fiduciaries, upon notice given through newspaper publication. The effect of the judicial settlement was to terminate "every right which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund." This, the Court said, worked to deprive the beneficiaries of property by, among other things, "cut[ting] off their rights to have the trustee answer for negligent or illegal impairments of their interests." Such a result was impermissible unless constitutionally adequate notice of the petition for a judicial settlement of accounts was established in accordance with the Fourteenth Amendment.[132]

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[127] Mathews v. Eldridge, 424 U.S. 319, 342–49 (1976).

[128] Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982).

[129] *Id.* at 429, *quoting* Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958).

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, . . . or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication. . . . What the Constitution does require is 'an *opportunity*, . . . granted at a meaningful time and in a meaningful manner,' . . . 'for a hearing appropriate to the nature of the case.' . . . The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *See* Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

[130] Logan v. Zimmerman Brush Co., 455 U.S. 422, 429–30 (1982), *quoting* Boddie v. Connecticut, 401 U.S. 371, 380 (1971).

[131] Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

[132] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 311–15 (1950).

Similarly, in *Covey v. Town of Somers*, 351 U.S. 141 (1956), the Court held that notice by publication in a foreclosure action, even though sufficient to provide a normal person with an opportunity for a hearing, was not sufficient where the defendant was a known incompetent.

In *Lehr v. Robertson*, 463 U.S. 248, 265 (1983), the Court held that a putative biological

[C51] In *Nelson v. Adams*, OCP Corporation sued Adams USA, claiming patent infringement. The district court eventually dismissed OCP's claim and ordered OCP to pay Adams' costs and attorney fees. Adams feared that OCP might be unable to pay the fee award and therefore sought a means to recover from Nelson, president and sole shareholder of OCP, in his individual capacity. In pursuit of that objective, Adams moved under the Federal Rules of Civil Procedure to amend its pleading to add Nelson as a party; Adams also asked the court, to amend the fee award. The district court granted the motion in full, simultaneously making Nelson a party and subjecting him to judgment. The court of appeals affirmed. The Court held that the district court had erred in amending the judgment immediately upon permitting amendment of the pleading, for due process required that Nelson "be given an opportunity to respond and contest his personal liability for the award after he was made a party and before the entry of judgment against him."[133]

i. Prisoners' Liberty Interests[134]

[C52] Cases involving parole revocation implicate due process. In *Morrissey*, the Court noted that "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." Hence, the state cannot revoke parole without some orderly process. Nevertheless, "[g]iven the previous conviction and the proper imposition of conditions, . . . the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial. . . . What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts, and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." First, due process requires, in this context, "that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. . . . Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. . . . [T]he determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case." The parolee should receive prior notice of the hearing, its purpose, and the alleged violations. "At the hearing, the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be sub-

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father who had never established an actual relationship with his child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother, noting that "[t]he Constitution does not require either the trial judge or a litigant to give special notice [of the adoption proceeding] to nonparties who are presumptively capable of asserting and protecting their own rights."

133 Nelson v. Adams USA, Inc., 529 U.S. 460, 463 (2000).

134 *See also* para. D30 (*involuntary transfer to a state mental hospital*); para. D31 (*involuntary administration of psychotropic drugs*); para. B56 (*right to access to courts*).

jected to confrontation and cross-examination. . . . Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. . . . [The officer] should state the reasons for his determination and indicate the evidence he relied on." Second, the "revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months . . . would not appear to be unreasonable." Minimum requirements of due process at the revocation hearing 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 reason for revoking parole."[135]

[C53] *Gagnon v. Scarpelli* concluded that the procedures outlined in *Morrissey* for parole revocation should also apply to probation revocation proceedings.[136] Further, the Court found "no justification for a new inflexible constitutional rule with respect to the requirement of counsel. . . . [T]he decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees. . . . Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record."[137]

[C54] In *Wolff*, Nebraska inmates challenged the decision of prison officials to revoke good time credits without adequate procedures. Inmates earned good time credits under a state statute that bestowed mandatory sentence reductions for good behavior, revo-

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[135] Morrissey v. Brewer, 408 U.S. 471, 482–89 (1972) (the Court did not "reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent"). *See also* Young v. Harper, 520 U.S. 143 (1997) (Oklahoma's "pre-parole conditional supervision program" found to differ from parole in name alone).

In *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357, 365–68 (1998), the Court held that the federal exclusionary rule does not bar the introduction, at parole revocation hearings, of evidence seized in violation of parolees' Fourth Amendment rights. *See also* para. G225.

[136] Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

[137] *Id.* at 790–91.

cable only for "flagrant or serious misconduct." The Court stressed that that the Due Process Clause itself does not create a liberty interest in credit for good behavior, but that the statutory provision created a liberty interest in a "shortened prison sentence" that resulted from good time credits. The Court, thus, articulated minimum procedures necessary to reach a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution." More specifically, noting that prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply, the Court held that: (1) "[W]ritten notice of the charges must be given to the disciplinary action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before" the prison's disciplinary body;" (2) "[T]here must be a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action;" (3) The inmate "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;"[138] (4) The inmate has no constitutional right to confrontation and cross-examination in prison disciplinary proceedings, "where prison disruption remains a serious concern;"[139] (5) Inmates have no right to retained or appointed counsel in such proceedings." "The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast, and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held." However, "[w]here an illiterate inmate is involved, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff."[140]

[C55] Inmates in *Meachum* sought injunctive relief, declaratory relief, and damages by reason of transfers from a Massachusetts medium security prison to a maximum security facility with substantially less favorable conditions. The transfers were ordered in the aftermath of arson incidents, for which the transferred inmates were thought to be responsible, and did not entail a loss of good time credits or any period of disciplinary confinement. The Court, first, rejected the notion "that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause." It then held that the Due Process Clause does not itself create a liberty interest in prisoners to be free from intra-

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[138] Prison officials are required to explain, in a limited manner, the reason why witnesses were not allowed to testify, "but that they may do so either by making the explanation a part of the 'administrative record' in the disciplinary proceeding or by presenting testimony in court if the deprivation of a 'liberty' interest is challenged because of that claimed defect in the hearing. In other words, the prison officials may choose to explain their decision at the hearing, or they may choose to explain it 'later.'" *See* Ponte v. Real, 471 U.S. 491, 497 (1985).

[139] Due process does not require written reasons for denying inmates the opportunity to confront or cross-examine adverse witnesses. *See* Baxter v. Palmigiano, 425 U.S. 308, 320–23 (1976).

[140] Wolff v. McDonnell, 418 U.S. 539, 556–70 (1974).

state prison transfers, since "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." The Court distinguished *Wolff* by noting that no Massachusetts law stripped officials of the discretion to transfer prisoners to alternate facilities "for whatever reason or for no reason at all."[141]

[C56] "Shortly after *Meachum*, the Court embarked on a different approach to defining state-created liberty interests. Because dictum in *Meachum* distinguished *Wolff* by focusing on whether state action was mandatory or discretionary, the Court in later cases laid ever greater emphasis on this dichotomy."[142] In *Greenholtz*, inmates alleged that they had been unconstitutionally denied parole. Their claim centered on a state statute that set the date for discretionary parole at the time the minimum term of imprisonment less good time credits expired. The statute ordered release of a prisoner at that time, unless one of four specific conditions were shown;[143] the parole board's decision, as defined by the statute, was necessarily subjective in part and predictive in part. The Court noted that there is no "constitutional or inherent right" to parole, but held that the statute's mandatory language—the use of the word "shall"—and the statutory presumption that parole release must be granted, unless one of four designated justifications for deferral was found, created a legitimate expectation of release, a liberty interest entitled to protection under the Due Process Clause.[144] "The Court thus held in *Greenholtz* that the presence of general or broad release criteria—delegating significant discretion to the decisionmaker—did not deprive the prisoner of the liberty interest in parole release created by the Nebraska statute. In essence, the Court made a distinction between two entirely distinct uses of the term discretion. In one sense of the word, an official has discretion when he or she 'is simply not bound by standards set by the authority in question.' . . . In this sense, officials who have been told to parole whomever they wish have discretion. In *Greenholtz*, the Court determined that a scheme awarding officials this type of discretion does not create a liberty interest in parole release. But the term discretion may instead signify that 'an official must use judgment in applying the standards set him [or her] by authority;' in other words, an official has discretion when the standards set by a statutory or regulatory scheme 'cannot be applied mechanically.' . . . The Court determined in *Greenholtz* that the presence of official discretion in this sense is not incompatible with the existence of a liberty interest in parole release, when release is *required* after the Board determines (in its broad discretion) that the necessary prerequisites exist."[145] Nevertheless, the state ultimately prevailed in that case, because the minimal process it had awarded the prisoners was deemed sufficient under the Fourteenth Amendment.[146]

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141 Meachum v. Fano, 427 U.S. 215, 224–28 (1976).

142 *See* Sandin v. Conner, 515 U. S. 472, 479 (1995)

143 The Nebraska statute involved in *Greenholtz* provided as follows: "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because: (a) There is a substantial risk that he will not conform to the conditions of parole; (b) His release would depreciate the seriousness of his crime or promote disrespect for law; (c) His release would have a substantially adverse effect on institutional discipline; or (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date."

144 Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 11–12 (1979).

145 *See* Bd. of Pardons v. Allen, 482 U.S. 369, 375–76 (1987), *discussing Greenholtz*.

146 Under Nebraska statutes, hearings were conducted in two stages to determine whether

[C57] "The Court made explicit in *Hewitt* what was implicit in *Greenholtz*. In evaluating the claims of inmates who had been confined to administrative segregation, it first rejected the inmates' claim of a right to remain in the general population as protected by the Due Process Clause, . . . [noting that] the Due Process Clause, standing alone, confers no liberty interest in freedom from state action taken 'within the sentence imposed.' It then concluded that the transfer to less amenable quarters for non-punitive reasons was ordinarily contemplated by a prison sentence. Examination of the possibility that the State had created a liberty interest by virtue of its prison regulations followed. Instead of looking to whether the State created an interest of 'real substance' comparable to the good time credit scheme of *Wolff*, the Court asked whether the State had gone beyond issuing mere procedural guidelines and had used 'language of an unmistakably mandatory character' such that the incursion on liberty would not occur 'absent specified substantive predicates.' . . . Finding such mandatory directives in the regulations before it, the Court decided that the State had created a protected liberty interest. It nevertheless, held, as it had in *Greenholtz*, that the full panoply of procedures conferred in *Wolff* were unnecessary to safeguard the inmates' interest and, if imposed, would undermine the prison's management objectives."[147]

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to grant or deny parole: initial review hearings and final parole hearings. Initial review hearings should be held at least once a year for every inmate. At the first stage, the Board of Parole examined the inmate's pre-confinement and post-confinement record and held an informal hearing; the Board interviewed the inmate and considered any letters or statements presented in support of a claim for release. If the Board determined that the inmate was not yet a good risk for release, it denied parole, stating why release was deferred. If the Board determined that the inmate was a likely candidate for release, a final hearing was scheduled, at which the inmate could present evidence, call witnesses, and be represented by counsel. A written statement of the reasons should be given, if parole was denied. The court of appeals required that a formal hearing be held for every inmate eligible for parole and that every adverse parole decision include a statement of the evidence relied upon by the Board. The Court reversed this holding. First, the formal hearing "would provide, at best, a negligible decrease in the risk of error. . . . [Since the Board of Parole's decision at its initial review hearing] is one that must be made largely on the basis of the inmate's file, this procedure adequately safeguards against serious risks of error, and thus satisfies due process. . . . [Second,] nothing in the due process concepts . . . requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests its discretionary determination to deny release. The Board communicates the reason for its denial as a guide to the inmate for his future behavior. . . . To require the parole authority to provide a summary of the evidence would tend to convert the process into an adversary proceeding and to equate the Board's parole release determination with a guilt determination. . . . The Nebraska procedure affords an opportunity to be heard, and, when parole is denied, it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances. "*See* Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 14–16 (1979).

147 *See* Sandin v. Conner, 515 U.S. 472, 480 (1995), *discussing* Hewitt v. Helms, 459 U.S. 460, 468–72 (1983). In the latter case, the Court held that prison officials were obligated to engage only in an informal, non-adversary review of the information supporting inmates' administrative confinement.

In *Sandin v. Conner*, 515 U.S. 472, 480–81 (1995), the Court also made the following remarks: "In a series of cases following *Hewitt*, the Court wrestled with the language of intricate, often rather routine prison guidelines to determine whether mandatory language and substantive predicates created an enforceable expectation that the state would produce a particular outcome with respect to the prisoner's conditions of confinement. In *Olim v. Wakinekona*, 461 U.S. 238 (1983), the claimants identified prison regulations that required a particular kind

[C58] The Court abandoned *Hewitt's* methodology in *Sandin*. There, the Court found that *Hewitt* "has produced at least two undesirable effects." First, it creates disincentives for states to codify prison management procedures in the interest of uniform treatment, for states might avoid creation of "liberty" interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel. Second, the *Hewitt* approach had led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little off-setting benefit to anyone. Hence, it was contrary to the principle that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment. Such flexibility is especially warranted in the fine-tuning of the ordinary incidents of prison life. In light of these considerations, and following *Wolff, Sandin* recognized that states may, under certain circumstances, create liberty interests, which are protected by the Due Process Clause, but held that "these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . [148] nonetheless imposes *atypical and significant hardship* on the inmate in relation to the ordinary incidents of prison life."[149]

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of hearing before the prison administrator could, in his discretion, effect an inter-state transfer to another prison. Parsing the language of the regulation led the Court to hold that the discretionary nature of the transfer decision negated any state-created liberty interest. *Id.* at 249–50. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), dealt with regulations governing the visitation privileges of inmates. Asserting that a regulation created an absolute right to visitors absent a finding of certain substantive predicates, the inmates sought review of the adequacy of the procedures. . . . [T]he Court determined the regulation left visitor exclusion to the discretion of the officials, and refused to elevate such expectations to the level of a liberty interest. 490 U.S at 464–65."

148 *See, e.g.*, para. D30 (*transfer to mental hospital*), and para. D31 (*involuntary administration of psychotropic drugs*).

149 Sandin v. Conner, 515 U.S. 472, 483–84 (1995) (emphasis added). The Court concluded that Conner's *discipline in segregated confinement* did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest. The record showed that, at the time of Conner's punishment, "disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody. . . . Based on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him in disciplinary segregation for 30 days did not work a major disruption in his environment. . . . Nor [did] Conner's situation present a case where the State's action [would] inevitably affect the duration of his sentence. Nothing in [state] law require[d] the parole board to deny parole in the face of a misconduct record or to grant parole in its absence, even though misconduct [wa]s by regulation a relevant consideration. . . . The decision to release a prisoner rest[ed] on a myriad of considerations. And, the prisoner [wa]s afforded procedural protection at his parole hearing in order to explain the circumstances behind his misconduct record. The chance that a finding of misconduct [would] alter the balance [wa]s simply too attenuated to invoke the procedural guarantees of the Due Process Clause." The Court held, therefore, that neither the state prison regulation in question, nor the Due Process Clause itself, afforded Conner a protected liberty interest that would entitle him to the procedural protections set forth in *Wolff*. "The regime to which he was subjected as a result of the misconduct hearing was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life." *Id.* at 485–87. The dissenters found that Conner had a liberty interest, protected by the Fourteenth Amendment's Due Process Clause, in avoiding disciplinary confinement. Conner's prison punishment "effected a severe alteration in the conditions of his incarceration. . . . Disciplinary confinement as punishment

B. RIGHT OF ACCESS TO COURTS

1. In General[150]

[C59] The Court has recognized a constitutional right of access to courts, which "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."[151] The basis of this right is unsettled. Decisions of the Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause,[152] the First Amendment Petition

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for 'high misconduct' not only deprives prisoners of privileges for protracted periods; unlike administrative segregation and protective custody, disciplinary confinement also stigmatizes them and diminishes parole prospects." *Id.* at 488–89, 494.

In *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Court found that inmates had a constitutionally protected liberty interest in avoiding assignment at OSP, Ohio's maximum security prison with highly restrictive conditions, noting that "[f]or an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context." *Id.* at 223–24. Further, the Court held that the process by which Ohio classified prisoners for placement at OSP provided prisoners with sufficient protection to comply with the Due Process Clause. Under the challenged rules, a prison official conducted a classification review either upon entry into the prison system if the inmate had been convicted of certain offenses, e.g., organized crime, or during the incarceration if the inmate engaged in specified conduct, leading a prison gang. The rules also provided for a three-tier review process after a recommendation that an inmate be placed in OSP. Among other things, the inmate should receive notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal at a hearing, although he might not call witnesses. In addition, the inmate was invited to submit objections prior to the final level of review. Although a subsequent reviewer could overturn an affirmative recommendation for OSP placement at any level, the reverse was not true; if one reviewer declined to recommend OSP placement, the process terminated. Ohio also provided for a placement review within 30 days of an inmate's initial assignment to OSP, and annual review thereafter. *Id.* at 225–29.

An inmate seeking *commutation of a life sentence* has no protected liberty interest in release from lawful confinement. *See* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 461, 464 (1981). But it is incorrect to say that a prisoner has been deprived of all interest in his life before his execution. Thus, some minimal procedural safeguards apply to clemency proceedings, where the clemency decision is entrusted to executive discretion. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (concurring opinion of Justice O'Connor, with whom Souter, Ginsburg and Breyer, JJ., joined); *id.* at 290–93 (opinion of Justice Stevens). "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 289 (opinion of Justice O'Connor).

150 *See also* paras. B88 *et seq.* (*constitutional torts, sovereign immunity*).

151 Wolff v. McDonnell, 418 U.S. 539, 579 (1974).

152 Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907); Blake v. McClung, 172 U.S. 239, 249 (1898).

Clause,[153] the Fifth Amendment Due Process Clause,[154] and the Fourteenth Amendment Equal Protection[155] and Due Process Clauses.[156]

[C60] There are two categories of cases on denial of access to courts. "In the first are claims that systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time."[157] "Thus, in the prison-litigation cases, the relief sought may be a law library for a prisoner's use in preparing a case"[158] "or a reader for an illiterate prisoner, . . . or simply a lawyer."[159] "In 'denial-of-access' cases challenging filing fees that poor plaintiffs cannot afford to pay, the object is an order requiring waiver of a fee to open the courthouse door for desired litigation, such as direct appeals or federal habeas petitions in criminal cases,"[160] "or civil suits asserting family-law rights."[161] "In cases of this sort, the essence of the access claim is that official action is presently denying an opportunity to litigate for a class of potential plaintiffs. The opportunity has not been lost for all time, however, but only in the short term; the object of the denial-of-access suit, and the justification for recognizing that claim, is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed."[162] "The second category covers claims not in aid of a class of suits yet to be litigated, but of specific cases that cannot now be tried (or tried with all material evidence), no matter what official action may be in the future. The official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case, . . . the loss of an opportunity to sue, . . . or the loss of an opportunity to seek some particular order of relief. . . . These cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable. The ultimate object of these sorts of access claims, then, is not the judgment in a further lawsuit, but simply the judgment in the access claim itself, in providing relief obtainable in no other suit in the future."[163]

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153 Be & K Constr. Co. v. Nat'l Labor Relations Bd., 536 U.S. 516 (2002); Bill Johnson's Rests., Inc. v. Nat'l Labor Relations Bd., 461 U.S. 731, 741 (1983); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 513 (1972).

154 Murray v. Giarratano, 492 U.S. 1, 11 n.6 (1989), (plurality opinion); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 335 (1985).

155 Pennsylvania v. Finley, 481 U.S. 551, 557 (1987).

156 Wolff v. McDonnell, 418 U.S. 539, 576, 579 (1974); Boddie v. Connecticut, 401 U.S. 371, 380–81 (1971).

157 Christopher v. Harbury, 536 U.S. 403, 413 (2002).

158 *Id.* at 413, *citing* Bounds v. Smith, 430 U.S. 817, 828 (1977). To establish a *Bounds* violation, an inmate must demonstrate that the alleged shortcomings in the prison library or legal assistance program have hindered his efforts to pursue a non-frivolous legal claim. This requirement derives ultimately from the doctrine of standing. *See* Lewis v. Casey, 518 U.S. 343, 351–53 (1996).

159 *Id.* 413, *citing* Lewis v. Casey, 518 U.S. 343, 346–48 (1996).

160 *Id.* at 413, *citing* Smith v. Bennett, 365 U.S. 708, 713–14 (1961) (filing fee for habeas petitions); Burns v. Ohio, 360 U.S. 252, 255–58 (1959) (fee for direct appeal in a criminal case); Mayer v. Chicago, 404 U.S. 189, 195–96 (1971) (same, as to petty crime); Griffin v. Illinois, 351 U.S. 12, 16–20 (1956) (transcript fee for appellate review in a criminal case).

161 *Id.* at 413, *citing* Boddie v. Connecticut, 401 U. S. 371, 372 (1971) (divorce filing fee); M.L.B. v. S.L.J., 519 U. S. 102, 106–07 (1996) (record fee in parental-rights termination action).

162 Christopher v. Harbury, 536 U.S. 403, 413 (2002).

163 *Id.* at 413–14.

[C61] "While the circumstances thus vary, the ultimate justification for recognizing each kind of claim is the same. Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong. . . . [Hence, the right of access to courts] is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court. [The Court] indicated as much in *Lewis v. Casey*, where [it] noted that even in forward-looking prisoner class actions to remove roadblocks to future litigation, the named plaintiff must identify a 'non-frivolous,' 'arguable' underlying claim, . . . and [there is] no reason to treat backward-looking access claims any differently in this respect. It follows that the underlying cause of action, whether anticipated or lost, is an element that must be described in the complaint, just as much as allegations must describe the official acts frustrating the litigation. It follows, too, that when the access claim . . . looks backward, the complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought. There is, after all, no point in spending time and money to establish the facts constituting denial of access when a plaintiff would end up just as well off after litigating a simpler case without the 'denial of access' element."[164]

2. Indigents' Access to Judicial Processes

a. Generally

[C62] The Court's decisions "concerning indigents' access to judicial processes reflect both equal protection and due process concerns;"[165] in cases of this order, "due process and equal protection principles converge."[166] "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable;"[167] "[t]he equal protection concern relates to the legitimacy of fencing out would-be litigants and appellants based solely on their inability to pay core costs."[168] In this area, the Court "inspect[s] the character and intensity

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[164] Christopher v. Harbury, 536 U.S. 403, 414–15 (2002).

Although those who petition government for redress are generally immune from anti-trust liability, such immunity is withheld when petitioning activity "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly" with a competitor's business relationships. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961). In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60–61 (1993), the Court adopted a two-part definition of sham anti-trust litigation: first, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits;" second, the litigant's subjective motivation must "concea[l] an attempt to interfere *directly* with the business relationships of a competitor . . . through the use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anti-competitive weapon."

[165] M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996).

[166] Bearden v. Georgia, 461 U.S. 660, 665 (1983).

[167] Ross v. Moffitt, 417 U.S. 600, 609 (1974).

[168] *See* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996).

Most decisions concerning access to appeal rest on an equal protection framework, for "due

of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other."[169]

b. In Criminal Cases[170]

[C63] *Griffin* involved an Illinois rule that effectively conditioned thoroughgoing appeals from criminal convictions on the defendant's procurement of a transcript of trial proceedings. Indigent defendants, other than those sentenced to death, were not excepted from the rule, so, in most cases, defendants without means to pay for a transcript had no access to appellate review at all. "Although the Federal Constitution guarantees no right to appellate review, . . . once a State affords that right, *Griffin* held, the State 'may not bolt the door to equal justice.'"[171]

[C64] *Griffin* and succeeding decisions regarding an indigent defendant's access to appellate review of a conviction[172] "stand for the proposition that a State cannot arbi-

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process does not independently require that the State provide a right to appeal." *See* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996).

[169] *Id. Court* "*fee requirements ordinarily are examined only for rationality.* . . . The State's need for revenue to off-set costs, in the mine run of cases, satisfies the rationality requirement; . . . States are not forced by the Constitution to adjust all tolls to account for disparity in material circumstances." *Id.* at 123 (emphasis added).

[170] *See also* paras. C79, C87 (*right to counsel during custodial interrogation*); paras. C92 *et seq.* (*right to counsel under the Sixth Amendment*).

[171] *See* M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996), *discussing* Griffin v. Illinois, 351 U.S. 12, 18, 24 (1956). The *Griffin* plurality recognized "the importance of appellate review to a correct adjudication of guilt or innocence." *Id.* at 18. Judging the Illinois rule inconsonant with the Fourteenth Amendment, "the *Griffin* plurality drew support from the Due Process and Equal Protection Clauses." *See* M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996), *citing* Griffin v. Illinois, 351 U.S. 12, 13, 18 (1956). Justice Frankfurter, concurring in the judgment in *Griffin*, emphasized and explained the decision's equal protection underpinning as follows: "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." *Id.* at 23.

"*Griffin* did not impose an inflexible requirement that a State provide a full trial transcript to an indigent defendant pursuing an appeal." *See* M.L.B. v. S.L.J., 519 U.S. 102, 112, n.5 (1996), *citing* Griffin v. Illinois, 351 U.S. 12, 20 (1956) (state need not "purchase a stenographer's transcript in every case where an indigent defendant cannot buy it. The [state] Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants."). In *Draper v. Washington*, 372 U.S. 487 (1963), the Court invalidated a state rule that tied an indigent defendant's ability to obtain a transcript at public expense to the trial judge's finding that the defendant's appeal was not frivolous. It emphasized, however, that the *Griffin* requirement is not rigid. "Alternative methods of reporting trial proceedings," the Court observed, "are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." *Id.* at 495. Moreover, the Court held, an indigent defendant is entitled only to those parts of the trial record that are "germane to consideration of the appeal." *Id. See also* Mayer v. Chicago, 404 U.S. 189, 194 (1971) ("A record of sufficient completeness does not translate automatically into a complete verbatim transcript.").

[172] *See, e.g.*, Williams v. Oklahoma City, 395 U.S. 458, 458–59 (1969) (*per curiam*) (transcript needed to perfect appeal must be furnished at state expense to indigent defendant sen-

trarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."[173] In *Douglas v. California*, however, "the Court departed somewhat from the limited doctrine of the transcript and fee cases and undertook an examination of whether an indigent's access to the appellate system was adequate. The Court in *Douglas* concluded that a State does not fulfill its responsibility toward indigent defendants merely by waiving its own requirements that a convicted defendant procure a transcript or pay a fee in order to appeal, and held that the State must go further and provide counsel for the indigent on his first appeal as of right. . . . [More specifically, *Douglas*] held unconstitutional California's requirement that counsel on appeal would be appointed for an indigent only if the appellate court determined that such appointment would be helpful to the defendant or to the court itself. The Court noted that, under this system, an indigent's case was initially reviewed on the merits, without the benefit of any organization or argument by counsel. By contrast, persons of greater means were not faced with the preliminary '*ex parte* examination of the record,' . . . but had their arguments presented to the court in fully briefed form."[174] Consequently, "where the record [wa]s unclear or the errors [we]re hidden, the indigent ha[d] only the right to a meaningless ritual, while the rich man ha[d] a meaningful appeal."[175] Further, relying on *Douglas*, the Court held, in *Halbert v. Michigan*, that the Due Process and Equal Protection Clauses required the appointment of counsel for defendants, convicted on their pleas, who sought access to first-tier discretionary review in the Michigan Court of Appeals.[176]

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tenced to 90 days in jail and a $50 fine for drunk driving); Long v. Dist. Court of Iowa, Lee County, 385 U.S. 192, 192–94 (1966) (*per curiam*) (transcript must be furnished at state expense to enable indigent state habeas corpus petitioner to appeal denial of relief); Smith v. Bennett, 365 U.S. 708, 708–09 (1961) (filing fee to process state habeas corpus application must be waived for indigent prisoner); Burns v. Ohio, 360 U.S. 252, 253, 257–58 (1959) (filing fee for motion for leave to appeal from judgment of intermediate appellate court to state supreme court must be waived when defendant is indigent).

[173] Ross v. Moffitt, 417 U.S. 600, 607 (1974). *See also* Rinaldi v. Yeager, 384 U.S. 305, 310 (1966), (avenues of appellate review "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts").

Mayer v. Chicago, 404 U.S. 189 (1971), involved an indigent defendant convicted on *nonfelony charges* of violating two city ordinances. Fined $250 for each offense, the defendant petitioned for a transcript to support his appeal. He alleged prosecutorial misconduct and insufficient evidence to convict. The state provided free transcripts for indigent appellants in felony cases only. The Court declined to limit *Griffin* to cases in which the defendant faced incarceration. "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay," the Court said in *Mayer*, "is not erased by any differences in the sentences that may be imposed." *Id.* at 197. Petty offenses can entail serious collateral consequences. *Id.* at 197.

[174] *See* Ross v. Moffitt, 417 U.S. 600, 607–08 (1974), *discussing* Douglas v. California, 372 U.S. 353 (1963).

[175] Douglas v. California, 372 U.S. 353, 358 (1963).

[176] Halbert v. Michigan, 545 U.S. 429 (2005). In so holding, the Court stressed, first, that the Michigan Court of Appeals, in ruling on an application for leave to appeal, looked to the merits of the appellant's claims, providing the first, and likely the only, direct review of the defendant's conviction and sentence, and, second, that indigent defendants pursuing first-tier review in the court of appeals were generally ill equipped to represent themselves.

Scope of court-appointed appellate counsel's duty to an indigent client. An indigent's right to counsel on direct appeal "does not include the right to bring a frivolous appeal and, concomitantly,

[C65] Nevertheless, "the duty of the State . . . is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Ross* thus held that neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee necessitated that states provide counsel in state discretionary appeals where defendants already had one appeal as of right.[177] Similarly, in *Finley*, the Court decided that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review.[178]

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does not include the right to counsel for bringing a frivolous appeal." *See* Smith v. Robbins, 528 U.S. 259, 278 (2000). *Anders v. California*, 386 U.S. 738 (1967), held that a court may not permit appointed counsel to withdraw from a criminal appeal on the basis of the bald assertion that "there is no merit to the appeal." Central to the Court's analysis was the constitutional imperative to assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel. *Id.* at 745. This *"constitutional requirement of substantial equality and fair process,"* the Court held, "can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*." *Id.* at 744 (emphasis added). Further, the Court set out what would be an acceptable procedure for treating frivolous appeals: "[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds, it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, it if finds any of the legal points arguable on their merits (and therefore not frivolous), it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id.* at 744.

In *Smith v. Robbins*, 528 U.S. 259 (2000), the Court made clear that the procedure sketched in *Anders* is a prophylactic one and that the states are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel. Subsequently, it upheld a procedure under which counsel neither explicitly stated that his review had led him to conclude that an appeal would be frivolous nor requested to withdraw but remained silent on the merits of the case and offered to brief issues at the court's direction.

In *Jones v. Barnes*, 463 U.S. 745 (1983), the Court held that appellate counsel who files a merits brief need not (and should not) raise every non-frivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.

[177] Ross v. Moffitt, 417 U.S. 600, 616 (1974).

[178] Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987).

The indigent defendant's right to expert services. Applying the *Mathews* balancing test, the Court held, in *Ake v. Oklahoma*, 470 U.S. 68, 78–83 (1985), that the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question. Hence, when the prosecutor presents psychiatric evidence of an indigent defendant's future dangerousness in a capital sentencing proceeding, due process requires that the state provide the defendant with the assistance of an independent psychiatrist. In *Medina v. California*, 505 U.S. 437, 444–45 (1992), the Court noted that the holding in *Ake* "can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'"

c. In Civil Cases

[C66] The Court has "recognized a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees."[179] *Boddie* held that the state could not deny a divorce to a married couple based on their inability to pay approximately $60 in court costs. Crucial to the Court's decision was the fundamental interest at stake. "[G]iven the basic position of the marriage relationship in the society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship," the Court held that due process "prohibit[s] a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages."[180]

[C67] *Little* held that the Due Process Clause required the states to provide a free blood grouping test to an indigent defendant in a paternity action. The Court observed that, "[a]part from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. Just as the termination of such bonds demands procedural fairness, so too does their imposition."[181]

[C68] *M.L.B.* held that a state could not, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees.[182] *Lassiter* concerned the appointment of counsel for indigent persons seeking to defend against the state's termination of their parental status. The Court held that "appointed counsel was not routinely required to assure a fair adjudication; instead, a case-by-case determination of the need for counsel would suffice, an assessment to be made 'in the first instance by the trial court, subject . . . to appellate review.'"[183]

[C69] In *Kras*, "the Court clarified that a constitutional requirement to waive court fees in civil cases is the exception, not the general rule."[184] *Kras* concerned fees, totaling $50, required to secure a discharge in bankruptcy. The Court noted that bankruptcy discharge entails no "fundamental interest." Although "obtaining [a] desired new start in life [is] important," that interest, the Court explained, "does not rise to the same constitutional level as the interest in establishing or dissolving a marriage." And in contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors.[185]

[C70] In *Ortwein*, the Court adhered to the line drawn in *Kras*. The appellants in *Ortwein* sought court review of agency determinations reducing their welfare benefits. Alleging poverty, they challenged, as applied to them, an Oregon statute requiring appellants in civil cases to pay a $25 fee. The Court summarily affirmed the Oregon Supreme

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179 M.L.B. v. S.L.J., 519 U.S. 102, 113 (1996).

180 Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

181 Little v. Streater, 452 U.S. 1 (1981).

182 M.L.B. v. S.L.J., 519 U.S. 102, 119–24 (1996). *See, in extenso*, para. F32.

183 *See* M.L.B. v. S.L.J., 519 U.S. 102, 117 (1996), *discussing* Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 32 (1981). *See, in extenso*, para. F31.

184 M.L.B. v. S.L.J., 519 U.S. 102, 114 (1996).

185 United States v. Kras, 409 U.S. 434, 445–46 (1973).

Court's judgment rejecting appellants' challenge. As in *Kras*, the Court saw no "fundamental interest . . . gained or lost depending on the availability" of the relief sought by the complainants. Absent a fundamental interest or classification attracting heightened scrutiny, the applicable equal protection standard was that of rational justification. The fee produced some revenue to assist the state in offsetting the expenses of its court system. Appellants did not contend that the fee was disproportionate or that it was not an effective means to accomplish the state's goal. Hence, the requirement of rationality was met. At the same time, the Court expressly rejected the argument that a fee waiver was required for all civil appeals, because the state permitted *in forma pauperis* filings in special classes of cases (criminal appeals, habeas corpus petitions from state institutions or civil commitment proceedings, and appeals from terminations of parental rights, including appeals from terminations of parental rights). In so doing, the Court noted that "if the Oregon courts have interpreted the applicable law to give special rights in the criminal area, in civil cases that result in loss of liberty, and in cases terminating parental rights, we cannot say that this categorization is capricious or arbitrary."[186]

[C71] *Lindsey* addressed the constitutionality of an Oregon statute that required tenants challenging eviction proceedings to post a bond of twice the amount of rent expected to accrue pending appellate review. The bond was forfeited to the landlord if the lower court decision was affirmed. The Court held that the double-bond requirement violated the Equal Protection Clause. For one thing, it was "unrelated to actual rent accrued or to specific damage sustained by the landlord." For another thing, the requirement, which burdened only tenants, including tenants whose appeals were nonfrivolous, erected "a substantial barrier to appeal faced by no other civil litigant in Oregon." The Court therefore concluded that the requirement bore no reasonable relationship to any valid state objective, and that it discriminated against the class of tenants appealing from adverse decisions in wrongful detainer actions in an arbitrary and irrational fashion. In so holding, the Court pointed out that the classification disadvantaged non-indigent, as well as indigent, appellants.[187]

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[186] Ortwein v. Schwab, 410 U.S. 656, 659–61 (1973) (*per curiam*).

[187] Lindsey v. Normet, 405 U.S. 56, 76–79 (1972).

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 551–53 (1949), the Court upheld, against a due process and equal protection challenge, a state law that required a shareholder who wished to file a shareholder's derivative suit but who owned less than 5 percent of the corporation's stock or whose stock was worth less than $50,000 to file, as a pre-condition to bringing the suit, a bond for the reasonable expenses, including attorney's fees, that might be incurred by defendants. The purpose of the security requirement was to protect the corporation from being injured by "strike suits" that harmed the very interests that plaintiffs claimed to be protecting.

In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 84–85 (1988), the Court upheld, against an equal protection challenge, a Mississippi statute imposing a 15-percent *penalty on parties who appealed unsuccessfully* from a money judgment. The statute passed constitutional muster under the rational basis test, since it was reasonably tailored to achieve the state's legitimate objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources. The statute posed little danger of discouraging meritorious appeals along with insubstantial ones, since the 15-percent penalty operated only after a judgment had been affirmed without modification and represented a relatively modest additional assessment.

C. JURY TRIAL IN CIVIL CASES[188]

[C72] The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." "On its face, this language is not directed to jury characteristics, such as size, but rather defines the kind of cases for which jury trial is preserved."[189] The Seventh Amendment "bears not only on the allocation of trial functions between judge and jury, . . . [but] also controls the allocation of authority to review verdicts."[190] The Amendment "exacts a trial by jury according to the course of the common law—that is, by a unanimous verdict"[191] and applies only to proceedings in federal court, not in state court.[192]

[C73] The right of trial by jury, thus preserved, is the right that existed under the English common law when the Amendment was adopted. Hence, the Court's interpretation of the Amendment has been guided by historical analysis comprising two principal inquiries. The Court asks, first, whether it is "dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was. If the action in question belongs in the law category, [the Court] then ask[s] whether the particular trial decision must fall to the jury in order to preserve the substance of the common law right as it existed in 1791."[193]

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188 *See also* para. C30 (*taking of property*).

189 Colgrove v. Battin, 413 U.S. 149, 152 (1973). There the Court upheld a federal court rule providing that a jury for the trial of civil cases will consist of six persons.

190 Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996). There the Court held that the Seventh Amendment's re-examination clause does not inhibit the authority of trial judges to grant new trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States" and does not preclude appellate review, confined to abuse of discretion, of the trial judge's denial of a motion to set aside a jury verdict as excessive.

191 Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 216 (1916).

192 *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 418 (1996).

193 Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996).

With respect to the first inquiry, the Court has held that "suits at common law" include "not merely suits, which the common law recognized among its old and settled proceedings, but also suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . The Seventh Amendment thus applies not only to common law causes of action, but also to statutory causes of action analogous to common law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708–09 (1999). There, the Court held that a 42 U.S.C. Section 1983 suit, seeking legal relief, is an action at law within the meaning of the Seventh Amendment.

With regard to the second question (whether the particular trial issue is necessarily a jury issue), the Court has referred to the distinction between substance and procedure, and has also spoken of the line as one between issues of fact and law. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 378 (1996), *citing* Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); *Ex parte* Peterson, 253 U.S. 300, 309–10 (1920). But the sounder course is to compare the modern practice to historical sources. Where there is no exact antecedent in the common law, the modern practice should be compared to earlier practices whose allocation to court or jury is known, and the best analogy that can be drawn between an old and the new must be

D. THE FIFTH AMENDMENT'S PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

1. General Considerations

[C74] The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the states.[194] The Court has held that the privilege against self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[195] The privilege afforded not only extends "to answers that would, in themselves, support a conviction under a criminal statute, . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime."[196]

[C75] To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled. "[T]o be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[197] By contrast, the privilege does not protect a suspect from being com-

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sought. Thus, the Court searches the English common law for "appropriate analogies," rather than a "precisely analogous" common law cause of action. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 377–78 (1996). In that case, the Court addressed the question whether the interpretation of a so-called patent claim, the portion of the patent document that defines the scope of the patentee's rights, is a matter of law reserved entirely for the court or subject to a Seventh Amendment guarantee that a jury will determine the meaning of any disputed term of art about which expert testimony is offered. The Court concluded that the construction of a patent, including terms of art within its claim, is exclusively within the province of the court.

Congress may devise novel causes of action involving "public rights" free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as fact finders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. For these purposes, a "public right" is not limited to a matter arising between the government and others but extends to a seemingly "private" right that is closely intertwined with a federal regulatory program that Congress has power to enact. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51–55 (1989).

194 Malloy v. Hogan, 378 U.S. 1, 6–11 (1964).

195 Minnesota v. Murphy, 465 U.S. 420, 426 (1984). Concern with prosecution by a foreign nation is beyond the scope of the Self-Incrimination Clause.

196 Hoffman v. United States, 341 U.S. 479, 486 (1951).

"It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. *See* Mitchell v. United States, 526 U.S. 314, 321 (1999), *citing* Rogers v. United States, 340 U.S. 367, 373 (1951). "The justifications for the rule of waiver in the testimonial context are evident: a witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry." *See* Mitchell v. United States, 526 U.S. 314, 322 (1999). As noted in *Rogers v. United States*, 340 U.S. 367, 371 (1951), a contrary rule "would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." As the Court said in *Brown v. United States*, 356 U.S. 148, 156 (1958), it would "make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure, but a positive invitation to mutilate the truth a party offers to tell."

197 Doe v. United States, 487 U.S. 201, 210 (1988). "Whenever a suspect is asked for a

pelled by the government to produce real or physical evidence.[198] Thus, a suspect may be compelled to furnish a blood sample,[199] to provide a handwriting exemplar,[200] or a voice exemplar,[201] to stand in a line-up,[202] and to wear particular clothing.[203] The Court "held that the privilege was not implicated in each of those cases, because the suspect was not required 'to disclose any knowledge he might have,' or 'to speak his guilt.'"[204] Similarly, "the fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement," such as filing an income tax return,[205] maintaining required records,[206] or

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response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component." *See* Pennsylvania v. Muniz, 496 U.S. 582, 597 (1990). A drunk-driving suspect's response to a question regarding the date of his sixth birthday is testimonial, because he is required to communicate an assertion of fact and, thus, is confronted with the above trilemma. *Id.* at 598–99.

198 Schmerber v. California, 384 U.S. 757, 764 (1966).

199 *Id.* at 765.

200 Gilbert v. California, 388 U.S. 263, 266–267 (1967).

201 United States v. Dionisio, 410 U.S. 1, 7 (1973). "[A]ny slurring of speech and other evidence of lack of muscular coordination revealed by [one's] responses . . . constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound of his voice . . . , does not, without more, compel him to provide a 'testimonial' response for purposes of the privilege." *See* Pennsylvania v. Muniz, 496 U.S. 582, 592 (1990).

202 United States v. Wade, 388 U.S. 218, 221–22 (1967).

203 Holt v. United States, 218 U.S. 245, 252–53 (1910).

204 *See* Doe v. United States, 487 U.S. 201, 210–11 (1988), *citing* United States v. Wade, 388 U.S. 218, 222–23 (1967); United States v. Dionisio, 410 U.S. 1, 7 (1973); Gilbert v. California, 388 U.S. 263, 266–67 (1967).

205 United States v. Sullivan, 274 U.S. 259 (1927). The Court pointed out that "[I]f the form of return provided called for answers that the defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all." *Id.* at 263.

206 Shapiro v. United States, 335 U.S. 1 (1948). There, the Court considered an application of the Emergency Price Control Act and a regulation issued thereunder that required licensed businesses to maintain records and make them available for inspection by administrators. The Court indicated that no Fifth Amendment protection attached to production of the "required records," which the "defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection." *Id.* at 17–18. The Court's discussion of the constitutional implications of the scheme focused upon the relation between the government's regulatory objectives and the government's interest in gaining access to the records in Shapiro's possession: "It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the recordkeeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." *Id.* at 32.

In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court held that a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers required by federal legislation. The Court noted that wagering was a crime in almost every state and that federal law required that lists of wagering taxpayers be furnished to state and local prosecutors on demand. The Court concluded that

reporting an accident,[207] "does not clothe such required conduct with the testimonial privilege."[208] Moreover, "a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief, because the creation of those documents was not 'compelled' within the meaning of the privilege."[209] Nevertheless, "the act of producing subpoenaed documents may have a compelled testimonial aspect." That act, as well as a custodian's compelled testimony about whether he has produced everything demanded, "may certainly communicate information about the documents' existence, custody, and authenticity."[210]

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compliance with the statute would have subjected petitioner to a real and appreciable risk of self-incrimination. It further recognized that the occupational tax was not imposed in "an essentially noncriminal and regulatory area" but was "directed to a selective group inherently suspect of criminal activities." The Court found that it would be inappropriate to impose restrictions on use of the information collected under the statute—a course urged by the government as a means of removing the impact of the statute upon the privilege against self-incrimination—because of the evident congressional purpose to provide aid to prosecutors. It noted that, unlike the petitioner in *Shapiro v. United States*, 335 U.S. 1 (1948), Marchetti was not required to supply information that had a "public aspect" or was contained in records of the kind he customarily kept.

[207] California v. Byers, 402 U.S. 424 (1971). There the Court upheld a California law making it a crime to leave the scene of an automobile accident without giving one's name and address. The plurality found it significant that the law "was not intended to facilitate criminal convictions, but to promote the satisfaction of civil liabilities" and was not aimed at a "highly selective group inherently suspect of criminal activities." *Id.* at 430. Similarly, Justice Harlan, in his concurring opinion, stressed "the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the [limited] nature of the required disclosures," which left the accusatorial burden upon the state. *Id.* at 458.

[208] United States v. Hubbell, 530 U.S. 27, 35 (2000). Likewise, a mother who is the custodian of her child pursuant to a court order may not invoke the Fifth Amendment privilege against self-incrimination to resist a subsequent court order to produce the child, that has been abused. *See* Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549 (1990).

[209] *See* United States v. Hubbell, 530 U.S. 27, 35–36 (2000), *citing* Fisher v. United States, 425 U.S. 391 (1976). That decision dealt with summonses issued by the Internal Revenue Service (IRS) seeking working papers used in the preparation of tax returns. Because the papers had been voluntarily prepared prior to the issuance of the summonses, they could not "be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else." Accordingly, the taxpayer could not "avoid compliance with the subpoena merely by asserting that the item of evidence which he [wa]s required to produce contain[ed] incriminating writing, whether his own or that of someone else." *Id.* at 409–10.

[210] United States v. Hubbell, 530 U.S. 27, 36–37 (2000).

Corporations and other artificial entities are not protected by the Fifth Amendment. *See, e.g.*, United States v. White, 322 U.S. 694, 701 (1944) (labor union has no privilege). "Individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties, nor to be entitled to their purely personal privileges. . . . In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative, rather than in a personal, capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." *See* Braswell v. United States, 487 U.S. 99, 110–11 (1988), *quoting* United States v. White, 322 U.S. 694, 699 (1944). "Because the custodian acts as a representative, the act is deemed one of the corporation, and not the individual. Therefore, [the government] may make no evidentiary use of the

[C76] The Fifth Amendment prohibits only compelled testimony that is incriminating. It has "long been settled that [the Fifth Amendment's] protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence;"[211] "incriminating" the Court has meant disclosures that "could be used in a criminal prosecution or could lead to other evidence that might be so used."[212] The government can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity from use of the compelled testimony and evidence derived therefrom in subsequent criminal proceedings, as "such immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over a claim of the privilege." When a person is prosecuted for matters related to immunized testimony, the prosecution has an "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." This ensures that the grant of immunity leaves the witness and the government in substantially the same position as if the witness had claimed his privilege in the grant's absence.[213]

[C77] The Fifth Amendment protects against *compulsory* self-incrimination. A statement cannot be considered voluntary if it is not the product of free choice.[214] Thus, when a state "compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution."[215] In *Garrity*, for example, police officers under investigation were told that, if they declined to answer potentially incriminating questions, they would be removed from office, but that any answers they did give could be used against them in a criminal prosecution. The Court held that statements given under such circumstances were made involuntarily and could not be used to convict the officers of crime.[216] The

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'individual act' against the individual. For example, in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian. The Government has the right, however, to use the corporation's act of production against the custodian. . . . The jury may draw from the corporation's act of production the conclusion that the records in question are authentic corporate records, which the corporation possessed, and which it produced in response to the subpoena. And if the defendant held a prominent position within the corporation that produced the records, the jury may, just as it would had someone else produced the documents, reasonably infer that he had possession of the documents or knowledge of their contents." *See* Braswell, *supra*, at 118.

[211] Hiibel v. Sixth Judicial Dist. of Nevada, 542 U.S. 177, 195 (2004), *quoting* United States v. Hubbell, 530 U.S. 27, 37 (2000). In the former case, the Court held that "[a]nswering a request to disclose a name is likely to be so insignificant as to be incriminating only in unusual circumstances."

[212] Hiibel v. Sixth Judicial Dist. of Nevada, 542 U.S. 177, 195 (2004), *quoting* Kastigar v. United States, 406 U.S. 441, 445 (1972).

[213] Kastigar v. United States, 406 U.S. 441, 453, 460, 462 (1972).

[214] *See also* para. B57.

[215] Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977).

[216] Garrity v. New Jersey, 385 U.S. 493 (1967).

The issue in *Gardner v. Broderick*, 392 U.S. 273 (1968), was whether the state might discharge a police officer who, after he was summoned before a grand jury to testify about the perform-

Fifth Amendment also prohibits indirect compulsion effected by comments on a defendant's refusal to testify. In *Griffin*, the trial court instructed the jury that it was free to take the defendant's failure to deny or explain facts within his knowledge as tending to indicate the truth of the prosecution's case. The Court held that such a comment, by "solemniz[ing] the silence of the accused into evidence against him," unconstitutionally "cuts down on the privilege [against self-incrimination] by making its assertion costly."[217]

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ance of his official duties and was advised of his right against compulsory self-incrimination, then refused to waive that right as requested by the state. Conceding that appellant could be discharged for refusing to answer questions about the performance of his official duties, if not required to waive immunity, the Court held that the officer could not be terminated, as he was, for refusing to waive his constitutional privilege.

In *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), the Court held that a political party officer cannot be removed from his position by the state and barred for five years from holding any other party or public office, because he has refused to waive his constitutional privilege against compelled self-incrimination.

[217] Griffin v. California, 380 U.S. 609, 614 (1965).

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the defendants, after being arrested for selling marijuana, received their *Miranda* warnings and chose to remain silent. At their trials, both took the stand and claimed that they had not sold marijuana but had been "framed." To impeach the defendants, the prosecutors asked each why he had not related this version of events at the time he was arrested. The Court held that this violated the defendants' rights to due process because the *Miranda* warnings contained an implicit "assurance that silence will carry no penalty." *Id.* at 618. Likewise, *Wainwright v. Greenfield*, 474 U.S. 284 (1986), held that the prosecutor's use of respondent's post-arrest, post-*Miranda* warnings, silence as evidence of sanity violated the Due Process Clause of the Fourteenth Amendment.

By contrast, "the Constitution does not prohibit the use *for impeachment* purposes of a defendant's silence prior to arrest, . . . or after arrest if no *Miranda* warnings are given. . . . Such silence is probative, and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." *See* Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) (emphasis added), *citing* Jenkins v. Anderson, 447 U.S. 231, 239 (1980), and Fletcher v. Weir, 455 U.S. 603, 606–07 (1982) (*per curiam*).

Moreover, the Court has held that it is constitutional for a prosecutor, in his summation, to call the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly. *See* Portuondo v. Agard, 529 U.S. 61 (2000).

Compulsion in the probation context. In *Minnesota v. Murphy*, 465 U.S. 420 (1984), the defendant's probation officer had previously received information from a treatment counselor that respondent had admitted to a rape and murder unrelated to his probation. One of the terms of the defendant's probation required him to be truthful with the probation officer in all matters. Seizing upon this, the officer interviewed the defendant about the rape and murder, and the defendant admitted his guilt. The Court found no Fifth Amendment violation, despite the defendant's fear of being returned to prison for 16 months if he remained silent. *Id.* at 434–39.

Compulsion in the prison context. In *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976), the Court refused to extend the *Griffin* rule to the context of state prison disciplinary hearings, because those proceedings "involve the correctional process and important state interests other than conviction for crime."

McKune v. Lile, 536 U.S. 24 (2002), involved a Sexual Abuse Treatment Program (SATP), under which participating inmates were required to complete and sign an "Admission of Responsibility" form, accepting responsibility for the crimes for which they had been sentenced, and completing a sexual history form detailing all prior sexual activities, regardless of whether the activities constituted uncharged criminal offenses. Prison officials informed respondent that if he refused to participate in the SATP, his prison privileges would be reduced, resulting in the

2. Suspects' Self-Incriminating Statements During Custodial Interrogation

a. Historical Background

[C78] Prior to *Miranda*, the Court "evaluated the admissibility of a suspect's confession under a voluntariness test. The roots of this test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy. . . . Over time, [the Court's] cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment."[218] For the middle third of the 20th century, the Court's cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process.[219] "Those cases refined the test into an inquiry that examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession."[220] The due process test takes into consideration "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[221] The determination "depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing."[222]

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automatic curtailment of his visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and other privileges. He also would be transferred to a potentially more dangerous maximum-security unit. Respondent refused to participate in the SATP. A sharply divided Court held that the alterations in respondent's prison conditions as a result of his failure to participate in the SATP did not constitute compulsion for the purposes of the Fifth Amendment privilege against self-incrimination. A four-Justice plurality thought that the Court's holding in *Sandin v. Conner*, 515 U. S. 472, 484 (1995), which challenged prison conditions, cannot give rise to a due process violation unless they constitute "atypical and significant hardship[s] on [inmates] in relation to the ordinary incidents of prison life" provided "a reasonable means of assessing whether the response of prison administrators to correctional and rehabilitative necessities are so out of the ordinary that one could sensibly say they rise to the level of unconstitutional compulsion." *Id.* at 41. Justice O'Connor, concurring in the judgment, agreed with the four dissenters that the Fifth Amendment compulsion standard is broader than the "atypical and significant hardship" standard the Court has adopted for evaluating due process claims in prisons, but concluded that the foregoing alterations were no so great as to amount to compulsion on any reasonable test.

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Court held that a death row inmate could be made to choose between incriminating himself at his clemency interview and having adverse inferences drawn from his silence. The Court reasoned that it "is difficult to see how a voluntary interview could compel respondent to speak. He merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment." *Id.* at 286.

[218] *See* Dickerson v. United States, 530 U.S. 428, 433 (2000), *citing*, respectively, Bram v. United States, 168 U.S. 532, 542 (1897) and Brown v. Mississippi, 297 U.S. 278 (1936).

[219] *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940).

[220] Dickerson v. United States, 530 U.S. 428, 434 (2000), *quoting* Schneckcloth v. Bustamonte, 412 U.S. 218, 226 (1973).

[221] *Id.*

[222] Dickerson v. United States, 530 U.S. 428, 434 (2000), *quoting* Stein v. New York, 346 U.S. 156, 185 (1953). *See, in extenso*, paras. B59–B61.

b. The *Miranda* Warnings

[C79] The Court has never abandoned the foregoing due process jurisprudence and thus continues to exclude confessions that were obtained involuntarily. But its decision in *Miranda* changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements. In that case, the Court noted that the advent of modern custodial police interrogation, which is psychologically, rather than physically, oriented, brings with it an increased concern about confessions obtained by coercion. Because custodial police interrogation, by its very nature, isolates and pressures the individual, the Court stated that, "[e]ven without employing brutality, . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[223] It thus "concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment not to be compelled to incriminate himself."[224] Accordingly, the Court laid down concrete constitutional guidelines for law enforcement agencies and courts to follow. Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as "*Miranda* rights") are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[225] *Miranda* warnings need not be given in the exact form described in that decision; the inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.[226] After initially being advised of his *Miranda* rights, the accused may himself validly waive his rights[227] and respond to interrogation. "[F]ailure to give the prescribed warnings and obtain a waiver of rights

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[223] Miranda v. Arizona, 384 U.S. 436, 455 (1966).

[224] *See* Dickerson v. United States, 530 U.S. 428, 433 (2000), *discussing Miranda*.

[225] Miranda v. Arizona, 384 U.S. 436, 479 (1966). In *Dickerson v. United States*, 530 U.S. 428, 432–44 (2000), the Court reaffirmed *Miranda* and struck down a federal statute that, in essence, laid down a rule that the admissibility of a suspect's statements made during custodial interrogation should turn only on whether or not they were voluntarily made.

[226] *See* Duckworth v. Eagan, 492 U.S. 195, 202–03 (1989); California v. Prysock, 453 U.S. 355, 361 (1981) (*per curiam*).

In *New York v. Quarles*, 467 U.S. 649 (1984), the Court recognized a *public safety exception* to the usual Fifth Amendment rights afforded by *Miranda*, so that police could recover a firearm that otherwise would have remained in a public area. In that case, police apprehended, after a chase in a grocery store, a rape suspect known to be carrying a gun. After handcuffing and searching him (and finding no gun)—but before reading him his *Miranda* warnings—the police demanded to know where the gun was. The defendant nodded in the direction of some empty cartons and responded that "the gun is over there." The Court held that both the unwarned statement—"the gun is over there"—and the recovered weapon were admissible in the prosecution's case in chief, considering that the concealed gun posed dangers to the public safety: an accomplice might make use of it, or a customer or employee might later come upon it.

In *Berkemer v. McCarty*, 468 U.S. 420, 429, n.10 (1984), the Court noted that, under the public safety exception to *Miranda*, "when the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may, without informing him of his constitutional rights, ask questions essential to elicit information necessary to neutralize the threat to the public. Once such information has been obtained, the suspect must be given the standard warnings."

[227] "'[A] valid waiver will not be presumed simply from the silence of the accused after

before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver."[228]

c. What Constitutes "Custodial Interrogation"

[C80] *Miranda* held that pre-interrogation warnings are required in the context of *custodial* interrogations given the compulsion inherent in custodial surroundings.[229] The Court explained that "custodial interrogation" meant "questioning initiated by law enforcement officers *after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.*"[230] The *Miranda* decision did not provide the Court with an opportunity to apply that test to a set of facts. After *Miranda*, the Court first applied the custody test in *Oregon v. Mathiason*. In that case, a police officer contacted the suspect after a burglary victim identified him. The officer arranged to meet the suspect at a nearby police station. At the outset of the questioning, the officer stated his belief that the suspect was involved in the burglary but that he was not under arrest. During the 30-minute interview, the suspect admitted his guilt. He was then allowed to leave. The Court held that the questioning was not custodial because there was "no indication that the questioning took place in a context where [the suspect's] freedom to depart was restricted in any way." The Court noted that the suspect had come voluntarily to the police station, that he was informed that he was not under arrest, and that he was allowed to leave at the end of the interview.[231] In *California v. Beheler*, the Court

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warnings are given, or simply from the fact that a confession was in fact eventually obtained.' . . . An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant, in fact, knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases, waiver can be clearly inferred from the actions and words of the person interrogated." *See* N. Carolina v. Butler, 441 U.S. 369, 373 (1979). *See also* paras. B60–B61.

[228] *See* Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) (plurality opinion).

[229] In *Beckwith v. United States*, 425 U.S. 341 (1976), the defendant, without being advised of his *Miranda* rights, made incriminating statements to government agents during an interview in a private home. He later asked that *Miranda* "be extended to cover *interrogation in non-custodial circumstances after a police investigation has focused on the suspect.*" The Court found his argument unpersuasive, explaining that it "was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning." *Id.* at 346–47. As a result, the Court concluded that the defendant was not entitled to Miranda warnings: "Although the focus of an investigation may indeed have been on Beckwith at the time of the interview . . . , he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding." *Id.* at 347.

[230] Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added).

[231] *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (*per curiam*), *as discussed in Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004).

reached the same result in a case with facts similar to those in *Mathiason*. In *Beheler*, the state court had distinguished *Mathiason* based on what it described as differences in the totality of the circumstances. The police interviewed Beheler shortly after the crime occurred; Beheler had been drinking earlier in the day; he was emotionally distraught; he was well known to the police; and he was a parolee who knew it was necessary for him to cooperate with the police. The Court agreed that "the circumstances of each case must certainly influence" the custody determination but re-emphasized that "the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." The Court found the case indistinguishable from *Mathiason*. It noted that how much the police knew about the suspect and how much time had elapsed after the crime occurred were irrelevant to the custody inquiry.[232]

[C 81] The Court's "more recent cases instruct that custody must be determined based on a how a reasonable person in the suspect's situation would perceive his circumstances."[233] In *Berkemer v. McCarty*, a police officer stopped a suspected drunk driver and asked him some questions. Although the officer reached the decision to arrest the driver at the beginning of the traffic stop, he did not do so until the driver failed a sobriety test and acknowledged that he had been drinking beer and smoking marijuana. The Court held the traffic stop non-custodial despite the officer's intent to arrest, because he had not communicated that intent to the driver. The lack of communication was crucial, for, under *Miranda*, "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time;" rather, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[234] In a footnote, the Court cited a New York state case for the view that an objective test was preferable to a subjective test in part because it does not "place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question."[235] *Stansbury* confirmed this analytical framework. *Stansbury* explained that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Courts must examine "all of the circumstances surrounding the interrogation" and determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action."[236] Finally, in *Thompson v. Keohane*, the Court offered the following description of the *Miranda* custody test: "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."[237]

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[232] *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) (*per curiam*), *discussed in* Yarborough v. Alvarado, 541 U.S. 652, 661–62 (2004).

[233] Yarborough v. Alvarado, 541 U.S. 652, 662 (2004).

[234] *See* Berkemer v. McCarty, 468 U.S. 420, 442 (1984), *discussed in* Yarborough v. Alvarado, 541 U.S. 652, 662 (2004).

[235] *Id.*, at 442, n.35 (*quoting* People v. P., 21 N. Y. 2d 1, 9–10, 233 N. E. 2d 255, 260 (1967)).

[236] Stansbury v. California, 511 U.S. 318, 322–25 (1994) (*per curiam*).

[237] Thompson v. Keohane, 516 U.S. 99, 112 (1995). The first inquiry is distinctly factual.

[C82] In *Miranda*, the Court observed that, by interrogation, it meant "questioning initiated by law enforcement officers."[238] "This passage and other references throughout the opinion to 'questioning' might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody. [The Court has not,] however, construe[d] the *Miranda* opinion so narrowly. The concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner,' and thereby undermine the privilege against compulsory self-incrimination. The police practices that evoked this concern included several that did not involve express questioning. For example, one of the practices discussed in *Miranda* was the use of line-ups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was, in fact, guilty as a predicate for further interrogation. A variation on this theme discussed in *Miranda* was the so-called 'reverse line-up' in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution. The Court in *Miranda* also included in its survey of interrogation practices the use of psychological ploys, such as to 'posi[t]' 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and 'to cast blame on the victim or on society.'[239] It

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State court findings on these scene- and action-setting questions attract a presumption of correctness under 28 U.S.C. Section 2254(d). The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination presents a "mixed question of law and fact" qualifying for independent review. *Id.* at 112–13.

In *Yarborough v. Alvarado*, 541 U.S. 652 (2004), respondent helped Soto try to steal a truck, leading to the death of the truck's owner. Alvarado was called in for an interview with Los Angeles detective Comstock. Alvarado was 17 years old at the time, and his parents brought him to the station and waited in the lobby during the interview. Comstock took Alvarado to a small room where only the two of them were present. The interview lasted about two hours, and Alvarado was not given a warning under *Miranda*. Although he at first denied being present at the shooting, Alvarado slowly began to change his story, finally admitting that he had helped Soto try to steal the victim's truck and to hide the gun after the murder. Comstock twice asked Alvarado if he needed a break and, when the interview was over, returned him to his parents, who drove him home. The Court held that the state court had not erred in failing to account for Alvarado's youth and inexperience when evaluating whether a reasonable person in his position would have felt free to leave the interview. Moreover, the Court found that the state court's conclusion that Alvarado was not in custody, for *Miranda* purposes during his police interview, was not unreasonable. Certain facts weighed against a finding that Alvarado was in custody. The police did not transport him to the station or require him to appear at a particular time; they did not threaten him or suggest he would be placed under arrest; his parents remained in the lobby during the interview, suggesting that the interview would be brief; Comstock appealed to Alvarado's interest in telling the truth and being helpful to a police officer; Comstock twice asked Alvarado if he wanted to take a break; and, at the end of the interview, Alvarado went home. Other facts pointed in the opposite direction. Comstock interviewed Alvarado at the police station; the interview lasted four times longer than the 30-minute interview in *Mathiason*; Comstock did not tell Alvarado that he was free to leave; he was brought to the station by his legal guardians rather than arriving on his own accord; and his parents allegedly asked to be present at the interview but were rebuffed. Given these differing indications, the state court's application of the Court's custody standard was held to be reasonable, within the meaning of 28 U.S.C. Section 2254(d)(1).

[238] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[239] *Id.* at 450.

is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation."[240] "This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in *Miranda* noted: 'Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment, and their admissibility is not affected by our holding today.'"[241] "[T]herefore, the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself."[242] Under these considerations, the Court, in *Rhode Island v. Innis*, concluded that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response. Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police *should have known* that their words or actions were reasonably likely to elicit an incriminating response from the suspect."[243]

[C83] In *Innis*, the defendant was arrested at 4:30 a.m. for robbery and was advised of his *Miranda* rights. He stated that he understood his rights and wanted to speak with a lawyer. He was then confined in a "caged wagon." While en route to the police station, two of the officers accompanying him engaged in a conversation between them-

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[240] *See* Rhode Island v. Innis, 446 U.S. 291, 298–99 (1980), *discussing and quoting* Miranda v. Arizona, 384 U.S. 436, 444, 450, 453, 457–58 (1966).

[241] *See* Rhode Island v. Innis, 446 U.S. 291, 298–99 (1980), *discussing and quoting* Miranda v. Arizona, 384 U.S. 436, 444, 450, 453, 457–58 (1966).

[242] Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

[243] Rhode Island v. Innis, 446 U.S. 291, 300–02 (1980). "Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect." *Id.* at 302, n.8.

selves concerning the missing shotgun. One of the officers stated that there were "a lot of handicapped children running around in this area," because a school for such children was located nearby, and "God forbid one of them might find a weapon with shells and they might hurt themselves." Respondent interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. Upon returning to the scene of the arrest where a search for the shotgun was in progress, respondent was again advised of his *Miranda* rights, replied that he understood those rights, but he "wanted to get the gun out of the way because of the kids in the area in the school" and then led the police to the shotgun. The Court held that respondent had not been "interrogated" in violation of his right under *Miranda* to remain silent until he had consulted with a lawyer. First, there was no express questioning of respondent; the conversation between the two officers was, at least in form, nothing more than a dialogue between them to which no response from respondent was invited. Moreover, respondent was not subjected to the "functional equivalent" of questioning. "There was nothing in the record to suggest that the officers were aware that respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children," or that "the police knew that respondent was unusually disoriented or upset at the time of his arrest." Nor did the record indicate that, in the context of a brief conversation, the officers should have known that respondent would suddenly be moved to make a self-incriminating response. The Court concluded that, while it might be said that respondent was subjected to "subtle compulsion," it should also be established that a suspect's incriminating response "was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response," which had not been done in that case.[244]

[C84] Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. "It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. . . . The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. . . . Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns. . . . [Hence,] an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response."[245]

[C85] *Muniz* held that a police officer may ask an arrestee his name, address, height, weight, eye color, date of birth, and current age, without giving *Miranda* warnings. Four members of the Court held that such questions, when asked only for record-keeping purposes, fall within a "routine booking question" exception that exempts from *Miranda*'s coverage "questions to secure the biographical data necessary to complete

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[244] *Id.* at 293–95, 302–03. In *Arizona v. Mauro*, 481 U.S. 520, 525–30 (1987), while respondent was in police custody, he indicated that he did not wish to answer any questions until a lawyer was present. The Court held that, in the circumstances of that case, officers did not interrogate respondent in violation of the Fifth and Fourteenth Amendments when they allowed him to speak with his wife in the presence of a police officer.

[245] Illinois v. Perkins, 496 U.S. 292, 296–97, 300 (1990).

booking or pretrial services."[246] Four other Justices found that an arrestee's responses to such "booking" questions are not testimonial and therefore do not warrant application of the Fifth Amendment's privilege.[247]

[C86] *Estelle v. Smith* considered a situation in which a psychiatrist conducted an ostensibly neutral competency examination of a capital defendant, but drew conclusions from the defendant's uncounseled statements regarding his future dangerousness, and later testified for the prosecution on that crucial issue. The Court likened the psychiatrist to "an agent of the State recounting unwarned statements made in a post-arrest custodial setting," and held that a "criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." The admission of the psychiatrist's testimony under those "distinct circumstances" violated the Fifth Amendment.[248]

d. Procedure to Be Followed When a Suspect Invokes His *Miranda* Rights

[C87] "If the individual indicates, in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[249] And if he requests counsel, the interrogation must cease "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[250] This layer of prophylaxis for the *Miranda* right to counsel "is designed to prevent police from badgering a defendant into waiving his previously

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[246] Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990).

[247] *Id.* at 608.

[248] Estelle v. Smith, 451 U.S. 454, 466–68 (1981).

[249] Miranda v. Arizona, 384 U.S. 436, 474 (1966). In *Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987), the Court held that, if a defendant requests a psychiatric examination, in order to prove a mental status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination to rebut the defense.

[250] Edwards v. Arizona, 451 U.S. 436, 484–85 (1981). The applicability of *Edwards* "requires courts to determine whether the accused *actually invoked* his right to counsel. . . . To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. . . . *Invocation of the Miranda right to counsel requires at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.* . . . But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer, in light of the circumstances, would have understood only that the suspect *might* be invoking the right to counsel, cessation of questioning is not required. . . . Rather, the suspect must unambiguously request counsel." *See* Davis v. United States, 512 U.S. 452, 458–59 (1994) (emphasis added).

Connecticut v. Barrett, 479 U.S. 523 (1987), concerned a suspect who had "told the officers that he would not give a *written* statement unless his attorney was present but had no problem talking about the incident." The Court held that this was a limited request for counsel, that Barrett himself had drawn a distinction between oral and written statements, that this distinction did not indicate "an understanding of the consequences so incomplete that [it] should deem Barrett's limited invocation of the right to counsel effective for all purposes," and, thus, that the officers could continue to question him. Hence, Barrett's incriminating oral statements concerning his involvement in a sexual assault were admissible in court, there being no evidence that he had been "threatened, tricked, or cajoled" into speaking to the police. *Id.* at 527–30.

asserted *Miranda* rights."[251] To that end, the Court has held that the requirement that counsel be "made available" to the accused refers not merely to the opportunity to consult with an attorney outside the interrogation room but to the right to have the attorney present during custodial interrogation.[252] "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[253]

e. The Exclusionary Rule

[C88] The Self-Incrimination Clause contains its own exclusionary rule. "Unlike the Fourth Amendment's bar on unreasonable searches, the Self-Incrimination Clause is

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In *Fare v. Michael C.*, 442 U.S. 707, 723–24 (1979), the Court held that a juvenile's request, made while undergoing custodial interrogation, to speak with his probation officer does not constitute a *per se* request to remain silent, nor is it tantamount to a request for an attorney.

The meaning of "initiation" of further communication with the police. In Oregon v. Bradshaw, 462 U.S. 1039 (1983), respondent asked for an attorney, and subsequently inquired of a police officer, "Well, what is going to happen to me now?" Four members of the Court held that "there are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up *a more generalized discussion relating directly or indirectly to the investigation.* Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*. Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation." *Id.* at 1045–46 (emphasis added). Four other Justices agreed that, in order to constitute "initiation" under *Edwards*, an accused's inquiry must demonstrate a desire to discuss the subject matter of the criminal investigation but concluded that, under the circumstances of this case, it was plain that respondent's only "desire" was to find out where the police were going to take him. *Id.* at 1055.

[251] Michigan v. Harvey, 494 U.S. 344, 350 (1990).

[252] *See* Minnick v. Mississippi, 498 U.S. 146, 150–56 (1990). "*Miranda* does not require that attorneys be producible on call. . . . The Court in *Miranda* emphasized that it was not suggesting that 'each police station must have a "station house lawyer" present at all times to advise prisoners.' . . . If the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel." *See* Duckworth v. Eagan, 492 U.S. 195, 204 (1989), *discussing* Edwards v. Arizona, 451 U.S. 436, 474 (1981).

[253] Miranda v. Arizona, 384 U.S. 436, 475 (1966). When a suspect asserts his right to cut off questioning, the police may scrupulously honor that right by "immediately ceas[ing] the interrogation, resum[ing] questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restrict[ing] the second interrogation to a *crime that had not been a subject of the earlier interrogation.*" *See* Michigan v. Mosley, 423 U.S. 96, 106 (1975) (emphasis added).

A suspect's request for counsel, unlike his decision to cut off questioning, raises the presumption that he is unable to proceed without a lawyer's advice. Hence, the *Edwards* rule applies to bar "police-initiated interrogation following a suspect's request for counsel in the context of a *separate investigation.*" *See* Butler v. McKellar, 494 U.S. 407, 411 (1990) (emphasis added), *discussing* Arizona v. Roberson, 486 U.S. 675, 682 (1988).

self-executing."[254] "[T]hose subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from such statements) in any subsequent criminal trial."[255]

[C89] "Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."[256] "But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted."[257]

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[254] United States v. Patane, 542 U.S. 630, 640 (2004) (plurality opinion).

[255] Chavez v. Martinez, 538 U.S. 760, 769 (2003) (plurality opinion), *citing, for example*, Oregon v. Elstad, 470 U.S. 298, 307–08 (1985).

[256] Oregon v. Elstad, 470 U.S. 298, 307 (1985).

[257] *Id.* at 307. In that case, the police went to the young suspect's house to take him into custody on a charge of burglary. Before the arrest, one officer spoke with the suspect's mother, while the other one joined the suspect in a brief stop in the living room, where the officer said he "felt" the young man was involved in a burglary. *Id.* at 301. The suspect acknowledged he had been at the scene. The Court noted that the pause in the living room "was not to interrogate the suspect but to notify his mother of the reason for his arrest" and described the incident as having "none of the earmarks of coercion." *Id.* at 316. The Court, indeed, took care to mention that the officer's initial failure to warn was an "oversight" that "may have been the result of confusion as to whether the brief exchange qualified as custodial interrogation or . . . may simply have reflected . . . reluctance to initiate an alarming police procedure before [an officer] had spoken with respondent's mother." *Id.* at 315–16. At the outset of a later and systematic station house interrogation going well beyond the scope of the laconic prior admission, the suspect was given *Miranda* warnings and made a full confession. In holding the second statement admissible and voluntary, *Elstad* rejected the "cat out of the bag" theory that any short, earlier admission, obtained in arguably innocent neglect of *Miranda*, determined the character of the later, warned confession. *Id.* at 311–14. On the facts of that case, the Court thought any causal connection between the first and second responses to the police was "speculative and attenuated." *Id.* at 313.

Missouri v. Seibert, 542 U.S. 600 (2004), involved *the technique of interrogating in successive, unwarned and warned phases*. In that case, "[t]he unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way the interrogating officer set the scene by saying 'we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?' . . . The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given." *Id.* at 616. Under these considerations, a four-Justice plurality held that "[i]t would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before"

For example, in *Harris v. New York*, the Court held that statements elicited from a defendant in violation of *Miranda*, can be introduced to impeach that defendant's credibility, even though they are inadmissible as evidence of his guilt, so long as the jury is instructed accordingly.[258] In reaching this conclusion, "the Court weighed the incremental deterrence of police illegality against the strong policy against countenancing perjury. In the balance, use of the incriminating statements for impeachment purposes prevailed."[259] Moreover, a failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements.[260]

E. OTHER BASIC PROCEDURAL GUARANTEES IN THE CRIMINAL CONTEXT[261]

1. Right to Fair Notice of the Charges and the Grand Jury Clause

[C90] Due process requires that a person be given reasonable notice of the charges against him.[262] "An indictment not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him is defective, although it may follow the language of the statute. . . . Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."[263] In *Cole*, petitioners were convicted at trial of one offense, but their convictions were affirmed by the supreme court of Arkansas on the basis of evidence in the record indicating that they had committed another offense on which the jury had not been instructed. In reversing the convictions, a unanimous Court wrote: "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . . To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were

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and that the above circumstances should "be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." *Id.* at 616–17. In his concurring opinion, Justice Kennedy concluded that when a two-step interrogation technique is used, post-warning statements related to pre-warning statements "must be excluded unless curative measures are taken before the post-warning statement is made. [Such] measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and . . . waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice" in most instances, as may an additional warning explaining the likely inadmissibility of the pre-warning statement. *Id.* at 622.

258 Harris v. New York, 401 U.S. 222, 223–26 (1971).

259 New Jersey v. Portash, 440 U.S. 450, 458 (1979).

260 United States v. Patane, 542 U.S. 630, 634, 644–45 (2004).

261 *See also* paras. C59 *et seq.* (*access to judicial processes*); paras. D58–D60 (*pre-trial detention*).

262 *In re* Oliver, 333 U.S. 257, 273 (1948).

263 Russell v. United States, 369 U.S. 749, 765 (1962). For example, when one is accused of violating a federal statute, which makes it a misdemeanor for any person summoned to testify before a committee of Congress to refuse to answer "any question pertinent to the question under inquiry," the grand jury indictment must state the question that was under inquiry at the time of the defendant's alleged default or refusal to answer. *Id.* at 753–68.

determined in the trial court."[264] "These fundamental principles of procedural fairness apply with no less force at the penalty phase than they do in the guilt-determining phase of any criminal trial."[265]

[C91] The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries.[266] The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand trial. An accused is not entitled to a hearing before a grand jury or to present evidence. A grand jury may act secretly, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.[267] Several constitutional protections afforded defendants in criminal proceedings have no application before that body. For example, the Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so.[268] The Sixth Amendment right to counsel, the Court has suggested, does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation.[269] Although the grand jury may not force a witness to answer questions in violation of the Fifth Amendment's constitutional guarantee against self-incrimination, an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination is nevertheless valid.[270] Indeed, "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act; . . . [a]n indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits."[271] Hence, an indictment is not invalidated by the grand jury's consideration of hearsay,[272] by the introduction of evidence obtained in violation of the Fourth Amendment,[273] or by the government's failure to disclose to the grand jury "substantial exculpatory evidence" in its possession.[274]

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[264] Cole v. Arkansas, 333 U.S. 196, 201–02 (1948).

[265] Presnell v. Georgia, 439 U.S. 14, 16 (1978) (*per curiam*). There, the Court reversed a death sentence that the Georgia supreme court had affirmed on the basis of its own finding that evidence in the record would support a statutory aggravating circumstance that had not been found by the jury.

[266] There is no constitutional requirement that states institute prosecutions by means of an indictment returned by a grand jury. *See* Hurtado v. California, 110 U.S. 516 (1884)). However, that fact does not relieve those states that do employ grand juries from complying with the commands of the Fourteenth Amendment in the operation of those juries. *See* Rose v. Mitchell, 443 U.S. 545, 557, n.7 (1979) (racial discrimination in the selection of grand jurors).

[267] *See* United States v. Calandra, 414 U.S. 338, 343 (1974).

[268] *See* United States v. Williams, 504 U.S. 36, 49 (1992), *citing Ex parte* United States, 287 U.S. 241, 250–51 (1932), and United States v. Thompson, 251 U.S. 407, 413–15 (1920).

[269] *See* United States v. Williams, 504 U.S. 36, 49 (1992), *citing* United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality opinion), and *In re* Groban, 352 U.S. 330, 333 (1957). The right to counsel mandated by *Miranda* was fashioned to secure the suspect's Fifth Amendment privilege in a setting thought inherently coercive.

[270] *See* United States v. Calandra, 414 U.S. 338, 346 (1974); Lawn v. United States, 355 U.S. 339, 348–50 (1958).

[271] Costello v. United States, 350 U.S. 359, 362–63 (1956).

[272] *Id.* at 361–63.

[273] *See* United States v. Calandra, 414 U.S. 338, 342–55 (1974).

[274] *See* United States v. Williams, 504 U.S. 36, 45–55 (1992).

2. The Sixth Amendment's Right to Counsel[275]

a. In General

[C92] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[276] Since this right is of fundamental nature, it is not only immune from federal abridgment, but it is equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.[277] The right is offense-specific.[278] "It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced,"[279] that is, "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[280]

[C93] The Sixth Amendment's provision for the assistance of counsel applies to criminal prosecutions, if conviction results in imprisonment. *Argersinger* rejected a formalistic distinction between petty and non-petty offenses and held the foregoing constitutional guarantee applicable to "any criminal trial, where an accused is deprived of his liberty."[281] *Scott* confirmed the "adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel," noting that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment. Subsequently, although the governing statute in that case authorized a jail sentence of up to one year, the Court held that the defendant had no right to state-appointed counsel, because the sole sentence actually imposed on him was a $50 fine.[282] In *Alabama v. Shelton*, the Court made clear that "a *suspended* sentence that may end up in the actual

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[275] *See also* paras. C115–C116 (*show-ups and line-ups*).

[276] United States v. Cronic, 466 U.S. 648, 654 (1984).

[277] Gideon v. Wainwright, 372 U.S. 335 (1963).

[278] Since the right is "offense-specific," it does not extend to offenses that are "factually related" to those that have actually been charged. Nevertheless, it encompasses offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test that has been applied to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offense." *See* Texas v. Cobb, 532 U.S. 162 (2001).

[279] McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). *By contrast, the Miranda-Edwards "Fifth Amendment" right to counsel, is not offense-specific:* "once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present." *See* McNeil v. Wisconsin, 501 U.S. 171, 177 (1991), *citing* Arizona v. Roberson, 486 U.S. 675 (1988).

[280] *See* McNeil v. Wisconsin, 501 U.S. 171, 175 (1991), *quoting* United States v. Gouveia, 467 U.S. 180, 188 (1984). In the latter case, the Court relied upon the significance of the absence of a formal charge in concluding that the Sixth Amendment does not require the appointment of counsel for indigent prison inmates confined in administrative detention while authorities investigate their possible involvement in criminal activity.

[281] Argersinger v. Hamlin, 407 U.S. 25, 32–33, 37 (1972).

[282] Scott v. Illinois, 440 U.S. 367, 368, 373 (1979). In *Nichols v. United States*, 511 U.S. 738, 748–49 (1994), the Court overruled *Baldasar v. Illinois*, 446 U.S. 222 (1980), and held that, consistent with the Sixth and Fourteenth Amendments of the Constitution, an uncounseled misdemeanor conviction, valid under *Scott*, because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.

deprivation of a person's liberty may not be imposed unless the defendant was accorded the 'guiding hand of counsel' in the prosecution for the crime charged."[283]

[C94] The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of the American adversarial system of criminal justice. Embodying "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself,"[284] "the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding."[285] As it was explained in *Powell v. Alabama*, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every stage of the proceedings against him."[286] The Court thus has recognized that "the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for

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[283] Alabama v. Shelton, 535 U.S. 654, 658 (2002) (emphasis added).

In *Middendorf v. Henry*, 425 U.S. 25 (1976), the Court held the *right to counsel inapplicable to summary court-martial defendants*. The Uniform Code of Military Justice provided four methods for disposing of cases involving offenses committed by servicemen: the general, special, and summary courts-martial, and disciplinary punishment administered by the commanding officer pursuant to Article 15. General and special courts-martial resembled judicial proceedings, nearly always presided over by lawyer judges with lawyer counsel for both the prosecution and the defense. General courts-martial were authorized to award any lawful sentence, including death. Special courts-martial might award a bad-conduct discharge, up to six months' confinement at hard labor, forfeiture of two-thirds pay per month for six months, and, in the case of an enlisted member, reduction to the lowest pay grade. Article 15 punishment, conducted personally by the accused's commanding officer, was an administrative method of dealing with the most minor offenses. The summary court-martial occupied a position between informal non-judicial disposition under Article 15 and the courtroom-type procedure of the general and special courts-martial. Its purpose, was "to exercise justice promptly for relatively minor offenses under a simple form of procedure." It was an informal proceeding conducted by a single commissioned officer with jurisdiction only over non-commissioned officers and other enlisted personnel. The presiding officer acted as judge, fact finder, prosecutor, and defense counsel. The presiding officer should inform the accused of the charges and the name of the accuser and call all witnesses whom he or the accused desired to call. The accused should consent to trial by summary court-martial; if he did not do so, trial could be ordered by special or general court-martial. The maximum sentence elements that might be imposed by summary courts-martial were: one month's confinement at hard labor; 45 days' hard labor without confinement; two months' restriction to specified limits; reduction to the lowest enlisted pay grade; and forfeiture of two-thirds pay for one month. Assuming, for purposes of its opinion, that the Sixth Amendment applied to courts-martial in general, the Court held that, because of their special characteristics, summary courts-martial in particular were simply not "criminal prosecutions" within the meaning of the Sixth Amendment.

[284] Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).

[285] Maine v. Moulton, 474 U.S. 159, 169 (1985).

[286] Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

the assistance of counsel, [the Court has] found that the right attaches at earlier, 'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'"[287] A pre-trial event constitutes a "critical stage" when the accused "require[s] aid in coping with legal problems or help in meeting his adversary."[288]

[C95] "Once the right to counsel has attached and been asserted, the State must, of course, honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. . . . [In this regard, the Court has] made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."[289] In a line of cases beginning with *Massiah*, "the Court has held that, once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case-in-chief statements 'deliberately elicited' from a defendant without an express waiver of the right to counsel."[290]

[C96] Following his indictment for first-degree murder, the defendant in *Spano* retained a lawyer and surrendered to the authorities. Before leaving the defendant in police custody, counsel cautioned him not to respond to interrogation. The prosecutor and police questioned the defendant, persisting in the face of his repeated refusal to answer and his repeated request to speak with his lawyer. The lengthy interrogation involved improper police tactics, and the defendant ultimately confessed. Agreeing with the Court that the confession was involuntary, and thus improperly admitted in evidence under the Fourteenth Amendment, the concurring Justices also took the position that

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[287] Maine v. Moulton, 474 U.S. 159, 170 (1985), *quoting* United States v. Wade, 388 U.S. 218, 224 (1967).

"The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to protect the unaided layman at critical confrontations with his 'expert adversary,' the government, after the adverse positions of government and defendant have solidified with respect to a particular alleged crime. The purpose of the Miranda-Edwards Fifth Amendment guarantee against compelled self-incrimination, on the other hand—and hence the purpose of invoking it—is to protect a quite different interest: the suspect's desire to deal with the police only through counsel. This is in one respect narrower than the interest protected by the Sixth Amendment guarantee (because it relates only to custodial interrogation), and in another respect broader (because it relates to interrogation regarding any suspected crime and attaches whether or not the 'adversarial relationship' produced by a pending prosecution has yet arisen)." *See McNeil v. Wisconsin*, 501 U.S. 171, 177–78 (1991), where the Court held that an accused's invocation of his Sixth Amendment right to counsel does not constitute an invocation of the *Miranda-Edwards* right to counsel.

[288] *See* Patterson v. Illinois, 487 U.S. 285, 298 (1988), *quoting* United States v. Ash, 413 U.S. 300, 313 (1973).

In *Powell v. Texas*, 492 U.S. 680 (1989) (*per curiam*), the Court held that, once a defendant is formally charged, the Constitution precludes the state from subjecting him to a psychiatric examination, concerning future dangerousness, without notice to counsel, and that such evidence of future dangerousness, taken in deprivation of a defendant's Sixth Amendment right to the assistance of counsel, cannot be used against him at a sentencing proceeding.

[289] Maine v. Moulton, 474 U.S. 159, 170–01 (1985).

[290] Michigan v. Harvey, 494 U.S. 344, 348 (1990).

the defendant's right to counsel was violated by the secret interrogation.[291] The position of the concurring Justices in *Spano* was adopted by the Court in *Massiah*. Massiah was indicted, along with a man named Colson, for conspiracy to possess and to distribute cocaine. Massiah retained a lawyer, pleaded not guilty, and was released on bail. Colson, meanwhile, decided to cooperate with government agents in their continuing investigation of the narcotics activity in which Massiah and others were thought to be engaged. Colson permitted a government agent to install a radio transmitter under the front seat of his automobile. Massiah held a lengthy conversation with Colson in this automobile while a government agent listened over the radio. Massiah made several incriminating statements, and these were brought before the jury through the testimony of the government agent. Massiah's conviction was reversed on the ground that the incriminating statements were obtained in violation of Massiah's rights under the Sixth Amendment. The Court held that, once a defendant's Sixth Amendment right to counsel has attached, he is denied that right when federal agents "deliberately elicit" incriminating statements from him in the absence of his lawyer.[292] "The Court adopted this test, rather than one that turned simply on whether the statements were obtained in an 'interrogation,' to protect accused persons from 'indirect and surreptitious interrogations,' as well as those conducted in the jailhouse."[293]

[C97] In *Brewer v. Williams*, a suspect in the abduction and murder of a ten-year-old girl had fled from the scene of the crime in Des Moines, Iowa, some 160 miles east to Davenport, Iowa, where he surrendered to police. An arrest warrant was issued in Des Moines on a charge of abduction, and the suspect was arraigned on that warrant before a Davenport judge. Des Moines police traveled to Davenport, took Williams into custody, and began the drive back to Des Moines. During the trip, respondent expressed no willingness to be interrogated in the absence of an attorney, but instead stated several times that he would tell the whole story after seeing his Des Moines lawyer. Along the way, one of the police officers, who knew that respondent was a former mental patient and was deeply religious, sought to obtain incriminating remarks from respondent by stating to him during the drive that he felt they should stop and locate the girl's body, because her parents were entitled to a Christian burial for the girl, who was taken away from them on Christmas Eve. Respondent eventually made several incriminating statements in the course of the trip and finally directed the police to the girl's body. The Court thought that the police officer had elicited incriminating remarks from the defendant through his "Christian burial speech." Consequently, it held that the evidence in question had been wrongly admitted at respondent's trial on the ground that he had been denied his constitutional right to the assistance of counsel.[294]

[C98] In *United States v. Henry*, the Court applied the *Massiah* test to incriminating statements made to a jailhouse informant. Henry was arrested and indicted for bank robbery. Counsel was appointed, and Henry was held in jail pending trial. Nichols, an inmate at the same jail and a paid informant for the Federal Bureau of Investigation,

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[291] Spano v. New York, 360 U.S. 315, 325–26 (1959) (Douglas, J., concurring, joined by Black and Brennan, JJ.); *id.* at 326–27 (Stewart, J., concurring, joined by Douglas and Brennan, JJ.).

[292] Massiah v. United States, 377 U.S. 201, 206 (1964).

[293] *See* Kuhlmann v. Wilson, 477 U.S. 436, 457 (1986), *discussing* Massiah v. United States, 377 U.S. 201, 206 (1964).

[294] Brewer v. Williams, 430 U.S. 387, 399–401 (1977).

told a government agent that he was housed in the same cellblock as several federal prisoners, including Henry. The agent told Nichols to pay attention to statements made by these prisoners, but expressly instructed Nichols not to initiate any conversations and not to question Henry regarding the bank robbery. Nichols and Henry subsequently engaged in some conversations during which Henry told Nichols about the robbery. Nichols testified about these conversations at Henry's trial, and Henry was convicted. The Court reversed, finding that the "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." Several facts were emphasized in the Court's opinion: that Nichols was acting as an informant for the government, and therefore had an incentive to produce useful information; that Henry was unaware of Nichols' role as a government informant; and, finally, that Henry and Nichols were incarcerated together at the time the conversations took place. With respect to this last fact, the Court reasoned that confinement may bring into play subtle influences that will make an individual particularly susceptible to the ploys of undercover government agents. Considering Nichols' conversations with Henry in light of these circumstances, the Court concluded that Nichols "deliberately used his position to secure incriminating information from Henry when counsel was not present," in violation of the Sixth Amendment. Although the informant had not questioned the defendant, the informant had "stimulated" conversations with the defendant in order to "elicit" incriminating information; those facts amounted to "indirect and surreptitious interrogation" of the defendant. The government argued that it should not be held responsible for Nichols' conduct, because its agent had instructed Nichols not to question Henry and had not intended that Nichols take affirmative steps to obtain incriminating statements. The Court rejected this argument, finding that, under the circumstances, the agent "must have known" that Nichols would take affirmative steps to secure incriminating information.[295]

[C99] *Henry* left open the question whether the Sixth Amendment forbids admission in evidence of an accused's statements to a jailhouse informant who was placed in close proximity but made no effort to stimulate conversations about the crime charged. This question was answered negatively in *Kuhlmann*. There, the Court made clear that "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached, . . . a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."[296]

[C100] In *Maine v. Moulton*, the defendant made incriminating statements in a meeting with his accomplice, who had agreed to cooperate with the police. During that meeting, the accomplice, who wore a wire transmitter to record the conversation, discussed with the defendant the charges pending against him, repeatedly asked the defendant to remind him of the details of the crime, and encouraged the defendant to describe

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295 United States v. Henry, 447 U.S. 264, 270–74 (1980).

296 Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

his plan for killing witnesses. The Court concluded that these investigatory techniques denied the defendant his right to counsel on the pending charges. In so doing, the Court emphasized that, because of the relationship between the defendant and the informant, the informant's "engaging [the defendant] in active conversation about their upcoming trial was certain to elicit incriminating statements" from the defendant. Thus, the informant's "merely participating in this conversation was 'the functional equivalent of interrogation.'"[297]

[C101] "For the fruits of post-indictment interrogations to be admissible in a prosecution's case-in-chief, the State must prove a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel."[298] The constitutional minimum for determining whether a waiver was "knowing and intelligent" is that the accused be "made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel."[299] When a suspect waives his right to counsel after receiving warnings equivalent to those prescribed by *Miranda*, "that will generally suffice to establish a knowing and intelligent waiver of the Sixth Amendment right to counsel for purposes of post-indictment questioning."[300]

[C102] In *Michigan v. Jackson*, the Court created a bright-line rule for deciding whether an accused, who has "asserted" his Sixth Amendment right to counsel, has subsequently waived that right. "Transposing the reasoning of *Edwards v. Arizona*, which had announced an identical 'prophylactic rule' in the Fifth Amendment context, the Court decided that, after a defendant requests assistance of counsel, any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid, and evidence obtained pursuant to such a waiver is inadmissible in the prosecution's case-in-chief."[301] However, just as statements taken in violation of only the prophylactic

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[297] Maine v. Moulton, 474 U.S. 159, 177, n.13 (1985).

[298] Michigan v. Harvey, 494 U.S. 344, 348–49 (1990), *citing* Patterson v. Illinois, 487 U.S. 285, 292, and n.4 (1988).

[299] Patterson v. Illinois, 487 U.S. 285, 292–93 (1988).

[300] *See* Michigan v. Harvey, 494 U.S. 344, 349 (1990), *discussing* Patterson v. Illinois, 487 U.S. 285 (1988).

In *Iowa v. Tovar*, 541 U.S. 77 (2004), the Iowa supreme court had held that a defendant must be advised specifically that waiving counsel's assistance in deciding whether to plead guilty (1) entails the risk that a viable defense will be overlooked and (2) deprives him of the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. The Court held that neither warning was mandated by the Sixth Amendment, noting, *inter alia*, that these warnings "might be misconstrued as a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted." *Id.* at 93. In addition, the Court held that "[t]he constitutional requirement of a knowing and intelligent waiver is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.* at 81.

Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses. *See* Maine v. Moulton, 474 U.S. 159, 180, n.16 (1985).

[301] *See* Michigan v. Harvey, 494 U.S. 344, 349 (1990), *discussing* Michigan v. Jackson, 475 U.S. 625, 636 (1986).

Miranda-Edwards rules are admissible to impeach conflicting testimony by the defendant,[302] the prosecution may use a statement taken in violation of the *Jackson* rule to impeach a defendant's false or inconsistent testimony.[303]

b. The Right to Counsel of One's Choice

[C103] The Sixth Amendment's guarantee of assistance of counsel comprehends "the right to select and be represented by one's preferred attorney." However, this right "is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford, or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government."[304]

[C104] *Morris v. Slappy* held that a state court did not violate a defendant's Sixth Amendment right to counsel by denying his motion for a continuance until the public defender initially assigned to defend him was available. In reaching that conclusion, the Court noted the new defense counsel's statement that he was fully prepared and ready for trial and rejected the claim that the Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel.[305]

[C105] *Caplin & Drysdale* involved a federal drug forfeiture statute containing no exemption for assets that a defendant wished to use to pay an attorney who conducted his defense in the criminal case where forfeiture was sought. The Court held that the statute did not offend the Fifth or Sixth Amendments, finding that a defendant cannot escape an otherwise appropriate forfeiture sanction by pointing to his need for counsel to represent him on the underlying charges.[306]

[C106] "[T]he essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant, rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Hence, in multiple-representation cases, "a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." Although the Sixth Amendment mandates "a presumption in favor of accepting a criminal defendant's choice of counsel, . . . that presumption may be overcome not only by a demonstration of actual conflict, but [also] by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court."[307]

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302 *See* Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975).
303 *See* Michigan v. Harvey, 494 U.S. 344, 350–51 (1990).
304 Wheat v. United States, 486 U.S. 153, 159 (1988).
305 Morris v. Slappy, 461 U.S. 1, 12–14 (1983).
306 Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624–35 (1989).
307 Wheat v. United States, 486 U.S. 153, 159, 160, 164 (1988).

c. Right to Effective Assistance of Counsel [308]

[C107] "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."[309] An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that the right to counsel is the right to the *effective* assistance of counsel,[310] the essence of which is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[311] The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor."[312] "If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated. To hold otherwise 'could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.'"[313] "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[314] "Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'"[315]

[C108] Because there is a presumption that the lawyer is competent to provide the guiding hand that the defendant needs, "the burden rests on the accused to demonstrate a constitutional violation."[316] *Strickland* announced a two-part test for evaluating claims that a defendant's counsel performed so incompetently in his or her representation of a defendant that the defendant's sentence or conviction should be reversed. Under this test, the defendant must prove two things: first, that counsel's "representation fell below an objective standard of reasonableness" and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

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[308] *See also* para. C64 (*scope of court-appointed appellate counsel's duty to an indigent client*).

[309] Strickland v. Washington, 466 U.S. 668, 685 (1984).

[310] McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970).

[311] United States v. Cronic, 466 U.S. 648, 656 (1984).

[312] United States v. Ash, 413 U.S. 300, 309 (1973).

[313] United States v. Cronic, 466 U.S. 648, 654 (1984), *quoting* Avery v. Alabama, 308 U.S. 444, 446 (1940).

[314] Strickland v. Washington, 466 U.S. 668, 686 (1984), *citing* Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612–13 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593–96 (1961) (bar on direct examination of defendant).

[315] Strickland v. Washington, 466 U.S. 668, 686 (1984), *citing* Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). *See also* McMann v. Richardson, 397 U.S. 759, 770–71 (1970), where the Court indicated that the accused is entitled to "a reasonably competent attorney," whose advice is "within the range of competence demanded of attorneys in criminal cases."

[316] United States v. Cronic, 466 U.S. 648, 658 (1984).

proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome."[317]

[C109] "The proper measure of attorney performance [is] reasonableness under prevailing professional norms. . . . Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. . . . From counsel's function as assistant to the defendant derives the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. . . . These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' . . . Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, including the defendant's own statements or actions, the identified acts or omissions were outside the wide range of professionally competent assistance."[318]

[C110] Under the "prejudice" component of the *Strickland* test, the defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[319] Thus, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. . . . Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."[320] For example, even if a defendant's

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317 Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

318 Strickland v. Washington, 466 U.S. 668, 688–90 (1984). In *Nix v. Whiteside*, 475 U.S. 157, 171 (1986), the Court held that counsel's refusal to cooperate in presentation of perjury falls "well within . . . the range of reasonable professional conduct acceptable under *Strickland*."

319 Strickland v. Washington, 466 U.S. 668, 687 (1984).

320 Lockhart v. Fretwell, 506 U.S. 364, 369, 372 (1993). There, the Court concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in *Strickland*. The death sentence that Arkansas had imposed on Fretwell was based on an aggra-

false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury.[321]

[C111] "There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel. . . . The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding."[322] "Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."[323] The same is true "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not."[324] By contrast, "the possibility of prejudice that inheres

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vating circumstance (murder committed for pecuniary gain) that duplicated an element of the underlying felony (murder in the course of a robbery). Shortly before the trial, the U.S. Court of Appeals for the Eighth Circuit had held that such "double counting" was impermissible (*Collins* decision), but Fretwell's lawyer (presumably because he was unaware of the *Collins* decision) failed to object to the use of the pecuniary gain aggravator. Before Fretwell's claim for federal habeas corpus relief reached the Supreme Court, the *Collins* case was overruled. Accordingly, even though the Arkansas trial judge probably would have sustained a timely objection to the double counting, it had become clear that the state had a right to rely on the disputed aggravating circumstance. Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, the Court held that his claim did not satisfy the "prejudice" component of the *Strickland* test.

321 *See* Nix v. Whiteside, 475 U.S. 157, 175–76 (1986).

322 See United States v. Cronic, 466 U.S. 648, 658–59, n.25 (1984), *citing* Geders v. United States, 425 U.S. 80 (1976) (attorney-client consultation prevented during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612–13 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593–96 (1961) (bar on direct examination of defendant); White v. Maryland, 373 U.S. 59 (1963) (absence of counsel from arraignment proceeding that affected entire trial because defenses not asserted were irretrievably lost); Hamilton v. Alabama, 368 U.S. 52 (1961) (same).

323 United States v. Cronic, 466 U.S. 648, 659 (1984).

324 *Bell v. Cone*, 535 U.S. 685, 696 (2002), *citing United States v. Cronic*, 466 U.S. 648, 659–62 (1984), where the Court discussed *Powell v. Alabama*, 287 U.S. 45 (1932), as follows: "The defendants had been indicted for a highly publicized capital offense. Six days before trial, the trial judge appointed 'all the members of the bar' for purposes of arraignment. 'Whether they would represent the defendants thereafter if no counsel appeared in their behalf was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court.' . . . On the day of trial, a lawyer from Tennessee appeared on behalf of persons 'interested' in the defendants, but stated that he had not had an opportunity to prepare the case or to familiarize himself with local procedure, and therefore was unwilling to represent the defendants on such short notice. The problem was resolved when the court decided that the Tennessee lawyer would represent the defendants, with whatever help the local bar could provide. 'The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.' . . . The Court held that 'such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard.' . . .

in almost every instance of multiple representation" does not justify "the adoption of an inflexible rule that would presume prejudice in all such cases. Instead, [the Court] 'presume[s] prejudice only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.'"[325]

d. The Defendant's Right to Self-Representation

[C112] In *Faretta*, the Court considered the case of a criminal defendant who was required to present his defense exclusively through counsel. The Court "held that an accused has a Sixth Amendment right to conduct his own defense at trial, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol."[326] *Faretta* stressed that, "[u]nless the accused has acquiesced in [representation through counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense."[327] This "holding was based on the longstanding recognition of a right of self-representation in federal and most state courts, and on the language, structure, and spirit of the Sixth Amendment. Under that Amendment, it is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who has the right to confront witnesses, and who must be accorded 'compulsory process for obtaining witnesses in his favor.' The Counsel Clause itself, which permits the accused 'to have the Assistance of Counsel for his defence,' implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial."[328]

The Court did not examine the actual performance of counsel at trial, but instead concluded that, under these circumstances, the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair."

[325] *See* Burger v. Kemp, 483 U.S. 776, 783 (1987), *quoting* Strickland v. Washington, 466 U.S. 668, 692 (1984). *See also* Mickens v. Taylor, 535 U.S. 162, 173–74 (2002).

[326] *See* McKaskle v. Wiggins, 465 U.S. 168, 173 (1984), *discussing* Faretta v. California, 422 U.S. 806 (1975). As the Court cautioned in the latter case, "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* at 835.

[327] Faretta v. California, 422 U.S. 806, 821 (1975).

[328] *See* McKaskle v. Wiggins, 465 U.S. 168, 174 (1984), *discussing* Faretta v. California, 422 U.S. 806 (1975).

The federal appellate courts have split on whether *Faretta* implies a right of the pro se defendant to have access to a law library. In *Kane v. Espitia*, 546 U.S. 9 (2005), the Court did not resolve that question, but made clear that *Faretta* does not, as 28 U.S.C. Section 2254(d)(1) requires for habeas corpus relief, "clearly establis[h]" the law library access right.

In *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), the Court held that, under the Sixth Amendment and the Due Process Clauses of the Federal Constitution, there is no right to self-representation on direct appeal from a criminal conviction. The Court reasoned that (1) the Sixth Amendment deals strictly with trial rights, and does not include any right to appeal; (2) the risk of disloyalty by a court-appointed attorney is not a sufficient concern to conclude that such a right is a necessary component of a fair appellate proceeding; and (3) the states are clearly within their discretion to conclude that the government's interest in the fair and efficient administration of the appellate process outweighs an invasion of the appellant's interest in self-representation.

[C113] "A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial. . . . [Nevertheless, a] defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course."[329]

[C114] The right to self-representation is not absolute. The trial judge "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. . . . Of course, a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."[330] However, the right to proceed *pro se* may be undermined by unsolicited and excessively intrusive participation by standby counsel. "In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether he had a fair chance to present his case in his own way. . . . Accordingly, the *Faretta* right must impose some limits on the extent of standby counsel's unsolicited participation. First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the *Faretta* right is eroded. Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself. The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy. . . . Participation by standby counsel outside the presence of the jury engages only the first of these two limitations. . . . Thus, *Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel."[331] If "a defendant elects to have counsel appear before the court or jury, his complaints concerning counsel's subsequent unsolicited participation lose much of their force. A defendant does not have a constitutional right to choreograph special appearances by counsel. Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced. *Faretta* rights are also not infringed when standby counsel assists the *pro se* defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete. Nor are they infringed when counsel merely helps to ensure the defendant's compliance with basic rules of courtroom

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329 McKaskle v. Wiggins, 465 U.S. 168, 174, 183–84 (1984).

330 Faretta v. California, 422 U.S. 806, 834, n.46 (1975).

331 McKaskle v. Wiggins, 465 U.S. 168, 177–79 (1984).

protocol and procedure. In neither case is there any significant interference with the defendant's actual control over the presentation of his defense. . . . The likelihood that the defendant's appearance in the status of one defending himself will be eroded is also slight, and, in any event, it is tolerable. Accordingly, . . . a defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."[332]

3. Safeguards Regarding Show-Ups, Line-Ups, and Other Pre-Trial Identification Procedures

[C115] In *Wade* and *Gilbert*, the Court held that "a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution, and that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth and Fourteenth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup."[333] "Those cases further held that no 'in-court identifications' are admissible in evidence if their 'source' is a lineup conducted in violation of this constitutional standard."[334] "Only a *per se* exclusionary rule as to such testimony can be an effective sanction," the Court explained, "to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup."[335]

[C116] *Kirby* declined to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony based upon a police station show-up that took place before the defendant had been indicted or otherwise formally charged with any criminal offense.[336] *Ash* held that there is no Sixth Amendment right to counsel whatsoever at a post-indictment photographic display identification, because this procedure is not one at which the accused requires aid in coping with legal problems or assistance in meeting his adversary.[337]

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[332] *Id.* at 183–84.

[333] Gilbert v. California, 388 U.S. 263, 272 (1967); United States v. Wade, 388 U.S. 218 (1967).

[334] *See* Kirby v. Illinois, 406 U.S. 682, 683 (1972)

[335] Gilbert v. California, 388 U.S. 263, 273 (1967).

[336] Kirby v. Illinois, 406 U.S. 682 (1972).

[337] *See* United States v. Ash, 413 U.S. 300, 313 (1973). The Court also noted: "Pre-trial photographic identifications . . . are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways, the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may 'strike hard blows,' but not 'foul ones.' Berger v. United States, 295 U.S. 78, 88 (1935); Brady v. Maryland, 373 U.S. 83, 87–88 (1963). If that safeguard fails, review remains available under due process standards. *See* Giglio v. United States, 405 U.S. 150 (1972); Mooney v. Holohan, 294 U.S. 103, 112 (1935); Miller v. Pate, 386 U.S. 1 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973). These same safeguards apply to misuse of photographs. *See* Simmons v. United States, 390 U.S. 377, 384 (1968). We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required. "*Id.* at 320–21.

[C117] Of course, this does not suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. When a person has not been formally charged with a criminal offense, *Stovall* strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime. That case concerned a petitioner who had been convicted in a New York court of murder. He was arrested the day following the crime and was taken by the police to a hospital where the victim's wife, also wounded in the assault, was a patient. After observing Stovall and hearing him speak, she identified him as the murderer. She later made an in-court identification. On federal habeas, Stovall claimed the identification testimony violated his Fifth, Sixth, and Fourteenth Amendment rights. The district court dismissed the petition, and the court of appeals, *en banc*, affirmed. The Court also affirmed. "On the identification issue, the Court reviewed the practice of showing a suspect singly for purposes of identification, and the claim that this was so unnecessarily suggestive and conducive to irreparable mistaken identification that it constituted a denial of due process of law. The Court noted that the practice 'has been widely condemned,' . . . but it concluded that 'a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.' . . . In that case, showing Stovall to the victim's spouse was 'imperative.' The Court then quoted the observations of the Court of Appeals, . . . to the effect that the spouse was the only person who could possibly exonerate the accused; that the hospital was not far from the courthouse and jail; that no one knew how long she might live; that she was not able to visit the jail; and that taking Stovall to the hospital room was the only feasible procedure, and, under the circumstances, 'the usual police station line-up . . . was out of the question.'"[338]

[C118] Subsequently, in *Simmons*, where the witnesses made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test: "each case must be considered on its own facts, and . . . convictions based on eye witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Again the Court found the identification procedure to be supportable, relying both on the need for prompt utilization of other investigative leads and on the likelihood that the photographic identifications were reliable, the witnesses having viewed the bank robbers for periods of up to five minutes under good lighting conditions at the time of the robbery.[339]

In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the Court stated: "Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error."

[338] *See* Manson v. Braithwaite, 432 U.S. 98, 104 (1977), *discussing* and *quoting* Stovall v. Denno, 388 U.S. 293, 301–02 (1967).

[339] Simmons v. United States, 390 U.S. 377, 384–85 (1968).

[C119] In *Foster v. California*, the witness failed to identify Foster the first time he confronted him, despite a suggestive line-up. The police then arranged a show-up, at which the witness could make only a tentative identification. Ultimately, at yet another confrontation, this time a line-up, the witness was able to muster a definite identification. The Court concluded that "the suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was, in fact, 'the man.' In effect, the police repeatedly said to the witness, 'This is the man.' This procedure so undermined the reliability of the eyewitness identification as to violate due process."[340]

[C120] *Neil v. Biggers* concerned a respondent who had been convicted in a Tennessee court of rape, on evidence consisting in part of the victim's visual and voice identification of Biggers at a stationhouse show-up seven months after the crime. The victim had been in her assailant's presence for some time and had directly observed him indoors and under a full moon outdoors. She testified that she had "no doubt" that Biggers was her assailant. She previously had given the police a description of the assailant. She had made no identification of others presented at previous show-ups, line-ups, or through photographs. On federal habeas, the district court held that the confrontation was so suggestive as to violate due process. The court of appeals affirmed. The Court reversed on that issue, and held that the evidence properly had been allowed to go to the jury. The Court expressed concern about the lapse of seven months between the crime and the confrontation, and observed that this would be a seriously negative factor in most cases. The central question, however, was whether "*under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive.*" Applying that test, the Court found "*no substantial likelihood of misidentification.*"[341]

[C121] *Manson* reaffirmed that "reliability is the linchpin in determining the admissibility of identification testimony." "The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself."[342]

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[340] Foster v. California, 394 U.S. 440, 442–43 (1969).

[341] Neil v. Biggers, 409 U.S. 188, 199–201 (1972) (emphasis added).

[342] Manson v. Braithwaite, 432 U.S. 98, 114 (1977). In that case, Glover, a trained police officer, had a sufficient opportunity to view the suspect, accurately described him, positively identified respondent's photograph as that of the suspect, and made the photograph identification only two days after the crime. The Court held that, although identifications arising from single-photograph displays may be viewed in general with suspicion, the foregoing indicators of Glover's ability to make an accurate identification were hardly outweighed by the corrupting effect of the challenged identification, for, in the specific case, there was little pressure on the witness to acquiesce in the suggestion that such a display entailed. A police officer had left the photograph at Glover's office, and was not present when Glover first viewed it two days after the event. There thus was little urgency, and Glover could view the photograph at his leisure. And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another. The identification was made in circumstances allowing care and reflection. Hence, the Court could not say that, under all the circumstances of this case, there was a very substantial likelihood of irreparable misidentification. *Id.* at 114–16.

4. The Excessive Bail Clause

[C122] The Eighth Amendment addresses pre-trial release by providing merely that "[e]xcessive bail shall not be required." "This Clause says nothing about whether bail shall be available at all. . . . The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil. . . . [T]o determine whether the Government's response is excessive, [one] must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more."[343] But "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight," such as the government's interest in community safety, "the Eighth Amendment does not require release on bail."[344]

5. Standard and Burden of Proof[345]

[C123] Proof of a criminal charge beyond a reasonable doubt is constitutionally required. *Winship* held that the Due Process Clause protects the accused "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[346] A "reasonable doubt" has been described as one "based on reason, which arises from the evidence or lack of evidence."[347] Hence, *Winship* "presupposes as an essential of the due process guarantee that no person will be made to suffer the onus of a criminal conviction except upon sufficient proof."[348]

[C124] Generally, in a criminal case, the prosecution bears both the burden of producing evidence and the burden of persuasion.[349] Nevertheless, presumptions may be used to encourage the jury to find certain (elemental) facts, with respect to which no direct evidence is presented, solely because other (basic) facts have been proved. Such encouragement can be provided either by statutory presumptions or by presumptions created in the common law.[350] A *permissive* inference or presumption "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof. Hence, it affects the application of the beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. . . . [By contrast, a *mandatory rebuttable* presumption] may affect not only the strength of the 'no reasonable doubt' burden, but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon

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343 United States v. Salerno, 481 U.S. 739, 752, 754 (1987), *citing* Stack v. Boyle, 342 U.S. 1, 5 (1951).

344 *Id.* at 754–55.

345 *See also* para. C153 (*facts treated as sentencing factors*).

346 *In re* Winship, 397 U.S. 358, 364 (1970).

347 *See* Johnson v. Louisiana, 406 U.S. 356, 360 (1972) (citing cases).

348 Jackson v. Virginia, 443 U.S. 307, 316 (1979).

349 *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 702, n.31 (1975). A jury instruction violates due process of it fails to give effect to the requirement that the state prove every element of the offense. *See* Sandstrom v. Montana, 442 U.S. 510, 520–21 (1979).

350 *See* County Court of Ulster County v. Allen, 442 U.S. 140, 168, n.1 (1979) (Powell, J., dissenting).

proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. . . . In this situation, the Court has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. . . . To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases."[351]

[C125] In *Tot*, the Court had before it a federal statute that made it a crime for one previously convicted of a crime of violence to receive any firearm or ammunition in an inter-state transaction. The statute further provided that "the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act." The Court held: "[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 proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts."[352] "The *Tot* Court reduced to the status of a 'corollary' another test which had some support in prior decisions: whether it was more convenient for the defendant or for the Government to supply proof of the ultimate fact which the presumption permitted to be inferred."[353] The Court stated that "[t]he argument from convenience is admissible only where the inference is a permissible one."[354] "The Court rejected entirely another suggested test with some backing in the case law, according to which the presumption should be sustained if Congress might legitimately have made it a crime to commit the basic act from which the presumption allowed an inference to be drawn."[355] "Applying the 'rational connection' test, the Court held the *Tot* presumption unconstitutional. The Court rejected the contention that, because most States forbade intrastate acquisition of firearms without a record of the transaction or registration of ownership, it could be inferred merely from possession that an acquisition which did not meet these requirements must have been interstate, noting the alternative possibilities of unlawful intra-state acquisition and inter-state shipment prior to the beginning of state regulation."[356]

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[351] *Id.* at 157–59.

Even if there may be ample evidence in the record other than an invalid presumption to support a conviction, the conviction must be reversed, as long as there is no certainty that the jury did not rely on the presumption. *See* Leary v. United States, 395 U.S. 6, 30–32 (1969).

[352] Tot v. United States, 319 U.S. 463, 467–68 (1943).

[353] *See* Leary v. United States, 395 U.S. 6, 34, n.59 (1969), *discussing Tot* and *citing* Morrison v. California, 291 U.S. 82 (1934); Rossi v. United States, 289 U.S. 89 (1933).

[354] Tot v. United States, 319 U.S. 463, 469 (1943).

[355] *See* Leary v. United States, 395 U.S. 6, 34, n.60 (1969), *discussing Tot* and *citing* Ferry v. Ramsey, 277 U.S. 88 (1928).

[356] *See* Leary v. United States, 395 U.S. 6, 34–35 (1969), *discussing* Tot v. United States, 319 U.S. 463, 468 (1943).

[C126] The statutory presumption in *Gainey* permitted a jury to infer from a defendant's presence at an illegal still that he was "carrying on" the business of a distiller "unless the defendant explains such presence to the satisfaction of the jury." The Court held that the presumption should be tested by the "rational connection" standard announced in *Tot*, adding that "[th]e process of making the determination of rationality is, by its nature, highly empirical, and, in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." Applying these principles, the Court sustained the *Gainey* presumption, finding that it "did no more than accord to the evidence, if unexplained, its natural probative force," in light of the common knowledge that illegal stills were secluded, secret operations.[357]

[C127] The following term, the Court determined, however, that presence at an illegal still could not support the inference that the defendant was in possession, custody, or control of the still, a narrower offense. While stating that the result in *Gainey* was entirely justified, since presence at an operating still was sufficient evidence to prove the charge of "carrying on," because anyone present at the site was very probably connected with the illegal enterprise, the Court concluded: "Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt."[358]

[C128] *Leary* involved a challenge to a statutory inference that possession of marihuana, unless satisfactorily explained, was sufficient to prove that the defendant knew that the marihuana had been illegally imported into the United States. "The Court concluded that in view of the significant possibility that any given marihuana was domestically grown and the improbability that a marihuana user would know whether his marihuana was of domestic or imported origin, the inference did not meet the standards set by *Tot, Gainey*, and *Romano*."[359] Referring to these three cases, the *Leary* Court stated that an inference is "irrational" or "arbitrary," and hence unconstitutional, "unless it can 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."[360] The Court invalidated the statute, finding there to be insufficient basis in fact for the conclusion that those who possess marihuana are more likely than not to know that it was imported illegally. In a footnote, the Court stated that, since the challenged inference failed to satisfy the "more likely than not" standard, it did not have to "reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use."[361]

[C129] In *Turner*, the Court considered the constitutionality of instructing the jury that it may infer from possession of heroin and cocaine that the defendant knew these drugs had been illegally imported. The Court noted that *Leary* reserved the question of whether the "more likely than not" or the "reasonable doubt" standard controlled in

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357 United States v. Gainey, 380 U.S. 63, 67–71 (1965).

358 United States v. Romano, 382 U.S. 136, 141 (1965).

359 *See* Barnes v. United States, 412 U.S. 837, 842 (1973), *discussing* Leary v. United States, 395 U.S. 6 (1969).

360 Leary v. United States, 395 U.S. 6, 36 (1969).

361 *Id.* at 36, n.64.

criminal cases, but it likewise found no need to resolve that question. It held that the inference with regard to heroin was valid judged by either standard, since it was abundantly clear that little, if any, heroin was made the United States. With regard to cocaine, the inference failed to satisfy even the "more likely than not" standard.[362]

[C130] *Barnes* addressed the constitutionality of a quite different sort of presumption—one that suggested to the jury that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference . . . that the person in possession knew the property had been stolen." After reviewing the various formulations used by the Court to articulate the constitutionally required basis for a criminal presumption, the Court once again found it unnecessary to choose among them. As for the presumption suggested to the jury in *Barnes*, the Court found that it was well founded in history, common sense, and experience and therefore upheld it as being "clearly sufficient to enable the jury to find beyond a reasonable doubt" that those in the unexplained possession of recently stolen property know it to have been stolen.[363]

[C131] *Patterson* stressed that "a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."[364] The Court thus has struck down a state murder statute providing that the element of malice (in the sense of want of provocation) would be presumed upon proof of intent to kill resulting in death, subject to a defendant's right of rebuttal that he had acted on provocation in the heat of passion, which would reduce the offense to manslaughter.[365]

[C132] A *mandatory conclusive* presumption "removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption."[366] The Court has held that a conclusive presumption of intent, which testimony cannot overthrow, violates due process, for it "would effectively eliminate intent as an ingredient of the offense," it "would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," and it "would invade the fact findingfunction" assigned solely to the jury.[367]

6. The Right to Present Evidence

a. Generally

[C133] Few rights are more fundamental than that of an accused to present material evidence in his own defense. However, this right "is not unlimited, but rather is subject to reasonable restrictions."[368] A defendant's interest in presenting such evidence may

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362 Turner v. United States, 396 U.S. 398, 405–18 (1970).

363 Barnes v. United States, 412 U.S. 837, 840, n.3, 845 (1973).

364 *See* Patterson v. New York, 432 U.S. 197, 215 (1977), *discussing* Mullaney v. Wilbur, 421 U.S. 684 (1975).

365 Mullaney v. Wilbur, 421 U.S. 684 (1975).

366 Francis v. Franklin, 471 U.S. 307, 314, n.2 (1985).

367 Sandstrom v. Montana, 442 U.S. 510, 522–23 (1979), *quoting* Morissette v. United States, 342 U.S. 246, 274–75 (1952).

368 United States v. Scheffer, 523 U.S. 303, 308 (1998) (citing cases).

thus "bow to accommodate other legitimate interests in the criminal trial process,"[369] such as the exclusion of unreliable evidence. "As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"[370] The Court has found "the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused."[371]

[C134] In *Washington v. Texas*, the Court was confronted with a state statute that prevented persons charged as principals, accomplices, or accessories in the same crime from being introduced as witnesses for one another. The statute was grounded in a concern for the reliability of evidence presented by an interested party: it was thought that, if two persons charged with the same crime were allowed to testify on behalf of each other, each would try to swear the other out of the charge. As the Court recognized, the incompetency of a co-defendant to testify had been rejected on non-constitutional grounds in 1918, when the Court stated: "[T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court."[372] The Court concluded that this reasoning was compelled by the Sixth Amendment's protections for the accused. In particular, the Court reasoned that the Sixth Amendment was designed in part "to make the testimony of a defendant's witnesses admissible on his behalf in court." By preventing the defendant from having the benefit of his accomplice's testimony, the state "arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[373]

[C135] "Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony."[374] In *Chambers v. Mississippi*, the Court invalidated a state's hearsay rule on

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[369] Rock v. Arkansas, 483 U.S. 44, 55 (1987), *quoting* Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

[370] United States v. Scheffer, 523 U.S. 303, 308 (1998), *quoting* Rock v. Arkansas, 483 U.S. 44, 56 (1987).

[371] United States v. Scheffer, 523 U.S. 303, 308 (1998), *citing* Rock v. Arkansas, 483 U.S. 44, 58 (1987); Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Washington v. Texas, 388 U.S. 14, 22–23 (1967).

[372] Rosen v. United States, 245 U.S. 467, 471 (1918).

[373] Washington v. Texas, 388 U.S. 14, 22–23 (1967). Under the Sixth Amendment, a defendant in a criminal case enjoys the right to have *compulsory process for obtaining witnesses* in his favor. The Compulsory Process Clause is applicable to the states through the Fourteenth Amendment. *See* Washington v. Texas, 388 U.S. 14, 17–19 (1967).

In *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982), the Court held that due process is violated when testimony is made unavailable to the defense by government *deportation of witnesses* "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact."

[374] Rock v. Arkansas, 483 U.S. 44, 55 (1987).

the ground that it abridged the defendant's right to present witnesses in his own defense. Chambers was tried for a murder to which another person repeatedly had confessed in the presence of acquaintances. The state's hearsay rule, coupled with a "voucher" rule that did not allow the defendant to cross-examine the confessed murderer directly, prevented Chambers from introducing testimony concerning these confessions, which were critical to his defense. "The Court reversed the judgment of conviction, holding that, when a state rule of evidence conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice,' but must meet the fundamental standards of due process. In the Court's view, the State in *Chambers* did not demonstrate that the hearsay testimony in that case, which bore 'assurances of trustworthiness' including corroboration by other evidence, would be unreliable, and thus the defendant should have been able to introduce the exculpatory testimony."[375]

[C136] "The *right to testify on one's own behalf* at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.' . . . The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. . . . Logically included in the accused's right to call witnesses whose testimony is 'material and favorable to his defense' . . . is a right to testify himself, should he decide it is in his favor to do so. . . . A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness. The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. . . . 'The choice of whether to testify in one's own defense . . . is an exercise of the constitutional privilege.' [Hence, an accused has the right] to present his own version of events in his own words."[376] In *Rock*, the defendant, accused of a killing to which she was the only eyewitness, was allegedly able to remember the facts of the killing only after having her memory hypnotically refreshed. Because Arkansas excluded all hypnotically refreshed testimony, the defendant was unable to testify about certain relevant facts, including whether the killing had been accidental. In holding that the exclusion of this evidence violated the defendant's right to present a defense, the Court noted:

> Despite the unreliability that hypnosis concededly may introduce, however, the procedure has been credited as instrumental in obtaining investigative leads or identifications that were later confirmed by independent evidence.
>
> The inaccuracies the process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards. One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. . . . These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist. Suggestion will be less likely also if the hypnosis is conducted in a neutral setting, with no one present but the hypnotist and the subject. Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked. Such guidelines do not guarantee the accuracy of the testimony, because they

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375 Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

376 Rock v. Arkansas, 483 U.S. 44, 51–53 (1987) (emphasis added).

> cannot control the subject's own motivations or any tendency to confabulate, but they do provide a means of controlling overt suggestions.
>
> The more traditional means of assessing accuracy of testimony also remain applicable in the case of a previously hypnotized defendant. Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions. Indeed, it is probably to a defendant's advantage to establish carefully the extent of his memory prior to hypnosis, in order to minimize the decrease in credibility the procedure might introduce.
>
> We are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy. Arkansas, however, has not justified the exclusion of all of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. *A State's legitimate interest in barring unreliable evidence does not extend to* per se *exclusions that may be reliable in an individual case.* Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections. The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.[377]

In that case, the defective condition of the gun, which was prone to fire, when hit or dropped, without the trigger's being pulled, corroborated the details petitioner remembered about the shooting. The tape recordings provided some means to evaluate the hypnosis, and the trial judge concluded that the doctor did not suggest responses with leading questions. Those circumstances presented an argument for admissibility of Rock's testimony, an argument that should have been considered by the trial court.[378]

[C137] *Scheffer* presented the question whether a Military Rule of Evidence, which made *polygraph evidence* inadmissible in court-martial proceedings, unconstitutionally abridged the right of accused members of the military to present a defense. First, the Court found that the rule was "a rational and proportional means of advancing the legitimate interest in barring unreliable evidence," for, "[a]lthough the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plagued even the best polygraph exams." In addition, *Rock, Washington*, and *Chambers* did not require that the rule be invalidated, because, unlike the evidentiary rules at issue in those cases, the rule did not implicate any significant interest of the accused. In *Scheffer*, "the court members heard

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377 Rock v. Arkansas, 483 U.S. 44, 60–61 (1987) (emphasis added).

378 *Id.* at 62.

all the relevant details of the charged offense from the perspective of the accused, and the Rule did not preclude him from introducing any factual evidence. Rather, respondent was barred merely from introducing expert opinion testimony to bolster his own credibility. Moreover, [the Rule] did not prohibit respondent from testifying on his own behalf; he freely exercised his choice to convey his version of the facts to the court-martial members." The Court therefore could not "conclude that respondent's defense was significantly impaired by the exclusion of polygraph evidence." The rule was thus constitutional.[379]

b. Discovery and Disclosure

[C138] *Brady* 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."[380] The Court has since held that the duty to disclose such evidence is applicable, even though there has been no request by the accused,[381] and that the duty encompasses impeachment evidence, as well as exculpatory evidence.[382] Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[383] Moreover, the rule encompasses evidence known only to police investigators and not to the prosecutor.[384] In order to comply with *Brady*, therefore, the prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."[385]

[C139] "These cases, together with earlier cases condemning the knowing use of perjured testimony,[386] illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, the Court has said that the United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"[387] "This special status explains both the basis for the prosecution's broad duty of disclosure and the conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. . . . [Thus,] there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have

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379 United States v. Scheffer, 523 U.S. 303, 312, 316–17 (1998).

380 Brady v. Maryland, 373 U.S. 83, 87 (1963).

381 United States v. Agurs, 427 U.S. 97, 107 (1976).

382 United States v. Bagley, 473 U.S. 667, 676 (1985).

383 *Id.* at 682. Information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

384 Kyles v. Whitley, 514 U.S. 419, 438 (1995).

385 *Id.* at 437.

386 *See, e.g.*, Mooney v. Holohan, 294 U.S. 103, 112 (1935) (*per curiam*); Pyle v. Kansas, 317 U.S. 213, 216 (1942); Napue v. Illinois, 360 U.S. 264, 269–70 (1959).

387 Strickler v. Greene, 527 U.S. 263, 281 (1999), *quoting* Berger v. United States, 295 U.S. 78, 88 (1935).

produced a different verdict. There are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[388]

[C140] But a defendant's claim that he has a right to notice of the evidence, which the state plans to use to prove the charges, stands on quite a different footing. The Due Process Clause "has little to say regarding the amount of discovery which the parties must be afforded."[389] In *Weatherford*, the Court considered the due process claim of a defendant who had been convicted with the aid of surprise testimony of an accomplice who was an undercover agent. Although the prosecutor had not intended to introduce the agent's testimony, he changed his mind the day of trial. To keep his cover, the agent had told the defendant and his counsel that he would not testify against the defendant. The Court rejected the defendant's claim, explaining that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady*," which addressed only exculpatory evidence, "did not create one."[390]

[C141] In *Williams v. Florida*, the Court upheld a Florida rule that required a criminal defendant to notify the state in advance of trial of any alibi witnesses that he intended to call. The Court observed that the notice requirement "by itself in no way affected [the defendant's] crucial decision to call alibi witnesses. . . . At most, the rule only compelled [the defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that [he] planned to divulge at trial." Accelerating the disclosure of this evidence did not violate the Constitution, the Court explained, because a criminal trial is not "a poker game in which players enjoy an absolute right always to conceal their cards until played."[391] In a subsequent decision, the Court described notice requirements as "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system."[392] This does not mean, of

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[388] Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

"A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [State's] files. . . . In the typical case where a defendant makes only a general request for exculpatory material under *Brady*, . . . it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." *See* Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987). That case involved the confidentiality of the Commonwealth's investigative files concerning child abuse. The Court found that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial could be protected fully by requiring that the files be submitted only to the trial court for in *camera* review. *Id.* at 60.

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), by contrast, the Court recognized that the Due Process Clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." The Court concluded that the failure to preserve this "potentially useful evidence" does not violate due process "*unless a criminal defendant can show bad faith on the part of the police.*" *Id.* at 57–58 (emphasis added).

[389] Wardius v. Oregon, 412 U.S. 470, 474 (1973).

[390] Weatherford v. Bursey, 429 U.S. 545, 559–60 (1977). *See also* Gray v. Netherland, 518 U.S. 152, 168–69 (1996).

[391] Williams v. Florida, 399 U.S. 78, 82, 85 (1970).

[392] Wardius v. Oregon, 412 U.S. 470, 474 (1973). The Court held in that case that state

course, that all notice requirements pass constitutional muster; for example, a brief notice period contravenes the Constitution if it is "arbitrary or disproportionate to the State's legitimate interests."[393]

[C142] Evidence may be excluded on account of a defendant's failure to comply with a discovery rule. In *Taylor v. Illinois*, the defendant violated a state procedural rule by failing to identify a particular defense witness in response to a pre-trial discovery request. The trial court sanctioned this violation by refusing to allow the undisclosed witness to testify. The Court rejected the defendant's argument that, under the Compulsory Process Clause of the Sixth Amendment, "preclusion is never a permissible sanction for a discovery violation."[394] *Taylor* "did not hold that preclusion is permissible every time a discovery rule is violated. Rather, [the Court] acknowledged that alternative sanctions 'would be adequate and appropriate in most cases.'"[395] The Court "stated explicitly, however, that there could be circumstances in which preclusion was justified because a less severe penalty 'would perpetuate, rather than limit, the prejudice to the State and the harm to the adversary process.'"[396] *Taylor* was such a case. The trial court found that Taylor's discovery violation amounted to "willful misconduct" and was designed to obtain "a tactical advantage." Based on these findings, the Court determined that, "[r]egardless of whether prejudice to the prosecution could have been avoided" by a lesser penalty, "the severest sanction [wa]s appropriate."[397]

c. The Confrontation Clause

[C143] The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Since the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial, the clause is made applicable to the states through the Fourteenth Amendment.[398]

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notice-of-alibi requirements could be enforced only if the state provided reciprocal discovery rights for the defendant. The defendant in that case had not given a notice of alibi. The state argued that he could not assert his constitutional claim, because he should have given his notice of alibi and then argued that the state had to grant him reciprocal discovery. The Court rejected that argument, and held that he need not give notice to raise his constitutional claim.

Where a defense counsel seeks to impeach the credibility of key prosecution witnesses by testimony of a defense investigator regarding statements previously obtained from the witnesses by the investigator, a federal trial court may compel the defense to reveal the relevant portions of the investigator's report for the prosecution's use in cross-examining him. *See* United States v. Nobles, 422 U.S. 225 (1975).

393 Michigan v. Lucas, 500 U.S. 145, 151 (1991).

394 Taylor v. United Stales, 484 U.S. 400, 414 (1988).

395 *See* Michigan v. Lucas, 500 U.S. 145, 152 (1991), *discussing* Taylor v. United Stales, 484 U.S. 400, 413 (1988).

396 *Id.*

397 Taylor v. United Stales, 484 U.S. 400, 417 (1988). *See also* Michigan v. Lucas, 500 U.S. 145, 152–53 (1991) (a defendant's failure to give statutorily required notice of his intention to present evidence of an alleged rape victim's past sexual conduct may, in some cases, justify even the severe sanction of preclusion).

398 Pointer v. Texas, 380 U.S. 400, 405–06 (1965).

[C144] "[T]he principal evil at which the Confrontation Clause is directed is the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[399] Accordingly, the Court has rejected "the view that the Confrontation Clause applies of its own force only to in-court testimony. . . . Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."[400] Moreover, "the Confrontation Clause applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. [Thus, the Confrontation Clause is implicated by] 'extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'"[401] "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."[402] But "testimonial statements of witnesses absent from trial may be admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[403]

[C145] *Bruton* involved two defendants—Evans and Bruton—tried jointly for robbery. Evans did not testify, but the government introduced into evidence Evans' confession, which stated that both he (Evans) and Bruton together had committed the robbery. The trial judge told the jury it could consider the confession as evidence only against Evans, not against Bruton. The Court held that, despite the limiting instruction, the introduction of Evans' out-of-court confession at Bruton's trial had violated Bruton's right, protected by the Sixth Amendment, to cross-examine witnesses. The Court recognized that in many circumstances, a limiting instruction will adequately protect one defendant from the prejudicial effects of the introduction at a joint trial of evidence intended for use only against a different defendant. But it said that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extra-judicial statements of a co-defendant, who stands accused side by side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant, but their credibility is inevitably suspect. . . . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify, and cannot be tested by cross-examination."[404]

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399 Crawford v. Washington, 541 U.S. 36, 51 (2004).

400 *Id.* at 52.

401 *Id.* at 51–52.

402 *Id.* at 59, n.9.

403 *Id.* at 59.

In *White v. Illinois*, 502 U.S. 346, 352–53 (1992), the Court rejected the proposition that the Confrontation Clause applies only to testimonial statements, and does not constitutionalize the "*hearsay rule*" and its exceptions (prohibition of introduction of hearsay into a trial unless the evidence falls within a "firmly rooted" hearsay exception, which is an exception that, in light of longstanding judicial and legislative experience, rests on such a solid foundation that admission of virtually any evidence within it comports with the substance of the constitutional protection). However, the Court's analysis in *Crawford* casts doubt on that holding.

404 Bruton v. United States, 391 U.S. 123, 135–36 (1968).

[C146] *Richardson* limited *Bruton*'s scope. The case involved a joint murder trial of Marsh and Williams. The state had redacted the confession of one defendant, Williams, so as to "omit all reference" to his co-defendant, Marsh—"indeed, to omit all indication that anyone other than . . . Williams" and a third person had "participated in the crime." The trial court also instructed the jury not to consider the confession against Marsh. As redacted, the confession indicated that Williams and the third person had discussed the murder in the front seat of a car while they traveled to the victim's house. The redacted confession contained no indication that Marsh—or any other person—was in the car. Later in the trial, however, Marsh testified that she was in the back seat of the car. For that reason, in context, the confession still could have helped convince the jury that Marsh knew about the murder in advance and therefore had participated knowingly in the crime. The Court held that this redacted confession fell outside *Bruton*'s scope and was admissible (with appropriate limiting instructions) at the joint trial. The Court distinguished Evans' confession in *Bruton* as a confession that was "incriminating on its face" and that had "expressly implicated" Bruton. By contrast, Williams' confession amounted to "evidence requiring linkage" in that it "became" incriminating in respect to Marsh "only when linked with evidence introduced later at trial." The Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."[405]

[C147] *Richardson* depends "in significant part upon the *kind* of, not the simple *fact* of, inference."[406] "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that . . . the law must require the same result. For one thing, a jury will often react similarly to an unredacted confession and a confession redacted as here, for it will realize that the confession refers specifically to the defendant, . . . even when the State does not blatantly link the defendant to the deleted name. . . . For another thing, the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference. . . . Finally, *Bruton*'s protected statements and statements redacted to leave a blank or some other similarly obvious alteration, function the same way grammatically. They are directly accusatory."[407]

[C148] The Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[408] That guarantee serves the perception that "confrontation is essential to fairness" and helps to "ensure the integrity of the factfinding process" by making it more difficult for witnesses to lie.[409] The procedure challenged in *Coy* involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. In holding that the use of this procedure violated the defendant's right to confront wit-

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405 *See* Richardson v. Marsh, 481 U.S. 200, 208, 211 (1987), *discussed in* Gray v. Maryland, 523 U.S. 185, 191 (1998).

406 Gray v. Maryland, 523 U.S. 185, 196 (1998).

407 *Id.* at 192–94.

408 Coy v. Iowa, 487 U.S. 1012, 1016 (1988).

409 *Id.* at 1019–20.

nesses against him, the Court suggested that any exception to the right "would surely be allowed only when necessary to further an important public policy"—i.e., only upon a showing of something more than the generalized, "legislatively imposed presumption of trauma" underlying the statute at issue in that case. The Court concluded that, "since there had been no individualized findings that these particular witnesses needed special protection, the judgment could not be sustained by any conceivable exception."[410]

[C149] In *Maryland v. Craig*, the Court made clear that the Confrontation Clause does not guarantee "criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial" and held that the "right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy, and only where the testimony's reliability is otherwise assured."[411] In that case, the Court sustained a conviction that resulted from a trial in which a child witness testified via closed circuit television after a particularized showing that such a procedure was necessary to avert a risk of harm to the child. While such a procedure prevents the child from seeing the defendant, it "preserves all of the other elements of the confrontation right: the child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. . . . [T]he presence of these other elements of confrontation . . . adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony."[412] Moreover, "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant. The requisite finding of necessity must be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" Without deciding "the minimum showing of emotional trauma required for the use of the special procedure," the Court held that the Maryland statute at issue, which required a determination that the child would suffer "serious emotional distress such that the child [could not] reasonably communicate," clearly sufficed to meet constitutional standards. In so doing, the Court stressed that "where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal."[413]

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410 *Id.* at 1021.

411 Maryland v. Craig, 497 U.S. 836, 844, 850 (1990).

412 *Id.* at 851, 855.

413 *Id.* at 855–57.

7. Public Trial

[C150] The Sixth Amendment, applicable to the states through the Fourteenth, guarantees to a defendant in a criminal case the right to a public trial. However, it does not guarantee the right to compel a private trial.[414] No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to an open trial that promotes fairness. "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness. . . . The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values, and is narrowly tailored to serve that interest."[415]

8. The Right to Jury Trial

a. General Considerations

[C151] The Sixth Amendment in terms guarantees "trial, by an impartial jury" in federal criminal prosecutions. Because trial by jury in criminal cases is fundamental to the American scheme of justice, the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions.[416] In essence, the right to jury trial guarantees, to the criminally accused, a fair trial by a panel of impartial, "indifferent" jurors.[417]

[C152] It is well established that the Sixth Amendment "reserves this jury trial right for prosecutions of serious offenses, and that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.'"[418] To determine whether an offense is petty, the Court considers "the maximum penalty attached to the offense," since this criterion "reveals the legislature's judgment about the offense's severity."[419] "The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task."[420] "An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious."[421] That a defendant is "tried for two counts of a petty offense, and therefore faces an aggregate potential term of imprisonment of more than six months, does not change the fact that the legislature deemed this offense petty."[422] "Where the legislature has not specified a maximum penalty, courts use the severity of the penalty actually imposed as the measure of the character of the particular offense."[423]

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414 Gannett Co. v. DePasquale, 443 U.S. 368, 382 (1979).

415 Press-Enter. Co. v. Superior Court of California, 464 U.S. 501, 509–10 (1984) (*Press-Enter. I*). The relevant issues are discussed at length in paras. I254 *et seq.* (*First Amendment right of the public and press to a public trial*).

416 Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

417 Irvin v. Dowd, 366 U.S. 717, 722 (1961).

418 Lewis v. United States, 518 U.S. 322, 325 (1996), *quoting* Duncan v. Louisiana, 391 U.S. 145, 159 (1968).

419 Lewis v. United States, 518 U.S. 322, 326 (1996).

420 *Id.* at 326, *quoting* Blanton v. N. Las Vegas, 489 U.S. 538, 541 (1989).

421 *Id.* at 326, *citing* Blanton v. N. Las Vegas, 489 U.S. 538, 543 (1989).

422 *Id.* at 330.

423 *Id.* at 328, *citing* Codispoti v. Pennsylvania, 418 U.S. 506, 511 (1974). *Codispoti* was a

[C153] The constitutional proscription of any deprivation of liberty without due process of law and the constitutional guarantee of a jury trial, taken together, entitle a criminal defendant to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[424] Further, the Constitution requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[425] The "statutory maximum" is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[426] By contrast, the Constitution does not preclude a state from enacting a law under which anyone convicted of certain enumerated felonies is subject to a mandatory *minimum* sentence, if the sentencing judge finds, by a preponderance of the evidence, a particular fact.[427] Moreover, "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[428]

[C154] The Sixth Amendment requires that the jury have at least six members.[429] In state criminal cases involving 12-person juries, the verdict need not be unanimous to satisfy constitutional requirements. Thus, the Court has upheld a state statute provid-

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criminal contempt case. There the Court held that the Sixth Amendment requires a jury trial if the sentences imposed aggregate more than six months, even though no sentence for more than six months was imposed for any one act of contempt.

"Like other minor crimes, 'petty' contempts may be tried without a jury, but contemnors in serious contempt cases have a Sixth Amendment right to a jury trial. . . . [L]acking legislative authorization of more serious punishment, a sentence of as much as six months in prison, plus normal periods of probation, may be imposed without a jury trial. . . . [B]ut imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial." *See* Muniz v. Hoffman, 422 U.S. 454, 475–76 (1975).

Moreover, the *imposition of serious criminal contempt fines triggers the right to jury trial. See* Mine Workers v. Bagwell, 512 U.S. 821, 837–38, n.5 (1994).

424 United States v. Gaudin, 515 U.S. 506, 510 (1995). *See also In re* Winship, 397 U.S. 358, 364 (1970).

425 Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). *Apprendi* involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual ten-year maximum, if the judge found the crime to have been committed "with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity." In *Ring v. Arizona*, 536 U. S. 584 (2002), the Court applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, the Court concluded that the defendant's constitutional rights had been violated, because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding.

In *United States v. Booker*, 543 U.S. 220 (2005), the Court held that the Sixth Amendment, as construed in *Apprendi* and *Blakely*, does apply to the federal sentencing guidelines, taking into account that these sentencing rules are mandatory and binding on all judges.

426 Blakely v. Washington, 542 U.S. 296, 303 (2004).

427 McMillan v. Pennsylvania, 477 U.S. 79 (1986).

428 *Id.* at 93.

429 Ballew v. Georgia, 435 U.S. 223 (1978). The Court, in separate opinions, held that conviction by a unanimous five-person jury in a trial for a non-petty offense deprives an accused of his right to trial by jury. While readily admitting that the line between six members and five was not altogether easy to justify, at least five members of the Court believed that reducing a jury to five persons in non-petty cases raised sufficiently substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six. *See id.* at 239 (opinion of Blackmun, J.); *id.* at 245–246 (opinion of Powell, J.).

ing that only ten members of a 12-person jury need concur to render a verdict in certain non-capital cases.[430] However, the Sixth Amendment requires a unanimous verdict in federal criminal jury trials.[431] Moreover, conviction for a non-petty criminal offense in a state court by a non-unanimous six-person jury violates the accused's right to trial by jury guaranteed by the Sixth and Fourteenth Amendments.[432]

[C155] In *Ludwig*, the appellant challenged a state system for disposition of certain crimes in which the defendant was first tried without a jury. If convicted, he could appeal and obtain a jury trial *de novo*. Although the range of penalties was the same at each tier, Ludwig suffered a harsher sentence when he appealed and was found guilty by a jury. Recognizing the interest of the state in efficient criminal procedure, the Court upheld the scheme, and rejected a claim that the system discouraged the assertion of the right to a jury trial by imposing harsher sentences upon those who exercised that right.[433]

[C156] In *Singer*, the Court upheld the constitutionality of a federal rule of criminal procedure, which conditioned a defendant's waiver of his right to a jury trial on the approval of the court and the prosecution. The Court reasoned that "[t]he Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."[434]

b. Jury Selection[435]

[C157] "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional, or perhaps overconditioned or biased response of a judge. . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the admin-

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[430] Apodaca v. Oregon, 406 U.S. 404 (1972). In terms of the role of the jury as a safeguard against oppression, the plurality opinion perceived no difference between those juries required to act unanimously and those permitted to act by votes of ten to two. Nor was unanimity viewed by the plurality as contributing materially to the exercise of the jury's common sense judgment or as a necessary pre-condition to effective application of the requirement that jury panels represent a fair cross-section of the community. *Id.* at 411–12. Justice Powell concurred in the judgment, concluding that, although Sixth Amendment history and precedent required jury unanimity in federal trials, the Due Process Clause of the Fourteenth Amendment does not incorporate all the elements of a jury trial required by the Sixth Amendment and did not prevent Oregon from permitting conviction by a verdict of ten to two. *Id.* at 369–80.

[431] Johnson v. Louisiana, 406 U.S. 356 (1972) (*see* concurring opinion of Justice Powell, dissenting opinion of Justice Douglas, in which Justices Brennan and Marshall joined, and dissenting opinion of Justice Stewart).

[432] Burch v. Louisiana, 441 U.S. 130 (1979).

[433] Ludwig v. Massachusetts, 427 U.S. 618 (1976).

[434] Singer v. United States, 380 U.S. 24, 36 (1965).

[435] With regard to *race- or gender-based exclusion* at the venire stage and at the individual petit jury stage, *see* paras. K30 *et seq.* (*racial discrimination*), and paras. K87–K88 (*gender discrimination*). With respect to prejudicial pre-trial publicity, *see* para. I263.

istration of the criminal law, moreover, is not only consistent with the country's democratic heritage, but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." Under these considerations, the Court held, in *Taylor v. Louisiana*, that the Sixth Amendment requires that the jury venire be drawn from a fair cross-section of the community.[436]

[C158] "[T]he Constitution presupposes that a jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case."[437] While "petit juries must be drawn from a source fairly representative of the community, [there is] no constitutional requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population; defendants are not entitled to a jury of any particular composition."[438] "A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, and would undermine, rather than further, the constitutional guarantee of an impartial jury. . . . The Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does). Without that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill-disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition. The State would have, in effect, unlimited peremptory challenges to compose the pool in its favor. The fair-cross-section venire requirement assures, in other words, that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis."[439]

[C159] "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides,' . . . thereby 'assuring the selection of a qualified and unbiased jury.'"[440] Moreover, "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[441] To date, the Court has recognized only one substantive control over a state actor's choice of whom to challenge peremptorily: under the Equal Protection Clause, a defendant or a prosecutor may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race.[442]

[C160] Nevertheless, unlike the right to an impartial jury guaranteed by the Sixth Amendment, "peremptory challenges are not of federal constitutional dimension. . . .

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436 Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

437 Lockhart v. McCree, 476 U.S. 162, 184 (1986).

438 Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

439 Holland v. Illinois, 493 U.S. 474, 478, 480–81 (1990).

440 *Id.* at 484, *quoting* Swain v. Alabama, 380 U.S. 202, 219 (1965) and Batson v. Kentucky, 476 U.S. 79, 91 (1986) respectively.

441 Swain v. Alabama, 380 U.S. 202, 220 (1965).

442 *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (gender); Hernandez v. New York, 500 U.S. 352 (1991) (ethnic origin); Batson v. Kentucky, 476 U.S. 79 (1986) (race).

[Rather,] they are a means to achieve the constitutionally required end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment or the Due Process Clause was violated."[443] In case of erroneous refusal of a trial judge to dismiss a potential juror for cause, followed by the defendant's exercise of a peremptory challenge to remove that juror, no constitutional deprivation occurs, when the defendant is convicted by a jury on which no biased juror sat.[444]

[C161] "[P]art of the guaranty of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors."[445] "Without an adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."[446] "Hence, '[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness.'"[447] "Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, trial judges have been accorded ample discretion in determining how best to conduct the *voir dire*."[448] However, the Court has not hesitated to find that certain inquiries must be made to effectuate constitutional protections. For example, there are "special circumstances" under which the Constitution requires a question on racial or ethnic prejudice.[449] While the Court enjoys more latitude in setting standards for *voir dire* in federal courts under its supervisory power than it has in interpreting the provisions of the Fourteenth Amendment

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[443] Ross v. Oklahoma, 487 U.S. 81, 88 (1988). In that case, a state trial court refused to remove for cause a juror who declared he would vote to impose death automatically if the jury found the defendant guilty. That juror was removed by the defendant's use of a peremptory challenge, and, for that reason, the death sentence could be affirmed. But "[h]ad [this juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned." *Id.* at 85. The Court rejected the defendant's *due process objection* that forced use of a peremptory challenge to cure a trial court's error in denying a challenge for cause arbitrarily deprived him of the full complement of peremptory challenges allowed under Oklahoma law. An Oklahoma statute accorded the defendant nine such challenges. State courts had read into that grant a requirement that a defendant who disagreed with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror. Even then, under state law, the error was grounds for reversal only if the defendant exhausted all peremptory challenges, and an incompetent juror therefore was forced upon him. The defendant in *Ross*, the Court concluded, did not lose any state law right when he used one of his nine challenges to remove a juror who should have been excused for cause; rather, he received all that state law allowed him and the fair trial that the Federal Constitution guaranteed. *Id.* at 89–91.

[444] United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000).

[445] Morgan v. Illinois, 504 U.S. 719, 729 (1992), *citing* Dennis v. United States, 339 U.S. 162, 171–72 (1950) ("preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury").

[446] Morgan v. Illinois, 504 U.S. 719, 729–30 (1992), *quoting* Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion).

[447] Morgan v. Illinois, 504 U.S. 719, 730 (1992), *quoting* Aldridge v. United States, 283 U.S. 308, 310 (1931).

[448] Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981) (plurality opinion).

[449] *See* Ristaino v. Ross, 424 U.S. 589 (1976).

with respect to *voir dire* in state courts, two principles emerge from both sets of the Court's cases: "first, the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice; second, the trial court retains great latitude in deciding what questions should be asked on *voir dire*."[450]

[C162] In several cases, the Court has examined the procedures for selection of jurors in criminal trials involving the possible imposition of capital punishment. *Witherspoon* held that the state infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the *venire* who express conscientious objections to capital punishment. Such a practice, the Court held, violated the Constitution by creating a "tribunal organized to return a verdict of death."[451] Nevertheless, the *Witherspoon* Court "also recognized the State's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme."[452] *Witt* held that the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment is "whether the juror's views would *prevent or substantially impair* the performance of his duties as a juror in accordance with his instructions and his oath."[453] Under this standard, it is clear that a juror, who in no case would

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[450] Mu'Min v. Virginia, 500 U.S. 415, 424 (1991).

In *Ham v. South Carolina*, 409 U.S. 524 (1973), the defendant was black and had been active in the civil rights movement in South Carolina; his defense at trial was that enforcement officers were "out to get him," because of his civil rights activities, and that he had been framed on the charge of marijuana possession of which he was accused. He requested that two questions be asked regarding racial prejudice and one question be asked regarding prejudice against persons, such as himself, who wore beards. The Court held that the Due Process Clause of the Fourteenth Amendment required the court to ask "either of the brief, general questions urged by the petitioner" with respect to race, but rejected his claim that an inquiry as to prejudice against persons with beards be made, given the traditionally broad discretion accorded to the trial judge in conducting *voir dire*. *Id.* at 527–28.

In *Ristaino v. Ross*, 424 U.S. 589 (1976), the Court held that the Constitution does not require a state court trial judge to question prospective jurors as to racial prejudice in every case where the races of the defendant and the victim differ. Nevertheless, in *Turner v. Murray*, 476 U.S. 28 (1986), the Court held that, in a capital case involving a charge of murder of a white person by a black defendant, such questions must be asked.

[451] Witherspoon v. Illinois, 391 U.S. 510, 521 (1968).

[452] *See* Wainwright v. Witt, 469 U.S. 412, 416 (1985), *discussing Witherspoon*.

[453] Wainwright v. Witt, 469 U.S. 412, 424 (1985), *quoting* Adams v. Texas, 448 U.S. 38, 45 (1980) (emphasis added).

In *Witherspoon v. Illinois*, 391 U.S. 510, 522, n.21 (1968), the Court had noted that venirepersons can be constitutionally excluded from service in capital cases if they make it "unmistakably clear that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." The *Witt* standard, "in addition to dispensing with *Witherspoon*'s reference to 'automatic' decision making, does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. . . . [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear;' these veniremen may not know how they will react when faced with

vote for capital punishment or who will automatically vote for the death penalty (and will fail in good faith to consider the evidence of aggravating and mitigating circumstances), regardless of his or her instructions, is not an impartial juror, and must be removed for cause.[454] On *voir dire*, a trial court must, at the defendant's or the state's request, inquire into the prospective jurors' views on capital punishment.[455]

[C163] In federal habeas corpus cases, the question of juror impartiality, "is not one of mixed law and fact. Rather, it is plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed."[456] A trial court's findings of juror impartiality may be overturned only for "manifest error."[457]

9. Freedom from Physical Restraints Visible to the Jury

[C164] Due process of law protected by the federal Constitution "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial."[458] The above rule gives effect to three fundamental legal principles. First, "the criminal process presumes that the defendant is innocent until proved guilty." Second, the use of physical restraints diminishes the right to counsel. And third, "judges must seek to maintain a judicial process that is a dignified process."[459] Given the presence of similarly weighty considerations, the foregoing rule also applies to the penalty phase of a capital proceeding.[460]

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imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." *See* Wainwright v. Witt, 469 U.S. 412, 424–26 (1985).

In *Lockhart v. McCree*, 476 U.S. 162, 165 (1986), the Court held that the Constitution does not prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial, considering, *inter alia*, that such a removal serves the state's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in a capital case.

454 *See* Morgan v. Illinois, 504 U.S. 719, 728–29 (1992).

455 *Id.* at 729–34; Lockhart v. McCree, 476 U.S. 162, 170, n.7 (1986).

456 Patton v. Yount, 467 U.S. 1025, 1036 (1984).

457 *See* Mu'Min v. Virginia, 500 U.S. 415, 428 (1991), *quoting* Patton v. Yount, 467 U.S. 1025, 1031 (1984).

458 Deck v. Missouri, 544 U.S. 622, 629 (2005).

459 *Id.* at 630–31.

460 *Id.* at 633. In so holding, the Court noted, *inter alia*, that although the defendant's conviction means that the presumption of innocence no longer applies, (1) the jury's decision between life and death is no less important than the decision about guilt; and (2) the appearance of the offender during the penalty phase in shackles, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking—and also almost inevitably affects adversely the jury's perception of the character of the defendant.

10. The Right to a Speedy Trial

[C165] The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." This right is "fundamental," and is imposed by the Due Process Clause of the Fourteenth Amendment on the states.[461]

[C166] "The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is essentially designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges."[462] The Court thus has held that the Speedy Trial Clause of the Sixth Amendment "does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused."[463] Until such an event occurs, a citizen "suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer."[464] "[W]hen no indictment is outstanding, only the '*actual* restraints imposed by arrest and holding to answer a criminal charge engage the particular protections of the speedy trial provision of the Sixth Amendment.'"[465] "Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment,"[466] "or to a claim under any applicable statutes of limitations, no Sixth

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461 Barker v. Wingo, 407 U.S. 514, 515 (1972), *citing* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

462 United States v. MacDonald, 456 U.S. 1, 8 (1982).

463 *Id.* at 6, *discussing* United States v. Marion, 404 U.S. 307, 313 (1971).

464 United States v. Marion, 404 U.S. 307, 321 (1971).

465 United States v. Loud Hawk, 474 U.S. 302, 310 (1986), *quoting* United States v. Marion, 404 U.S. 307, 320 (1971) (emphasis added).

466 United States v. MacDonald, 456 U.S. 1, 7 (1982), *citing* United States v. Lovasco, 431 U.S. 783, 788–89 (1977). Such claims can prevail only upon a showing that the delay caused substantial prejudice to the defendant's rights to a fair trial, and that the government delayed seeking an indictment "in a deliberate attempt to gain an unfair tactical advantage over the defendant or in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges." *See* United States v. Marion, 404 U.S. 307, 324 (1971); United States v. Lovasco, 431 U.S. 783, 790 (1977); United States v. $8,850, 461 U.S. 555, 563 (1983).

In *Lovasco*, the Court rejected the proposition that "once the Government has assembled sufficient evidence to prove guilt beyond a reasonable doubt, it should be constitutionally required to file charges promptly, even if its investigation of the entire criminal transaction is not complete." First, "compelling a prosecutor to file public charges as soon as the requisite proof has been developed against one participant on one charge would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act. In some instances, an immediate arrest or indictment would impair the prosecutor's ability to continue his investigation, thereby preventing society from bringing lawbreakers to justice. In other cases, the prosecutor would be able to obtain additional indictments despite an early prosecution, but the necessary result would be multiple trials involving a single set of facts. Such trials place needless burdens on defendants, law enforcement officials, and courts. Second, insisting on immediate prosecution, once sufficient evidence is developed to obtain a conviction, would pressure prosecutors into resolving doubtful cases in favor of early—and possibly unwarranted—prosecutions. . . . Finally, requiring the Government to make charging decisions immediately upon assembling evidence sufficient to establish guilt would preclude the

Amendment right to a speedy trial arises until charges are pending."[467] Similarly, the Clause "has no application after the Government, acting in good faith, formally drops charges. Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause. . . . Once charges are dismissed, . . . the formerly accused is, at most, in the same position as any other subject of a criminal investigation."[468]

[C167] On its face, the Speedy Trial Clause is written with such breadth that, taken literally, it would forbid the government from delaying the trial of an "accused" for any reason at all. The Court, however, has qualified the literal sweep of the provision by specifically recognizing the relevance of four separate enquiries: "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result."[469]

> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.
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> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government, rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.
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> [Third,] failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. . . . Whether and how a defendant asserts his right is closely related to the other factors mentioned above. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.
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> A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. Th[e] Court has identified three such interests: (i) to prevent

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Government from giving full consideration to the desirability of not prosecuting in particular cases." *See* United States v. Lovasco, 431 U.S. 783, 792–94 (1977).

467 United States v. MacDonald, 456 U.S. 1, 7 (1982).

468 United States v. MacDonald, 456 U.S. 1, 7–9 (1982).

469 Doggett v. United States, 505 U.S. 647, 651 (1992).

> oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. . . .
>
> [The Court] regard[s] none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors, and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must engage in a difficult and sensitive balancing process. But, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.[470]

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[470] Barker v. Wingo, 407 U.S. 514, 530–533 (1972).

A 90-month delay in the trial of charges of possessing firearms and dynamite is presumptively prejudicial and serves to trigger application of *Barker*'s other factors. *See* United States v. Loud Hawk, 474 U.S. 302, 314 (1986).

"[D]elay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The passage of time, following the filing by the defendant of repetitive and unsuccessful motions, may make it difficult or impossible for the Government to carry this burden." *See* United States v. Loud Hawk, 474 U.S. 302, 315 (1986).

A constitutional violation may occur when a significant interval separates the formal accusation from the arrest, possibly because the accused is out of the jurisdiction or because of administrative delays in effecting the arrest. *See* Doggett v. United States, 505 U.S. 647 (1992) (time lag between indictment and arrest of eight and a half years, due, in part, to the defendant's absence from the country and, in part, to the government's negligence).

In *Smith v. Hooey*, 393 U.S. 374, 383 (1969), the Court held that a state must, consistent with the Sixth and Fourteenth Amendments, "make a diligent, good faith effort to bring" a prisoner to trial on a state indictment even though he is incarcerated in another jurisdiction.

In *United States v. Loud Hawk*, 474 U.S. 302, 312–16 (1986), the Court held: "The speedy trial safeguards may be as important to the accused when the delay is occasioned by an *unduly long appellate process* as when the delay is caused by a lapse between the initial arrest and the drawing of a proper indictment, . . . or by continuances in the date of trial. . . . At the same time, there are important public interests in the process of appellate review. The assurance that motions to suppress evidence or to dismiss an indictment are correctly decided through orderly appellate review safeguards both the rights of defendants and the 'rights of public justice.' . . . Under *Barker*, delays in bringing the case to trial caused by the Government's interlocutory appeal may be weighed in determining whether a defendant has suffered a violation of his rights to a speedy trial. . . . [Nevertheless,] an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay. In assessing the purpose and reasonableness of such an appeal, courts may consider several factors. These include the strength of the Government's position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime. For example, a delay resulting from an appeal would weigh heavily against the Government if the issue were clearly tangential or frivolous. Moreover, the charged offense usually must be sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal. . . . In that limited class of cases where a pretrial appeal by the defendant is appropriate (*see, e.g.*, United States v. Hollywood Motor Car Co., 458 U.S. 263, 265–66 (1982)), delays from such an appeal ordinarily will not weigh in favor of a defendant's speedy trial claims. A defendant with a meritorious appeal would bear the heavy burden of showing an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court. A defendant who resorts to an interlocutory appeal normally should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial (emphasis added)."

[C168] "The amorphous quality of the right to a speedy trial leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence, because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy."[471]

11. Appeals and Post-Conviction Review

a. The Defendant's Right to Appeal

[C169] It is well settled that there is no constitutional right to an appeal. The right of appeal, as it is presently known in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal, one must come within the terms of the applicable statute.[472]

[C170] "While sentencing discretion permits consideration of a wide range of information relevant to the assessment of punishment, . . . [the Court has] recognized it must not be exercised with the purpose of punishing a successful appeal."[473] While the Constitution does not impose an absolute bar to a more severe sentence upon reconviction, the Court held in *North Carolina v. Pearce* that "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. In order to assure the absence of such a motivation, we have concluded that, whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."[474] "Otherwise, a presumption arises that a greater sentence has been imposed for a vindictive purpose—a presumption that must be rebutted by 'objective information . . . justifying the increased sentence.'"[475]

[C171] "While the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, . . . subsequent cases have made clear that its presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.'"[476] "The evil the [*Pearce*] Court sought to prevent" was not the imposition of "enlarged sentences after a new trial," but "vindictiveness of a sentencing judge."[477] Because the *Pearce* presumption may operate in the absence of any proof of an improper motive, and thus block a legitimate response to criminal conduct, the Court

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471 Barker v. Wingo, 407 U.S. 514, 522 (1972). *See also* Strunk v. United States, 412 U.S. 434, 440 (1973).

472 *See, e.g.*, Abney v. United States, 431 U.S. 651, 656 (1977).

473 Alabama v. Smith, 490 U.S. 794, 798 (1989).

474 North Carolina v. Pearce, 395 U.S. 711, 725–26 (1969).

475 Alabama v. Smith, 490 U.S. 794, 798–99 (1989), *quoting* Texas v. McCullough, 475 U.S. 134, 142 (1986) (*quoting* United States v. Goodwin, 457 U.S. 368, 374 (1982)).

476 Alabama v. Smith, 490 U.S. 794, 799 (1989), *quoting* Texas v. McCullough, 475 U.S. 134, 138 (1986).

477 Texas v. McCullough, 475 U.S. 134, 138 (1986).

has limited its application to circumstances where its objectives are thought most efficaciously served. "Such circumstances are those in which there is a 'reasonable likelihood' . . . that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority."[478] "Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness."[479]

[C172] In *Colten*, for example, the Court refused to apply the presumption when the increased sentence was imposed by the second court in a two-tier system which gave a defendant convicted of a misdemeanor in an inferior court the right to trial *de novo* in a superior court. The Court observed that the trial *de novo* represented a "completely fresh determination of guilt or innocence" by a court that was not being "asked to do over what it thought it had already done correctly." If the *de novo* trial resulted in a greater penalty, the Court said that "it no more follows that such a sentence is a vindictive penalty . . . than that the inferior court imposed a lenient penalty."[480] Similarly, *Chaffin* held that no presumption of vindictiveness arose when a second jury, on retrial following a successful appeal, imposed a higher sentence than a prior jury. The Court thought that a second jury was unlikely to have a "personal stake" in the prior conviction or to be "sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals."[481]

b. The "Harmless Error" Rule

[C173] In *Chapman v. California*, the Court held that federal constitutional errors in the course of a criminal trial do not require reversal of a conviction if they are "harmless." Under harmless error analysis, the state must establish "beyond a reasonable doubt

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[478] *See* Alabama v. Smith, 490 U.S. 794, 799–800 (1989), *quoting* United States v. Goodwin, 457 U.S. 368, 373 (1982).

[479] Alabama v. Smith, 490 U.S. 794, 800 (1989), *citing* Wasman v. United States, 468 U.S. 559, 569 (1984).

[480] Colten v. Kentucky, 407 U.S. 104, 117 (1972).

[481] Chaffin v. Stynchcombe, 412 U.S. 17, 27 (1973).

In *Texas v. McCullough*, 475 U.S. 134 (1986), respondent was tried before a jury in a Texas district court and convicted of murder. He elected to be sentenced by the jury, as was his right under Texas law, and the jury imposed a 20-year sentence. The trial judge then granted respondent's motion for a new trial on the basis of prosecutorial misconduct. Respondent was retried before a jury, with the same trial judge presiding, and again was found guilty. This time he elected to have the judge fix his sentence, and she imposed a 50-year sentence. The Court found that the facts of this case provided no basis for a presumption of vindictiveness, since (1) unlike the judge who has been reversed, the trial judge in that case had no motivation to engage in self-vindication; and (2) different sentencers assessed the varying sentences, the second sentencer providing an on-the-record, logical, non-vindictive reason for the longer sentence.

In *Alabama v. Smith*, 490 U.S. 794 (1989), after successfully challenging the validity of his plea bargain on the ground that the trial judge had misinformed him about the penalties he could face, respondent went to trial. He was convicted and resentenced to a longer sentence than the one he had initially received as a result of his plea bargain. The Court held that no presumption of vindictiveness arises when the first sentence was based upon a guilty plea and the second sentence follows a trial, reasoning that, even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial, and that the factors that may have indicated leniency as consideration for the guilty plea are no longer present in such a case.

that the error complained of did not contribute to the verdict obtained."[482] The *Chapman* standard recognizes that certain constitutional errors, no less than other errors, may have been "harmless" in terms of their effect on the fact finding process at trial.[483] Harmless error review "looks to the basis on which 'the jury *actually rested* its verdict.' . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in the specific trial was surely unattributable to the error."[484]

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[482] Chapman v. California, 386 U.S. 18, 24 (1967). However, a federal court reviewing a state court determination in a habeas corpus proceeding should apply the "harmless error" standard that the Court had previously enunciated in *Kotteakos v. United States*, 328 U.S. 750 (1946), namely "whether the error had substantial and injurious effect or influence in determining the jury's verdict." *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), *citing* Kotteakos, *supra*, at 776. This standard reflects the presumption of finality and legality that attaches to a conviction at the conclusion of direct review. It protects the state's sovereign interest in punishing offenders and its good faith attempts to honor constitutional rights, while ensuring that the extraordinary remedy of habeas corpus is available to those whom society has grievously wronged. *See* Brecht, *supra*, at 633–35.

[483] Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

[484] Sullivan v. Louisiana, 508 U.S. 275, 279 (1993).

In *Yates v. Evatt*, 500 U.S. 391, 403–05 (1991), the Court stated:

> To say that an error did not contribute to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. When, for example, a trial court has instructed a jury to apply an unconstitutional presumption, a reviewing court can hardly infer that the jurors failed to consider it, a conclusion that would be factually untenable in most cases, and would run counter to a sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given. *To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.* Thus, to say that an instruction to apply an unconstitutional presumption did not contribute to the verdict is to make a judgment about the significance of the presumption to reasonable jurors, when measured against the other evidence considered by those jurors independently of the presumption. Before reaching such a judgment, a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict. If, for example, the fact presumed is necessary to support the verdict, a reviewing court must ask what evidence the jury considered as tending to prove or disprove that fact. Did the jury look at only the predicate facts, or did it consider other evidence bearing on the fact subject to the presumption? In answering this question, a court does not conduct a subjective enquiry into the jurors' minds. The answer must come, instead, from analysis of the instructions given to the jurors and from application of that customary presumption that jurors follow instructions and, specifically, that they consider relevant evidence on a point in issue when they are told that they may do. Once a court has made the first enquiry into the evidence considered by the jury, it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy *Chapman*'s reasonable doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Since that enquiry cannot be a subjective one into the jurors' minds, a *court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond*

[C174] Since *Chapman*, the Court has applied harmless error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless.[485] "The common thread connecting these cases is that each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[486] However, in a limited class of cases, the Court has found an error to be "structural" and thus subject to automatic reversal.[487] For example, "the entire conduct of the trial, from beginning to end, is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. . . . [In case of such constitutional deprivations, which affect] the framework within which the trial proceeds, . . . 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'"[488]

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a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said, in *Chapman*'s words, that the presumption did not contribute to the verdict rendered. (Emphasis added.)

[485] *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 306–12 (1991) (admission of coerced confessions); Clemons v. Mississippi, 494 U.S. 738, 752–54 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); Satterwhite v. Texas, 486 U.S. 249 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); Carella v. California, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); Rose v. Clark, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); Neder v. United States, 527 U.S. 1 (1999) (jury instruction that omits an element of an offense); Pope v. Illinois, 481 U.S. 497, 501–04 (1987) (jury instruction misstating an element of the offense); Crane v. Kentucky, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); Delaware v. Van Arsdall, 475 U.S. 673 (1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); Rushen v. Spain, 464 U.S. 114, 117–18, and n.2 (1983) (denial of a defendant's right to be present at trial); United States v. Hasting, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); Hopper v. Evans, 456 U.S. 605 (1982) (statute improperly forbidding trial court's giving a jury instruction on a lesser-included offense in a capital case in violation of the Due Process Clause); Kentucky v. Whorton, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption of innocence); Moore v. Illinois, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of the Sixth Amendment Counsel Clause); Brown v. United States, 411 U.S. 223, 231–32 (1973) (admission of the out-of-court statement of a non-testifying co-defendant in violation of the Sixth Amendment Counsel Clause); Milton v. Wainwright, 407 U.S. 371 (1972) (confession obtained in violation of *Massiah v. United States*, 377 U.S. 201 (1964)); Chambers v. Maroney, 399 U.S. 42, 52–53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); Coleman v. Alabama, 399 U.S. 1, 10–11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

[486] Arizona v. Fulminante, 499 U.S. 279, 307–08 (1991).

[487] Johnson v. United States, 520 U.S. 461, 468 (1997), *citing* Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39 (1984) (denial of public trial); Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable doubt instruction vitiates *all* the jury's findings, and produces consequences that are necessarily unquantifiable and indeterminate).

[488] Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991), *quoting* Rose v. Clark, 478 U.S. 570, 577–78 (1986).

CHAPTER 4

DIGNITY AND WORTH OF THE INDIVIDUAL—PERSONAL INVIOLABILITY AND LIBERTY

A. DIGNITY AND WORTH OF THE INDIVIDUAL

[D1] The Constitution of the United States does not provide explicitly for the protection of dignity and intrinsic worth of every individual. However the Court considers that the respect of human dignity lies at the heart of various constitutional provisions and constitutes an essential element of the constitutional order. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[1] The police violate the Constitution when they use brutal methods, "offensive to human dignity," to obtain evidence.[2] The Fifth Amendment, assuring the right against self-incrimination, precludes interrogation methods "destructive of human dignity," such as the inflicting of psychological intimidation, for the purpose of subjugating the person under investigation to the will of his examiner.[3]

[D2] The Eighth Amendment prohibition of cruel and unusual punishments, whose reach extends to the conditions of serving a sentence,[4] embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," against which the Court evaluates penal measures,[5] has in its core the basic concept of human dignity[6] and requires observance of the "evolving standards of decency that mark the progress of a maturing society."[7] Abortion is considered to be a choice "central to personal dignity and autonomy," lying at the heart of liberty protected by the Fourteenth Amendment.[8] Unlawful gender discrimination "deprives persons of their individual dignity."[9] Racial discrimination in the qualification or selection of jurors "offends the dignity of persons"

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1 Schmerber v. California, 384 U.S. 757, 767 (1966).

2 Rochin v. California, 342 U.S. 165, 174 (1952).

3 Miranda v. Arizona, 384 U.S. 436, 457 (1966).

4 Farmer v. Brennan, 511 U.S. 825, 832 (1994) (prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement); Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (conditions of imprisonment must meet the contemporary standards of human decency).

5 Estelle v. Gamble, 429 U.S. 97, 102 (1976).

6 *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 738 (2002), *citing* Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion). *See also* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (three-member plurality).

7 Stanford v. Kentucky, 492 U.S. 361, 369 (1989); Thompson v. Oklahoma, 487 U.S. 815, 821 (1988); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

8 *See* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

9 Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984).

and the integrity of the courts, in violation of the Equal Protection Clause.[10] Discrimination based on ancestry demeans a person's "dignity and worth."[11] Experimentation on soldiers, without their voluntary consent, "offends their essential human dignity;" the subject of experimentation who has not volunteered is treated as an object, a sample.[12] Therefore, one's dignity and worth constitute an established constitutional value.

[D3] The Court has also used the concept of human dignity and decency with respect to society as a whole. The Eighth Amendment prohibition of cruel and unusual punishments protects "the dignity of society itself from the barbarity of exacting mindless vengeance."[13] The political system of the United States rests upon "individual dignity and choice."[14] The interest to a decent society may justify restrictions on civil liberties, especially on the freedom of expression. The pervasive and strong interest of the society in preventing and redressing attacks upon one's reputation "reflects no more than [the] basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[15] The nation and the states have the right to "maintain a decent society;"[16] thus, "the primary requirements of decency may be enforced against obscene publications."[17] Nonetheless, the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus cannot be proscribed in the name alone of "conventions of decency."[18] Moreover, the state's interest in preserving the dignity of the legal profession is insufficient to justify the ban on all use of illustrations in attorney advertisements.[19]

B. PERSONAL INVIOLABILITY AND LIBERTY

1. Compulsory Labor and Service

[D4] The Thirteenth Amendment forbids slavery or involuntary servitude,[20] except if it is inflicted as punishment for a crime of which an individual was duly convicted.

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10 Powers v. Ohio, 499 U.S. 400, 402 (1991).

11 Rice v. Cayetano, 528 U.S. 495, 517 (2000) (voting qualification, implemented by the Hawaiian law, that limits the right to vote to "native Hawaiians," defined as descendants of the peoples inhabiting the Hawaiian Islands in 1778).

12 *See* dissenting opinion of three Justices in *United States v. Stanley*, 483 U.S. 669, 708 (1987) (a serviceman volunteered for what was ostensibly a chemical warfare testing program, but in which he was secretly administered LSD, pursuant to an Army plan to test the effects of the drug on human subjects, whereby he suffered severe personality changes that led to his discharge and the dissolution of his marriage).

13 *See* Ford v. Wainwright, 477 U.S. 399, 410 (1986) (the Eighth Amendment prohibits the state from inflicting the death penalty upon a prisoner who is insane).

14 Cohen v. California, 403 U.S. 15, 24 (1971).

15 Milkovich v. Lorain Journal Co., 497 U.S. 1, 22 (1990), *quoting* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

16 Paris Adult Theatre v. Slaton, 413 U.S. 49, 59 (1973).

17 Near v. Minnesota, 283 U.S. 697, 716 (1931); Kingsley Books Inc. v. Brown, 354 U.S. 436, 440 (1957).

18 Papish v. Bd. of Curators of the Univ. of Missouri, 410 U.S. 667, 670 (1973).

19 Zauderer v. Office of Disciplinary Counsel, Supreme Court of Ohio, 471 U.S. 626, 647–49 (1985).

20 The Amendment is "self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. *See* United States v. Kozminski, 487 U.S. 931, 942 (1988), *quoting* Civil Rights Cases, 109 U.S. 3, 20 (1883).

The aim of this prohibition "was not merely to end slavery, but to maintain a system of completely free and voluntary labor throughout the United States;"[21] that is why its scope extends beyond state action and reaches legal relations between private persons.[22] Pursuant to the Thirteenth Amendment, Congress may strike down all laws, regulations, and usages in the states that attempt "to maintain and enforce, directly or indirectly, the involuntary service or labor of any persons as peons in the liquidation of any debt or obligation."[23] "[N]o state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor."[24]

[D5] The Thirteenth Amendment prohibition refers to involuntary servitude "enforced by the use or threatened use of physical or legal coercion. The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion. . . . [The latter construction] does not imply that evidence of other means of coercion, or of extremely poor working conditions, or of the victim's special vulnerabilities, is irrelevant. The vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve. In addition, a trial court could properly find that evidence of other means of coercion or of extremely poor working conditions is relevant to corroborate disputed evidence regarding the use or threatened use of physical or legal coercion, the defendant's intention in using such means, or the causal effect of such conduct."[25]

[D6] Yet, "not all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment. By its terms, the Amendment excludes involuntary servitude imposed as legal punishment for a crime. Similarly, the Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties,"[26] such as the giving of testimony and the attendance upon court or grand jury in order to testify,[27] jury service,[28] roadwork,[29] or military service. The grant to Congress of the power to raise and support armies, considered in conjunction with the grants of the powers to declare war, to make rules for the government and regulation of the land and naval forces, and to make laws necessary and proper for

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[21] Pollock v. Williams, 322 U.S. 4, 17 (1944).

[22] *See*, in particular, United States v. Kozminski, 487 U.S. 931, 942 (1988).

[23] United States v. Reynolds, 235 U.S. 133, 143 (1914) (constant fear of punishment under the criminal law renders work compulsory).

[24] Pollock v. Williams, 322 U.S. 4, 18 (1944) (state law subjecting debtors to prosecution and criminal punishment for failing to perform labor and receiving an advance payment).

[25] United States v. Kozminski, 487 U.S. 931, 944, 952 (1988).

[26] *Id.* at 943–44.

[27] Hurtado v. United States, 410 U.S. 578, 588–89 (1973). The government may compel witnesses to testify at trial or before a grand jury, on pain of contempt, so long as the witness in not the target of the criminal case in which he testifies. *See* Kastigar v. United States, 406 U.S. 441, 443–44 (1972); Chavez v. Martinez, 538 U.S. 760, 767–68 (2003).

[28] *See, e.g.*, Butler v. Perry, 240 U.S. 328, 333 (1916).

[29] Butler v. Perry, 240 U.S. 328 (1916) (a reasonable amount of work on public roads near his residence is a part of the duty owed by able-bodied men to the public, and a requirement by a state to that effect does not amount to imposition of involuntary servitude otherwise than as a punishment for crime within the prohibition of the Thirteenth Amendment, nor does the enforcement of such requirement deprive persons of their liberty and property without due process of law in violation of the Fourteenth Amendment).

executing granted powers (Article I, Section 8), includes the power to compel military service. Compelled military service is neither repugnant to a free government nor in conflict with the constitutional guaranties of individual liberty; indeed, "[i]t may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it."[30] Furthermore Article I establishes that Congress may authorize members of the National Guard of the United States to be ordered to active duty for purposes of training outside the United States without either the consent of a state governor or the declaration of a national emergency.[31] The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is "broad and sweeping." Pursuant to this power, "Congress may establish a system of registration for individuals liable for training and service, and may require such individuals, within reason, to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. . . . [And since] the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances," criminal legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.[32]

[D7] Apart from that, the Court has observed that the Thirteenth Amendment was not intended to apply to "exceptional" cases well established in the common law at the time of the Thirteenth Amendment, such as the right of parents and guardians to the custody of their minor children or wards or laws preventing sailors who contracted to work on vessels from deserting their ships.[33]

2. The Right to Travel

a. The Right to Travel and Settle in the United States—Residency Requirements[34]

[D8] Although the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State," that right finds no explicit mention in the Constitution. "The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."[35] The Court has recognized that "the nature of [the] Federal Union and . . . constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of [the land

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30 Selective Draft Law Cases, 245 U.S. 366, 378 (1918).

31 Perpich v. Dep't of Def., 496 U.S. 334, 347–55 (1990).

32 United States v. O' Brien, 391 U.S. 367, 377–78, 381–82 (1968) (a criminal law that prohibits the willful mutilation or destruction of "draft cards" does not abridge free speech on its face).

33 United States v. Kozminski, 487 U.S. 931, 944 (1988), *citing* Robertson v. Baldwin, 165 U.S. 275, 282, 288 (1897).

34 *See also* paras. K132 *et seq.* (*durational voter residency requirements*).

35 United States v. Guest, 383 U.S. 745, 758 (1966); Shapiro v. Thompson 394 U.S. 618, 630–31 (1969).

of the United States] uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[36] According to Justice O'Connor, the right predates the Constitution, and was carried forward in the Privileges and Immunities Clause of Article IV;[37] but equally plausible is the argument that the right resides in the Commerce Clause[38] or in the Privileges and Immunities Clause of the Fourteenth Amendment.[39] In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.[40] The constitutional right to travel from one state to another encompasses the right "to use the highways and other instrumentalities of interstate commerce in doing so,"[41] as well as the freedom to reside in any state.[42] The freedom to travel is thought to be an "unconditional personal right."[43] Nevertheless, since the right to travel is a part of the constitutionally protected "liberty" of the individual, it may be limited, so long as the due process clause is observed.[44] Indeed that freedom "does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole."[45] On the contrary, a state statute making it a misdemeanor for anyone knowingly to bring or assist in bringing into the state a nonresident "indigent person" is invalid as an unconstitutional burden on inter-state commerce.[46]

[D9] The right to travel embraces also "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present" in another state.[47] This component of the freedom to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV, Section 2, provides: "The Citizens of each

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[36] Shapiro v. Thompson 394 U.S. 618, 629 (1969).

[37] *See* concurring opinion of Justice O'Connor in *Zobel v. Williams*, 457 U.S. 55, 78–81 (1982). *Cf.* Paul v. Virginia, 8 Wall. 168, 180 (1869); Ward v. Maryland, 12 Wall. 418, 430 (1871).

[38] Edwards v. California, 314 U.S. 160, 173 (1941). *See also* Justice Brennan's opinion in *Zobel v. Williams*, 457 U.S. 55, 66 (1982).

[39] *See* opinion of Justice Douglas in *Edwards v. California*, 314 U.S. 160, 177–78 (1941) and Justice Brennan's opinion in *Zobel v. Williams*, 457 U.S. 55, 66–67 (1982).

[40] United States v. Guest, 383 U.S. 745, 758 (1966); Shapiro v. Thompson 394 U.S. 618, 631 (1969).

[41] United States v. Guest, 383 U.S. 745, 757 (1966).

[42] Dunn v. Blumstein, 405 U.S. 330, 338 (1972). *See also* Attorney Gen. of New York v. Soto Lopez, 476 U.S. 898, 902 (1986) (plurality opinion).

[43] Dunn v. Blumstein, 405 U.S. 330, 341 (1972); Saenz v. Roe, 526 U.S. 489, 498 (1999).

[44] Kent v. Dulles, 357 U.S. 116, 125–27 (1958).

[45] Zemel v. Rusk, 381 U.S. 1, 15–16 (1965). *See also* Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (an American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared).

[46] Edwards v. California, 314 U.S. 160, 172–74 (1941). The statute was held invalid as an unconstitutional burden on inter-state commerce, but it was the right to go from one place to another, including the right to cross state borders while en route, that was vindicated, as the Court noted in *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

[47] Saenz v. Roe, 526 U.S. 489, 500 (1999).

State shall be entitled to all Privileges and Immunities of Citizens in the several States." Thus, by virtue of a person's state citizenship, a citizen of one state who travels in other states, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States"[48] and was designed "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."[49] However, "it is 'only with respect to those "privileges" and "immunities" bearing on the vitality of the Nation as a single entity' that a State must accord residents and nonresidents equal treatment."[50] As a threshold matter, it must be determined "whether the out-of-state resident's interest at issue is sufficiently 'fundamental' to the promotion of interstate harmony."[51] Thus, the Clause provides protection for non-residents who enter a state whether to procure medical services,[52] to obtain employment,[53] or to engage in professional activities.[54] On the contrary, amateur recreational activities do not fall within the category of rights protected by the Privileges and Immunities Clause.[55]

[D10] Moreover, like many other constitutional provisions, the privileges and immunities clause is not an absolute.[56] The Clause does not preclude discrimination against non-residents where "there is a substantial reason for the difference in treatment and . . . the discrimination practiced against nonresidents bears a substantial relationship to the State's objective. . . . In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means."[57] This inquiry must be conducted "with due regard for the principle that the States should have considerable leeway in analyzing local evils and

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48 *Id.* at 501, *quoting* Paul v. Virginia, 8 Wall. 168, 180 (1869).

49 Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64 (1988), *quoting* Paul v. Virginia, 8 Wall. 168, 180 (1869).

50 Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279 (1985), *quoting* Baldwin v. Montana Fish & Game Comm'n of Montana, 436 U.S. 371, 383 (1978).

51 Building Trades & Constr. Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208, 218 (1984).

52 Doe v. Bolton, 410 U.S. 179, 200 (1973) (state law allowing abortion only if the patient was a state resident).

53 Building Trades & Constr. Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208, 214–18 (1984) (city ordinance requiring that at least 40 percent of the employees of contractors and subcontractors working on city construction projects be city residents); Hicklin v. Orbeck, 437 U.S. 518, 526–34 (1978) (Alaska statute requiring that all Alaskan oil and gas leases, easements or right-of-way permits for oil and gas pipelines, and unitization agreements contain a requirement that qualified Alaska residents be hired in preference to non-residents).

54 *See*, in particular, Toomer v. Witsell, 334 U.S. 385, 396–403 (1948) (state law requiring non-residents fishermen to pay a license fee for each shrimp boat 100 times higher than the fee due by residents).

55 Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 384–88 (1978) (state statutory elk hunting license scheme, which imposed substantially higher (at least seven and a half times) license fees on non-residents of the state than on residents, and which required non-residents (but not residents) to purchase a "combination" license in order to be able to obtain a single elk).

56 *See, e.g.*, Toomer v. Witsell, 334 U.S. 385, 396 (1948).

57 Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985).

in prescribing appropriate cures;"[58] "[t]his caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls."[59] Subsequently a city ordinance requiring that at least 40 percent of the employees of contractors and sub-contractors working on city construction projects be city residents may be valid, if necessary to counteract grave economic and social ills, for example when spiraling unemployment, a sharp decline in population, and a dramatic reduction in the number of businesses located in the city have eroded property values and depleted the city's tax base.[60] However, even under the dubious assumption that a state may validly alleviate its unemployment problem by requiring private employers within the state to discriminate against non-residents,[61] such a statute cannot be upheld, if the state's unemployment is not attributable to the influx of non-resident job-seekers, but rather to the fact that a substantial number of jobless residents were unemployed either because of lack of education and job training or because of geographical remoteness from job opportunities and, moreover, if the statutory preference over non-residents is given to all state residents, not just those who are unemployed.[62] Similarly a state law requiring non-residents fishermen to pay a license fee for each shrimp boat 100 times more than the fee due by residents was struck down, since the state could eliminate the danger of excessive trawling through less restrictive means, such as by restricting the type of equipment used in its fisheries, graduating license fees according to the size of the boats, or charging non-residents a differential to compensate for the added enforcement burden they imposed.[63]

[D11] Finally, for those travelers who elect to become permanent residents in a state, the freedom to travel embraces a third component, "the right to be treated like other citizens of that State."[64] That right is protected by the new arrival's status as both a state citizen and a U.S. citizen, and it is plainly identified in the Fourteenth Amendment's Privileges or Immunities Clause. The Fourteenth Amendment's Citizenship Clause expressly "equates citizenship with residence . . . [and] does not tolerate a hierarchy of . . . subclasses of similarly situated citizens based on the location of their prior residences."[65] Thus, a discriminatory classification of state citizens having the effect of imposing a penalty on the exercise of the constitutional right of inter-state immigration is upheld only if it is "shown to be necessary to promote a compelling governmental interest."[66] Besides, such a classification is impermissible, even if there is no finding that the discriminatory statute actually deterred travel.[67]

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58 Toomer v. Witsell, 334 U.S. 385, 396 (1948).

59 Building Trades & Constr. Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208, 223 (1984).

60 *Id.* at 222–23.

61 In *Building Trades, supra* note 59 at 223, the Court noted that the Alaska hire statute, at issue in *Hicklin v. Orbeck*, was invalidated as an attempt to force virtually *all businesses* (public and private) that benefited in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the state's residents.

62 Hicklin v. Orbeck, 437 U.S. 518, 526–28 (1978).

63 *See* Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284, n.17 (1985), *discussing* Toomer v. Witsell, 334 U.S. 385, 397–399 (1948).

64 Saenz v. Roe, 526 U.S. 489, 500 (1999).

65 *Id.* at 506–07.

66 Shapiro v. Thompson, 394 U.S. 618, 634 (1969). *See also* Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 906 (1986).

67 *See* Dunn v. Blumstein, 405 U.S. 330, 339–40 (1972); Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 258 (1974).

[D12] The Court's jurisprudence regarding the third component of the freedom to travel involves mainly state laws that condition the conferral of welfare benefits on the duration of residency in the state. In *Shapiro*, the leading case in that field, the Court struck down state statutory provisions that denied welfare assistance to persons who were residents and met all other eligibility requirements except that they had not resided within the jurisdiction for at least a year immediately preceding their applications for assistance.[68] First, the Court noted that the purpose of deterring the in-migration of indigents could not serve as justification for the classification created by the one-year waiting period, since that purpose was constitutionally impermissible; moreover, a state may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. In any case, the statutes were not tailored to serve that objective; rather, the class of barred newcomers was all-inclusive, lumping the great majority who came to the state for other purposes with those who came for the sole purpose of collecting higher benefits. The argument that the challenged classification might be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they had made to the community through the payment of taxes was rejected, since this reasoning would logically permit the state to bar new residents from schools, parks, and libraries or deprive them of police and fire protection and, in general, to apportion all benefits and services according to the past tax contributions of its citizens, in disregard of the Equal Protection Clause.[69] Next the Court pointed out that, although a state has a valid interest in preserving the fiscal integrity of its programs, it may not accomplish such a purpose by invidious distinctions between classes of its citizens; the relevant argument that the waiting period requirement facilitated budget predictability was considered to be wholly unfounded. The argument that the waiting period served as an administratively efficient rule of thumb for determining residency did not also withstand scrutiny, since the residence requirement and the one-year waiting period requirement were distinct and independent prerequisites for assistance under the statutes at issue. Similarly, there was no need for a state to use the one-year waiting period as a safeguard against fraudulent receipt of benefits, for less drastic means were available to minimize that hazard, like administrative inquiries (in fact already employed) and cooperation among state welfare departments. Finally, the suggestion that the one-year waiting period was justified as a means of encouraging new residents to join the labor force promptly would also require a similar waiting period for long-term residents of the state and, thus, provided no rational basis for imposing a one-year waiting period restriction on new residents only.[70]

[D13] Applying analogous reasoning, the Court has invalidated a state statute requiring a year's residence in a county as a condition to an indigent's receiving non-emergency hospitalization or medical care at the county's expense. More particularly, the

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[68] Yet, the Constitution does not require that a person who travels to a state must be given benefits superior to those enjoyed by other residents of that state, if the newcomer enjoyed those benefits in the state from which he came. *See* Califano v. Torres, 435 U.S. 1, 4–5 (1978) (*per curiam*).

[69] Shapiro v. Thompson, 394 U.S. 618, 632–33 (1969). *See also Zobel v. Williams*, 47 U.S. 55, 64 (1982), where four members of the Court, concurring, noted that "even the idea of rewarding past public service offers scarce support for the 'past contribution' justification for durational residence classifications, since length of residence has only the most tenuous relation to the *actual* service of individuals to the State." *Id.* at 71.

[70] Shapiro v. Thompson, 394 U.S. 618, 634–38 (1969).

claim that the one-year waiting period was a convenient rule of thumb to determine *bona fide* residence was rejected, because this test was "certainly overbroad to accomplish its avowed purpose . . . [since a] mere residence requirement would accomplish the objective of limiting the use of public medical facilities to *bona fide* residents of the County without sweeping within its prohibitions those *bona fide* residents who had moved into the State within the qualifying period."[71] Moreover, the allegation that the waiting period was a useful tool for preventing fraud was held as ill-suited to that purpose. On the one hand, an indigent applicant, intent on committing fraud, could as easily swear to having been a resident of the county for the preceding year as to being one currently; on the other hand, there was no need for the state to rely on the durational requirement as a safeguard against fraud when other mechanisms to serve that purpose were available that would have a less drastic impact on constitutionally protected interests, for example, the state law making it a crime to file an untrue statement for the purpose of obtaining hospitalization, medical care, or outpatient relief, at county expense.[72]

[D14] In *Zobel*, the Court ruled that Alaska's program of distributing cash dividends on the basis of the recipient's years of residency in the state violated the Equal Protection Clause. First, the Court found that the state objective of creating a financial incentive for individuals to establish and maintain Alaska residence was not rationally related to the distinction Alaska sought to make. Assuming, *arguendo*, that granting increased dividend benefits for each year of continued Alaska residence might give some residents an incentive to stay in the state in order to reap increased dividend benefits in the future, the state's interest was not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment. Further, the Court emphasized that rewarding citizens for past contributions was not a legitimate state purpose and concluded: "If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence—or even limiting access of finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible."[73]

[D15] Similarly, the Court invalidated on equal protection grounds New Mexico's policy of providing a permanent tax exemption for Vietnam veterans who had been state residents before May 8, 1976, but not to more recent arrivals. The Court expressly rejected the state's claim that it had a legitimate interest in providing special rewards to veterans who lived in the state before 1976, and concluded that "[n]either the Equal Protection Clause nor this Court's precedents permit the State to prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit."[74]

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[71] Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 267 (1974). Nevertheless, in *Vlandis v. Kline*, 412 U.S. 441 (1973), involving a statutory definition of "residents" for purposes of fixing tuition to be paid by students in a state university system, the Court warned that its decision should not be construed to deny a state the right to impose on a student, as one element in demonstrating *bona fide* residence, a reasonable durational residency requirement.

[72] Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 268 (1974).

[73] Zobel v. Williams, 47 U.S. 55, 64 (1982).

[74] Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623 (1985).

[D16] In *Saenz*, the Court found violative of the Fourteenth Amendment a law of the state of California (which had one of the highest welfare benefit levels in the country) that limited new residents, during their first year in California, to the welfare benefits they would have received in the state of their prior residence. The statute was doubly vulnerable: neither the duration of California residence of the beneficiaries nor the identity of their prior states of residence had any relevance to their need for benefits; nor did those factors bear any relationship to the state's interest in making an equitable allocation of the funds to be distributed among its needy citizens.[75]

[D17] *Soto-Lopez* invalidated a statutory scheme of the state of New York that granted a civil service employment preference, in the form of points added to examination scores, to New York residents who were honorably discharged veterans of the armed forces, served during time of war, and were New York residents when they entered military service. A four-Justice plurality found an unconstitutional transgression of the freedom of travel, considering that New York did not demonstrate that its classification was necessary to accomplish a compelling state interest. More specifically, the justifications offered in support of the prior residence requirement—encouraging New York residents to join the armed forces, helping war veterans re-establish themselves, inducing veterans to return to New York, and employing a "uniquely valuable class of public servants" who possessed useful experience acquired through military service—failed to pass constitutional muster, since New York could accomplish these purposes without penalizing the right to travel by awarding special credits to all qualified veterans.[76]

[D18] On other occasions, the Court found no violation of the freedom to travel. A state statutory requirement that a petitioner in a divorce action be a resident of the state for one year preceding the filing of the petition is valid, for such requirement "may reasonably be justified on grounds . . . [of the State's] interest in requiring those seeking a divorce from its courts to be genuinely attached to the State, as well as [of the State's] desire to insulate its divorce decrees from the likelihood of successful collateral attack."[77] A charge, like a "use and service charge" for each passenger enplaning any commercial aircraft operated from a state airport, designed to make the user of state-provided facilities pay a reasonable fee—fixed according to some "uniform, fair and practical standard"—for their construction and maintenance may constitutionally be imposed on inter-state and intra-state users; since the facility provided at public expense aids, rather than hinders, the right to travel, a permissible charge to help defray the cost of the facility is not a burden in the constitutional sense.[78] Moreover, although a simple penalty for leaving a state is impermissible, if departure aggravates the consequences of conduct that is otherwise punishable, such as the abandonment of a minor child, the state may treat the entire sequence of events, from the initial offense to departure from the state, as more serious than its separate components, without infringing upon the constitutionally protected right to travel.[79]

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[75] Saenz v. Roe, 526 U.S. 489, 507 (1999).

[76] Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 906–11 (1986). Two members of the Court concurred in the judgment, finding a violation of the Equal Protection Clause.

[77] Sosna v. Iowa, 419 U.S. 393, 406, 409 (1975).

[78] Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc. 405 U.S. 707, 713–14 (1972).

[79] Jones v. Helms, 452 U.S. 412, 422–23 (1981).

[D19] A municipal regulation requiring employees of the city to be residents of that city is valid.[80] And the states have the power to require that voters be *bona fide* residents of the relevant political subdivision, for an "appropriately defined and uniformly applied requirement of *bona fide* residence may be necessary to preserve the basic conception of a political community, and therefore can withstand close constitutional scrutiny."[81] A state statute that permits a school district to deny tuition-free admission to its public schools for a minor who lives apart from a parent, guardian, or other person having lawful control of him, if his presence in the district is for the primary purpose of attending the public free schools, satisfies constitutional standards, because the fact that provision for primary and secondary education is one of the most important functions of local government is an adequate justification for local residence requirements, absent which "the proper planning and operation of the schools would suffer significantly."[82] Moreover, a zoning ordinance, prohibiting automobile commuters from parking in designated residential neighborhoods and providing for free parking permits for residents of such neighborhoods, does not violate the Equal Protection Clause, for the distinction drawn between residents and non-residents of a neighborhood bears a rational relation to the the ordinance's stated legitimate objectives of reducing air pollution and other adverse consequences of automobile commuting and of enhancing the quality of life in residential areas, such as by reducing noise, traffic hazards, and litter.[83]

[D20] Taking into account that "the right to remove from one place to another, according to inclination," has been acknowledged as "an attribute of personal liberty,"[84] three members of the Court admitted, in *Morales*, that the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Subsequently they concluded that a city ordinance, prohibiting criminal street gang members from remaining in any public place with no apparent purpose, was void for vagueness, for it failed to establish standards sufficient to guard against arbitrary deprivation of liberty.[85]

b. The Right to International Travel

[D21] The right to international travel is considered to be a part of the "liberty" of which a citizen cannot be deprived without due process of law under the Fifth Amendment.[86] The Court's jurisprudence in this field involves principally cases of passport[87] denial or revocation.

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80 McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976) (*per curiam*).

81 *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343–44 (1972).

82 Martinez v. Bynum, 461 U.S. 321, 329 (1983).

83 Arlington County Bd. v. Richards, 434 U.S. 5, 7 (1977) (*per curiam*).

84 Williams v. Fears, 179 U.S. 270, 274 (1900).

85 Chicago v. Morales, 527 U.S. 41, 53, 56–60 (1999) (plurality opinion).

86 Kent v. Dulles, 357 U.S. 116, 125 (1958); Aptheker v. Sec'y of State, 378 U.S. 500, 514 (1964); Regan v. Wald, 468 U.S. 222, 240–42 (1984).

87 A passport is a document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers. *See* United States v. Laub, 385 U.S. 475, 481 (1967).

[D22] The Subversive Activities Control Act of 1950 provided that, when a Communist organization was registered, or under final order to register, it would be unlawful for any member with knowledge or notice thereof to apply for or use a passport. Under that provision, the Department of State revoked the passports of high-ranking officials of the Communist Party, who filed suits. Beginning its reasoning, the Court observed that, even though the protection of national security is a legitimate and substantial governmental purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment should be viewed in the light of less drastic means for achieving the same basic purpose." The provision in question swept within its prohibition both knowing and unknowing members. At the same time, it rendered irrelevant "the member's degree of activity in the organization and his commitment to its purpose," establishing an irrebuttable presumption that individuals who were members of the specified organizations would, if given passports, engage in activities inimical to the security of the United States. The prohibition applied regardless of the purposes for which an individual wished to travel and regardless of the security-sensitivity of the areas that a party member would like to visit. In addition, Congress had within its power "less drastic" means of achieving the congressional objective of safeguarding the national security. For example, under Executive Order No. 9835, membership in a Communist organization was not considered conclusive but only as one factor to be weighed in determining the loyalty of an applicant or employee. The foregoing considerations compelled the conclusion that the regulation swept too widely and too indiscriminately across the right to international travel and was unconstitutional on its face.[88]

[D23] On the contrary, the Court has twice approved measures prohibiting travel to Cuba. In 1962, after the United States had broken diplomatic relations with Cuba and the Department of State had eliminated Cuba from the area for which passports were not required, an American citizen applied to have his passport validated for travel to Cuba to satisfy his curiosity and to make him a better informed citizen. His request was denied, under the Passport Act of 1926, and he filed suit seeking a judgment declaring that he was entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport validated for that purpose. The Court emphasized that in the early days of the Castro regime, U.S. citizens had been arrested and imprisoned without charges. The United States and other members of the Organization of American States had determined that travel between Cuba and the other countries of the Western Hemisphere was an important element in the spreading of subversion. Since the Secretary of State had justifiably concluded that travel to Cuba by American citizens might involve the action in dangerous international incidents, the Court, pointing out that the right to travel may be limited in cases involving the safety and welfare of the nation as a whole and recalling, at the same time, the Cuban missile crisis of October 1962, admitted that the challenged restriction was supported by the weightiest considerations of national security.[89] Similarly the Court upheld, in 1984, a federal regulation

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[88] Aptheker v. Sec'y of State, 378 U.S. 500, 508–14 (1964). *Cf.* Kent v. Dulles, 357 U.S. 116 (1958).

[89] Zemel v. Rusk, 381 U.S. 1, 14–15 (1965). The Court also noted that, "because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information that cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Id.* at 17.

excluding general tourist and business travel to Cuba. Respondents alleged that there was no "emergency" at that time, and that the relations between Cuba and the United States were subject to only the normal tensions inherent in contemporary international affairs. The Court rejected the argument. First, it observed that matters relating to the conduct of foreign relations are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Next, it stressed that relations between Cuba and the United States had not been "normal" for the last quarter of a century, and that those relations had deteriorated further in recent years due to increased Cuban efforts to destabilize governments throughout the Western Hemisphere. Given the traditional deference to executive judgment in the realm of foreign policy, the Court thought that there was an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by restricting travel.[90]

[D24] In 1974, *Agee*, an American citizen and a former employee of the Central Intelligence Agency, who had held key positions in the Agency's division responsible for covert intelligence-gathering in foreign countries, announced a campaign to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they were operating. He then engaged in activities abroad that resulted in identifications of alleged undercover CIA agents and intelligence sources in foreign countries. Because of these activities, the Secretary of State revoked respondent's passport, explaining that the revocation was based on a regulation authorizing revocation of a passport where the Secretary determined that an American citizen's activities abroad were causing or were likely to cause serious damage to the national security or the foreign policy of the United States. The Court noted that the freedom to travel abroad with a "letter of introduction" in the form of a passport issued by the sovereign is "subordinate to national security and foreign policy considerations [and,] as such, it is subject to reasonable governmental regulation." Not only had Agee jeopardized the security of the United States, but he had also endangered the interests of other countries, thereby creating serious problems for American foreign relations and foreign policy. Subsequently, restricting Agee's foreign travel, although perhaps not certain to prevent all of Agee's harmful activities, was upheld, as the only avenue open to the government to limit these activities. Furthermore, it was decided that when there is a substantial likelihood of serious damage to national security or foreign policy as a result of a passport holder's activities in foreign countries, the government may take action to ensure that the holder may not exploit the sponsorship of his travels by the United States, without a pre-revocation hearing; in such cases the Constitution's due process guarantees call for no more than a statement of reasons and an opportunity for a prompt post-revocation hearing.[91]

[D25] The question of violation of the right to international travel has also arisen in relation to a federal law providing that no benefits under the Supplemental Security Income program for the needy aged, blind, and disabled were to be paid for any month that the recipient spent entirely outside of the United States. The Court stressed that the provision at issue had only an incidental effect on the freedom to travel; it did not limit the availability or validity of passports, but merely withdrew a governmental benefit during and shortly after an extended absence from this country. Therefore, it would

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90 Regan v. Wald, 468 U.S. 222, 242–43 (1984).

91 Haig v. Agee, 453 U.S. 280, 306–10 (1981).

be enough if the provision were rationally based. The Court noted that the statute added assurance that the beneficiary's residency in the United States was genuine and that Congress might simply have decided to limit payments to those who needed them in the United States and, indeed, might only have wanted to increase the likelihood that these funds would be spent inside the United States. Hence, the law was held to be constitutional as having a rational basis.[92]

3. The Right to Bodily Integrity

a. Generally

[D26] The Constitution guarantees the right of the individual that "his person be held inviolable"[93] and the right to "bodily integrity."[94] The vitiation of these rights may contravene the Eighth Amendment, when the government acts against a convicted person who serves his sentence,[95] or the Fourth Amendment, in relation to searches and seizures involving the body.[96] In any other case, the Court invokes the Fifth and Fourteenth Amendments, considering that the "liberty" specially protected by the Due Process Clause includes, *inter alia*, the right to bodily integrity.[97]

b. Corporal Punishment in Public Schools

[D27] "Where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, . . . Fourteenth Amendment liberty interests are implicated. . . . The openness of the public school and its supervision by the community afford significant safeguards against . . . abuses. . . . [T]hese safeguards are reinforced by the legal constraints of the common law, [whereby any punishment going beyond that which] is reasonably necessary for the proper education and discipline of the child . . . may result in both civil and criminal liability. . . . The concept that reasonable corporal punishment in school is justifiable . . . represents the balance between the child's interest in personal security and the traditional view that some limited corporal punishment may be necessary in the course of a child's education. Under that longstanding accommodation of interests, there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the [foregoing] common law privilege. . . . In view of the low incidence of abuse, the openness of [public] schools, and the common law safeguards that already exist, the risk of error that may result in violation of a school child's substantive rights can only be regarded a minimal. Imposing additional admin-

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92 Califano v. Aznavorian, 439 U.S. 170, 175–78 (1978).

93 Breithaupt v. Abram, 352 U.S. 432, 439 (1957).

94 *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997), *citing* Rochin v. California, 342 U.S. 165 (1952); Albright v. Oliver, 510 U.S. 266, 272 (1994) (plurality opinion). *Cf. Winston v. Lee*, 470 U.S. 753 (1985), in which the Court referred to the individual's constitutionally protected "*interest*" in bodily integrity.

95 *See* paras. E121 *et seq.*

96 *See* paras. G49, G112, G137, G204, G214–G216.

97 *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997). The Court has also invoked the Sixth Amendment, in case of involuntary medication of an individual found mentally incompetent to stand trial. *See* Riggins v. Nevada, 504 U.S. 127, 133–38 (1992).

istrative safeguards as a constitutional requirement might reduce that risk marginally, but would also entail a significant intrusion into an area of primary educational responsibility. [Therefore,] the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law."[98]

c. The Right to Refuse Medical Treatment, Vaccination, and the Administration of Drugs

[D28] Under the Due Process Clause, a competent person has a "liberty interest in refusing unwanted medical treatment."[99] The Court admitted implicitly the previous rule at the beginning of the 20th century when it examined the constitutionality of a state regulation providing for compulsory vaccination against smallpox. Regarding the claim that vaccination had little or no value as a means of preventing the spread of smallpox and tended to bring about other diseases, the Court pointed out that, although it was for the legislative department—and no part of its function—to make such determinations, it could take judicial notice of the fact that, according to the common belief (opinion accepted by the mass of the people, as well as by most members of the medical profession), vaccination had a decisive tendency to prevent the spread of smallpox and to render it less dangerous to those who contracted it. Thus it held that the statute in question had been enacted in a reasonable and proper exercise of the police power. However, the Court expressed the reservation that the police power of a state "may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression, [for instance, in] case of an adult who is embraced by the mere words of the act, but yet to subject him to vaccination in a particular condition of his health or body, would be cruel and inhuman in the last degree." Subsequently, the Court construed the statute in a way that vaccination was not required, if it was apparent or could be shown "with reasonable certainty" that an individual was not "at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death."[100]

[D29] Similarly, in the interest of discouraging the violation of narcotics laws or in the interest of the general health and welfare of its inhabitants, a state might establish a program of compulsory treatment for those addicted to narcotics. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures.[101]

[D30] A prisoner has a constitutionally protected interest in not being arbitrarily subjected to unwelcome medical treatment. In *Vitek*, a convicted felon was placed in solitary confinement, where he set his mattress on fire, burning himself severely. Since he was found to suffer from a mental illness or defect and could not receive proper treatment in the penal complex, he was transferred to the security unit of a state mental hospital, without notice and opportunity for a hearing. The Court noted that "involuntary

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98 Ingraham v. Wright, 430 U.S. 651, 670, 674, 676, 682 (1977).

99 Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 278 (1990).

100 Jacobson v. Massachusetts, 197 U.S. 11, 25–35, 38–39 (1905).

101 Robinson v. California, 370 U.S. 660, 664–65 (1962).

commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections." Although the state's interest in segregating and treating mentally ill patients appears to be strong, the prisoner's interest in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, and the risk of error in making the relevant determinations is substantial enough to warrant the following minimum procedural safeguards: written notice to the prisoner that a transfer to a mental hospital is being considered; a hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given; an opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination; an independent decisionmaker, who need not come from outside the prison or hospital administration; and a written statement by the fact finder as to the evidence relied on and the reasons for transferring the inmate.[102]

[D31] In *Harper*, a ward of the Washington state penal system engaged in violent conduct and received psychiatric treatment, including the consensual administration of anti-psychotic drugs. On two occasions, he was transferred to the Special Offender Center (SOC), a state institute for convicted felons with serious mental illness, where he was diagnosed as suffering from a manic-depressive disorder. While at the center, he was required to take anti-psychotic drugs against his will pursuant to an SOC regulation, providing, *inter alia*, that, if a psychiatrist ordered such medication, an inmate might be involuntarily treated only if he suffered from a "mental disorder" and was "gravely disabled" or posed a "likelihood of serious harm" to himself or others; that, after a hearing and upon a finding that the above conditions were met, a special committee consisting of a psychiatrist, a psychologist, and a center official, none of whom might be currently involved in the inmate's diagnosis or treatment, could order involuntary medication if the psychiatrist was in the majority; and that the inmate had the right to notice of the hearing, the right to attend, present evidence, and cross-examine witnesses, the right to representation by a disinterested lay advisor versed in the psychological issues, the right to appeal to the center's superintendent, and the right to periodic review of any involuntary medication ordered. The Court upheld the above regulatory scheme. Although an inmate possesses a significant liberty interest in avoiding the unwanted administration of anti-psychotic drugs under the Due Process Clause of the Fourteenth Amendment, prison administrators have an interest in ensuring the safety of prison staffs and administrative personnel and, at the same time, "have the duty to take reasonable measures for the prisoners' own safety." Thus, the challenged regulation served

[102] Vitek v. Jones, 445 U.S. 480, 493–96 (1980). Four of the five Justices who reached the merits concluded that an indigent prisoner is entitled to appointed counsel before being involuntarily transferred for treatment to a state mental hospital. *Id.* at 496–497. The fifth Justice thought that due process merely requires that the state provide an inmate with qualified and independent assistance, which may be rendered by a licensed psychiatrist, or other mental health professional, or competent laymen in some cases. *Id.* at 500.

the state's legitimate interest in combating the danger posed by a violent, mentally ill inmate. Moreover, the regulation was reasonably related to the furtherance of that interest, since (1) it applied exclusively to mentally ill inmates who were gravely disabled or represented a significant danger to themselves or others; (2) there was little dispute in the psychiatric profession that proper use of anti-psychotic drugs was one of the most effective means of treating and controlling a mental illness likely to cause violent behavior; (3) the drugs could be administered only for treatment and under the direction of a licensed psychiatrist. Taking into account the above government interest, the Court rejected Harper's contention that, as a pre-condition to anti-psychotic drug treatment, the state should find him incompetent and then obtain court approval for the treatment. The Court also rejected Harper's allegation that physical restraints or seclusion were alternative means for accommodating his interest in rejecting the forced administration of anti-psychotic drugs, noting, on the one hand, that physical restraints are effective only in the short term and can have serious physical side effects when used on a resisting inmate, as well as leaving the staff at risk of injury while putting the restraints on or tending to the inmate who is in them, and, on the other hand, that Harper had failed to demonstrate that physical restraints or seclusion are acceptable substitutes for anti-psychotic drugs, in terms of either their medical effectiveness or their toll on limited prison resources. In addition, the regulation's hearing procedures comported with procedural due process. The Due Process Clause does not require a *judicial* hearing before the state may treat a mentally ill prisoner with anti-psychotic drugs against his will, considering, among other things, that the inmate's interest is adequately protected and perhaps better served by allowing the decision to medicate to be made by independent medical professionals rather than a judge, and, second, that the inmate may obtain judicial review of the committee's decision. Neither was the regulation deficient in not allowing representation by counsel, since the provision of an independent lay advisor, who understood the psychiatric issues, was sufficient protection given the medical nature of the decision to be made.[103]

[D32] In *Riggins*, the Court repeated that an individual has a constitutionally protected liberty interest in avoiding involuntary administration of anti-psychotic drugs—an interest that only an "essential" or "overriding" state interest might overcome. The Court suggested that, in principle, forced medication in order to render a defendant competent to stand trial for murder was constitutionally permissible. The Court, citing *Harper*, noted that the state would have satisfied due process, if the prosecution had demonstrated that treatment with anti-psychotic medication was "medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others." And it said that the state similarly "might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence of the murder charge by using less intrusive means." Because the trial court had permitted forced medication of Riggins without taking account of his "liberty interest," with a consequent possibility of trial prejudice, the Court reversed Riggins' conviction and remanded for further proceedings.[104]

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[103] Washington v. Harper, 494 U.S. 210, 219–36 (1990).

[104] Riggins v. Nevada, 504 U.S. 127, 133–38 (1992). Justice Kennedy, concurring in the judgment, emphasized that anti-psychotic drugs might have side effects that would interfere with the defendant's ability to receive a fair trial. *Id.* at 138.

[D33] The Court has held that these two cases, *Harper* and *Riggins*, indicate that "the Constitution permits the Government involuntarily to administer anti-psychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests."[105]

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[105] Sell v. Unites States, 539 U.S. 166, 179 (2003). The Court explained (*id.* at 180–83) that this standard says or fairly implies the following:

> First, a court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property. . . .
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> Courts, however, must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest. The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime. We do not mean to suggest that civil commitment is a substitute for a criminal trial. The Government has a substantial interest in timely prosecution. And it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost. The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution. The same is true of the possibility that the defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed. . . . Moreover, the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.
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> Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial. At the same time, it must find that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair. . . .
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> Third, the court must conclude that involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. . . . And the court must consider less intrusive means for administering the drugs, e.g., a court order to the defendant backed by the contempt power, before considering more intrusive methods.
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> Fourth, . . . the court must conclude that administration of the drugs is *medically appropriate*, i.e., in the patient's best medical interest in light of his medical condition. . . .
>
> [T]he court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest—namely the interest in rendering the defendant competent to stand trial. . . . There are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds before turning to the trial competence question.

4. Termination of Life-Sustaining Medical Treatment—Assisted Suicide

[D34] In *Cruzan*,[106] the Court dealt with the issue of termination of artificial life support. Nancy Beth Cruzan suffered severe brain damage, as the result of an automobile accident, and entered a persistent "vegetative" state—generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. The state of Missouri was bearing the cost of her care. Her parents and coguardians sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties. The case reached the federal Supreme Court. The Court noted that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment; however the majority of the Court's members avoided the acknowledgment of a competent person's constitutional right to refuse lifesaving hydration and nutrition but only assumed the existence of such a right for the purposes of the case.[107] Then, the Court pointed out that an incompetent person, like Nancy Beth Cruzan, could not possess the above right, since such a person is unable to make an informed and voluntary choice to exercise that hypothetical right or any other right. Petitioners alleged that the foregoing right should be exercised for their daughter by some sort of surrogate. Missouri recognized, indeed, that, under certain circumstances, a surrogate might act for the patient in electing to withdraw hydration and nutrition and thus cause death. Yet, it had established a procedural safeguard to assure that the surrogate's action conformed, as best it might, to the wishes expressed by the patient while competent. More particularly, it required a judicial (nonadversarial) procedure in which the incompetent's wishes as to the withdrawal of treatment should be proved by clear and convincing evidence. The Court considered this heightened evidentiary standard as appropriate. First, the majority explained that the state may constitutionally adopt this rule to govern determinations of an incompetent's wishes in order to advance the state's substantive interest in the preservation of human life; in relation to that, the state "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."[108] Thus, it is entitled to guard against potential abuses

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> For one thing, the inquiry into whether medication is permissible, say, to render an individual nondangerous is usually more "objective and manageable" than the inquiry into whether medication is permissible to render a defendant competent. . . . For another thing, courts typically address involuntary medical treatment as a civil matter, and justify it on these alternative, Harper-type grounds. Every State provides avenues through which, for example, a doctor or institution can seek appointment of a guardian with the power to make a decision authorizing medication—when in the best interests of a patient who lacks the mental competence to make such a decision. . . .
>
> If a court authorizes medication on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear. Even if a court decides medication cannot be authorized on the alternative grounds, the findings underlying such a decision will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes.

[106] Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 278–87 (1990).

[107] Four Members of the Court admitted the constitutional protection of that right. *See id.* at 289 and at 304–07.

[108] *Id.* at 282.

by surrogates who may not act to protect the patient. Moreover, the state may also legitimately seek to safeguard the personal element of an individual's choice between life and death and is under no constitutional obligation to accept the "substituted judgment" of close family members in the absence of substantial proof that their views reflect the patient's. Apart from that, a state "is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary process brings with it." The clear and convincing evidence standard also serves as a societal judgment about how the risk of error should be distributed between the litigants; the state may permissibly place the increased risk of an erroneous decision on those seeking to terminate life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the *status quo* with at least the potential that a wrong decision will eventually be corrected or its impact mitigated by an event, such as an advancement in medical science or the patient's unexpected death. However, an erroneous decision to withdraw such treatment is not susceptible to correction. In the light of the foregoing considerations, the Court confirmed the judgment of the state supreme court, that had found no "clear and convincing" proof of Nancy Cruzan's desire to have hydration and nutrition withdrawn.

[D35] In the same case, Justice Brennan filed a very interesting dissenting opinion in which two other members of the Court joined. He stressed that a patient has a fundamental right to be free from unwanted lifesaving medical care and is "entitled to choose to die with dignity" and not to be remembered in a persistent vegetative state; the mere fact that the patient is incompetent does not deprive him of his fundamental rights. The state "has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment;" the only state interest that may be asserted is an interest in safe-guarding the accuracy of the determination of the patient's desire. The determination needed in this context is whether the incompetent person would choose to live in a persistent vegetative state on life-support or to avoid this medical treatment. Just as a state may not override the patient's choice directly, it may not do so indirectly through the imposition of a procedural rule. Missouri's standard of proof imposed a markedly asymmetrical evidentiary burden and constituted an obstacle to the exercise of a constitutional right: only clear and convincing evidence of specific statements of treatment choice made by the patient when competent was admissible to support a finding that the patient would wish to avoid further medical treatment; no proof was required to support a finding that the incompetent person would wish to continue treatment. On the other hand, Justice Brennan noted, the testimony of close friends and family members may often be the best evidence available of what the patient's choice would be, for it is they that have a unique knowledge of the patient that is vital to any decision on his or her behalf. In addition, the majority's argument that the allocation of the risk of error was justifiable, because an erroneous decision to terminate life-support is irrevocable, while an erroneous decision not to terminate results in a maintenance of the *status quo*, might not be sustained, since "from the point of view of the patient, an erroneous decision in either direction is irrevocable. . . . An erroneous decision not to terminate life-support . . . robs a patient of the very qualities protected by the right to avoid unwanted medical treatment; his own degraded existence is perpetuated, his family's suffering is protracted and the memory he leaves behind becomes more and more distorted."[109]

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[109] Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 302, 313, 317, 321 (1990).

[D36] Yet, there is no constitutional right to assisted suicide. The Court has not accepted the proposition that, under the Equal Protection Clause, ending or refusing lifesaving medical treatment "is nothing more nor less than assisted suicide," holding that the distinction between letting a patient die and making that patient die is important, rational, and well established: it comports with fundamental legal principles of causation and intent and has been widely recognized and endorsed in the medical profession, the state courts, and the overwhelming majority of state legislatures, which have permitted the former while prohibiting the latter.[110] The question is essentially whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide, which itself includes a right to assistance in doing so. The Court declined the existence of such a right, noting, on the one hand, that this right has no place in the nation's traditions, given the country's consistent, almost universal, and continuing rejection of the right, even for terminally ill, mentally competent adults, and, on the other hand, that, although many of the rights and liberties protected by the Due Process Clause sound in personal autonomy, it does not follow that any and all important, intimate, and personal decisions are so protected.[111] State laws making assisted suicide a crime do not violate the Due Process Clause, as they are rationally related to important and legitimate government interests. These interests include preserving human life and its sanctity; preventing the serious public health problem of suicide, especially among the young, the elderly, the depressed or mentally ill persons, or those who are suffering from untreated pain; protecting the medical profession's integrity and ethics and maintaining physicians' role as their patients' healers; protecting the poor, the elderly, disabled persons, the terminally ill, and persons in other vulnerable groups from subtle coercion, undue influence, and societal indifference; and avoiding a possible slide towards voluntary and perhaps even involuntary euthanasia.[112]

5. Deprivation of Personal Liberty Without Prior Criminal Conviction

a. In General

[D37] As a general rule of substantive due process, the government may not detain a person prior to a judgment of guilt in a criminal trial.[113] Apart from that, government detention violates the Due Process Clause unless it is ordered in a criminal proceeding with adequate procedural safeguards, or a special justification outweighs the individual's liberty interest.[114] In that context, the Court has recognized a distinction between *punitive* measures that may not constitutionally be imposed prior to a determination of guilt and *regulatory restraints* that may.[115]

[D38] In times of war or insurrection, when society's interest is at its peak, the government may detain individuals deemed to be dangerous to the public safety.[116] But

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[110] Vacco v. Quill, 521 U.S. 793, 800–08 (1997) (a state legislation that accords different treatment to those competent, terminally ill persons who wish to hasten their deaths by self-administering prescribed drugs than it does to those who wish to do so by directing the removal of life-support systems, comports with the Equal Protection Clause).

[111] Washington v. Glucksberg, 521 U.S. 702, 723–28 (1997).

[112] *Id.* at 728–35; Vacco v. Quill, 521 U.S. 793, 808–09 (1997).

[113] United States v. Salerno, 481 U.S. 739, 749 (1987).

[114] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[115] *See* Bell v. Wolfish, 441 U.S. 520, 537 (1979).

[116] *See* United States v. Salerno, 481 U.S. 739, 748 (1987), *citing* Moyer v. Peabody, 212 U.S. 78, 84–85 (1909) (rejecting due process claim of individual jailed without probable cause by

even in times of peace, "sufficiently compelling governmental interests can justify detention of dangerous persons."[117] If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists.[118] Pre-trial detention may be permissible on the basis of prevention of flight or danger to the community.[119] A state can involuntarily confine persons afflicted with a highly contagious disease.[120] A state program of compulsory treatment for those addicted to narcotics might require periods of involuntary confinement.[121] The government may also detain mentally unstable individuals who present a danger to the public,[122] even if their condition is not treatable,[123] and dangerous defendants who become incompetent to stand trial.[124] Similarly there is no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings.[125] However, dangerousness, standing alone, is not a sufficient ground upon which to justify detention; this rationale would be only a step away from substituting confinements for dangerousness for the present criminal system and would permit the state to hold indefinitely, e.g., any convicted criminal, even though he has completed his prison term.[126]

b. Involuntary Commitment to a Mental Institution

i. Generally

[D39] Involuntary commitment to a mental hospital entails a massive curtailment of liberty that requires due process protection.[127] The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement, since it can engender adverse social consequences to the individual.[128] "At one time or another, every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is, in fact, within a range of conduct that is generally acceptable. . . . Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior."[129]

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governor in time of insurrection), and Ludecke v. Watkins, 335 U.S. 160, 163–66 (1948), (approving unreviewable executive power to detain enemy aliens in time of war). *See also* paras. B45–B46.

117 United States v. Salerno, 481 U.S. 739, 748 (1987).

118 *See* Gerstein v. Pugh, 420 U.S. 103, 119 (1975). A direction by a legislature to the police to arrest all persons who are "suspicious" for past or future criminality would not pass constitutional muster. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

119 United States v. Salerno, 481 U.S. 739, 746–52 (1987).

120 Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902). *See also* Kansas v. Hendricks, 521 U.S. 346, 366 (1997).

121 Robinson v. California, 370 U.S. 660, 665 (1962).

122 *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

123 Kansas v. Hendricks, 521 U.S. 346, 366 (1997).

124 Jackson v. Indiana, 406 U.S. 715, 731–39 (1972).

125 Carlson v. Landon, 342 U.S. 524, 537–42 (1952).

126 *See* Foucha v. Louisiana, 504 U.S. 71, 82–83 (1992).

127 Vitek v. Jones, 445 U.S. 480, 491–92 (1980).

128 Addington v. Texas, 441 U.S. 418, 425–26 (1979).

129 *Id.* at 427.

[D40] "A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . [T]here is no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom. [The State may not] confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community. . . . [T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely, if ever, a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends. [In addition the State may not] fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different, . . . [since] [m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty. . . . In short, 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."[130] Besides, dangerousness, standing alone, is not a sufficient ground upon which to justify indefinite involuntary commitment.[131] Generally, the Court has sustained a commitment statute if it couples proof of dangerousness with proof of some additional factor, such as a "mental illness" or "mental abnormality,"[132] which makes it difficult, if not impossible, for the person to control his dangerous behavior.[133]

[D41] A "clear and convincing" standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital. "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. [T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." On the other hand, due process does not require states to use the "beyond a reasonable doubt" standard of proof applicable in criminal prosecutions and delinquency proceedings. "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable doubt standard of criminal law functions in its realm because there the stan-

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[130] O'Connor v. Donaldson, 422 U.S. 563, 575–76 (1975). *Cf.* Zinermon v. Burch, 494 U.S. 113, 133–34 (1990).

[131] Foucha v. Louisiana, 504 U.S. 71, 75–85 (1992); Kansas v. Hendricks, 521 U.S. 346, 358 (1997).

[132] The task of defining terms of a medical nature that have legal significance is traditionally left to legislators, and those definitions may not fit precisely with the specialized terms to define mental health concepts. *See* Kansas v. Hendricks, 521 U.S. 346, 359 (1997). *See also* Kansas v. Crane, 534 U.S. 407, 413 (2002) (the states retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment).

[133] Kansas v. Hendricks, 521 U.S. 346, 358 (1997). *See also Kansas v. Crane*, 534 U.S. 407, 411–15 (2002), where the Court explained that there must be proof of serious difficulty in controlling behavior, but there is no requirement of total or complete lack of control and that, when considering civil commitment, it has not ordinarily distinguished for constitutional purposes between volitional, emotional, and cognitive impairments.

dard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for 'factfinding' is a "reasonable medical certainty.' . . . [The state should not] be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments."[134] However, indefinite commitment of an insanity acquittee, based on proof of insanity by only a preponderance of the evidence, comports with due process, since the insanity defense was advanced by the acquittee himself and, more important, the proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere "idiosyncratic behavior."[135]

[D42] An individual involuntary committed to a psychiatric hospital is entitled to constitutionally adequate procedures to establish the grounds for his confinement.[136] To determine what procedural protections the Constitution requires in a particular case, several factors are to be weighed. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the 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 requirement would entail. Since the relative issues are "of unusual delicacy, in an area where professional judgments regarding desirable procedures are constantly and rapidly changing, . . . restraint is appropriate on the part of courts called upon to adjudicate whether a particular procedural scheme is adequate under the Constitution."[137]

[D43] The Due Process Clause usually requires some kind of a hearing before the state deprives a person of liberty. If a person signs forms, requesting admission to, and treatment at, a mental hospital, it is foreseeable that he might be incapable of informed consent. Thus, the hospital staff should be in a position to take notice of any misuse of the voluntary admission process and to ensure that the proper procedures for involuntary placement are afforded both to those patients who are unwilling and to those who are unable to give consent.[138]

[D44] Allowing guardians and immediate family members to participate as parties in commitment proceedings does not violate due process, for it "increases the accuracy of those proceedings and implements the State's interest in providing family members a voice in the proceedings, without undermining those interests of the individual protected by the Due Process Clause." Even if parents, close family members, or legal guardians can be said, in certain instances, to have interests adverse to those of the person facing commitment, their participation as formal parties in the commitment proceedings does not increase the risk of an erroneous deprivation of this person's liberty interest. Rather, these parties often will have valuable information that, if placed before

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134 Addington v. Texas, 441 U.S. 418, 427, 430 (1979).

135 Jones v. United States., 463 U.S. 354, 366–68 (1983).

136 Foucha v. Louisiana, 504 U.S. 71, 79 (1992).

137 Heller v. Doe, 509 U.S. 312, 333 (1993), *quoting* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 855–56 (1977).

138 Zinermon v. Burch, 494 U.S. 113, 127–37 (1990).

the court, will increase the accuracy of the commitment decision. And the fact that they may favor commitment is beside the point, because, "[a]t least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court, not in a result more favorable to him."[139]

[D45] "Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed."[140] The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. "When a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society."[141] A verdict of not guilty by reason of insanity is sufficiently probative of mental illness and dangerousness to justify commitment of the acquittee for the purposes of treatment and the protection of society. Such a verdict establishes that the defendant committed an act constituting a criminal offense, and that he committed the act because of mental illness. It is not unreasonable for the legislator to determine that these findings constitute an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person. The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. Nor is it unreasonable to conclude that an insanity acquittal supports an inference of continuing mental illness. "It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment. The precise evidentiary force of the insanity acquittal, of course, may vary from case to case, but the Due Process Clause does not require [the legislator] to make classifications that fit every individual with the same degree of relevance." A statutory provision of a hearing within 50 days of the commitment assures that every acquittee has prompt opportunity to obtain release if he has recovered. Moreover, an insanity acquittee is not entitled to his release merely because he has been hospitalized for a period longer than he could have been incarcerated if convicted. There simply is no necessary correlation between severity of the offense and length of time necessary for recovery.[142] In the same context, the Court has held that "a person charged by a State with a criminal offense, who is committed solely on account of his incapacity to proceed to trial, cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."[143]

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139 Heller v. Doe, 509 U.S. 312, 331–33 (1993).

140 Foucha v. Louisiana, 504 U.S. 71, 79 (1992), *citing* Jackson v. Indiana, 406 U.S. 715, 738 (1972), and Jones v. United States, 463 U.S. 354, 368 (1983).

141 Jones v. United States, 463 U.S. 354, 370 (1983).

142 *Id.* at 363–69.

143 Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[D46] A state must observe the Equal Protection Clause when it fixes the statutory conditions of involuntary commitment to, and release from, a mental institution. A state prisoner is denied equal protection if he is civilly committed at the expiration of his prison sentence on the finding of a surrogate, without a jury trial available to all others civilly committed in the state, and in case his commitment to an institution is maintained by the Department of Correction beyond the expiration of his prison term without the judicial determination that he is dangerously mentally ill, such as that afforded to all others so committed.[144] If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice. A system for pre-trial commitment of those accused of crime, which subjects criminal defendants to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all other persons not charged with offenses, runs counter the Equal Protection Clause.[145]

[D47] However, a state statute concerning involuntary commitment of dangerous mentally retarded or mentally ill individuals does not violate the Equal Protection Clause, if it establishes procedures for the commitment of these two groups that differ in the two following aspects: first, the applicable burden of proof in mental retardation commitment proceedings is clear and convincing evidence, while the standard in mental illness proceedings is beyond a reasonable doubt; second, guardians and immediate family members of the subject of a mental retardation proceeding may participate as if parties to those proceedings, with all attendant rights. "[M]ental retardation is easier to diagnose than is mental illness, . . . [for it] is a developmental disability that becomes apparent before adulthood. . . . By the time the person reaches 18 years of age the documentation and other evidence of the condition have been accumulated for years. Mental illness, on the other hand, may be sudden, and may not occur, or at least manifest itself, until adulthood. . . . Furthermore, . . . diagnosis of mental illness is difficult. . . . If diagnosis is more difficult in cases of mental illness than in instances of mental retardation, a higher burden of proof for the former tends to equalize the risks of an erroneous determination that the subject of a commitment proceeding has the condition in question. . . . From the diagnostic standpoint alone, [the state's] differential burdens of proof . . . are rational. There is, moreover, a 'reasonably conceivable state of facts,' . . . from which [the state can] conclude that the second prerequisite to commitment—that 'the person presents a danger or a threat of danger to self, family, or others,'—is established more easily, as a general rule, in the case of the mentally retarded. Previous instances of violent behavior are an important indicator of future violent tendencies. . . . Mental retardation is a permanent, relatively static condition, . . . so a determination of dangerousness may be made with some accuracy based on previous behavior. . . . This is not so with the mentally ill. Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. Prediction of future behavior is complicated as well by the difficulties inherent in diagnosis of mental illness. . . . There is a further, more far-reaching rationale justifying the different burdens of proof: the

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[144] Baxstrom v. Herold, 383 U.S. 107, 110 (1966). In rejecting the state's argument that Baxtrom's conviction and sentence constituted adequate justification for the difference in procedures, the Court noted that there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments. *Id.* at 111–12.

[145] Jackson v. Indiana, 406 U.S. 715, 724, 729–30 (1972).

prevailing methods of treatment for the mentally retarded, as a general rule, are much less invasive than are those given the mentally ill."[146] There is also a rational basis for a state to allow immediate family members and guardians to participate as parties in proceedings to commit the mentally retarded but not the mentally ill. A state can rationally conclude that "close relatives and guardians, both of whom likely have intimate knowledge of a mentally retarded person's abilities and experiences, have valuable insights which should be considered during the involuntary commitment process. . . . Mental illness, by contrast, may arise or manifest itself with suddenness only after minority, . . . when the afflicted person's immediate family members have no knowledge of the medical condition and have long ceased to provide care and support. Further, determining the proper course of treatment may be far less dependent upon observations made in a household setting. . . . In addition, adults previously of sound mental health who are diagnosed as mentally ill may have a need for privacy that justifies the State in confining a commitment proceeding to the smallest group compatible with due process. Based on these facts, [the state] may have concluded that participation as parties by relatives and guardians of the mentally ill would not, in most cases, have been of sufficient help to the trier of fact to justify the additional burden and complications of granting party status."[147]

ii. Civil Commitment of Minors

[D48] A child has a liberty interest in not being confined unnecessarily for medical treatment, and, presumably, a protectible interest in not being erroneously labeled as mentally ill. Therefore, a minor is constitutionally entitled to appropriate procedural guarantees, when his parents or guardian seek state administered institutional mental health care for him. "In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, [the Court's] precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and . . . the traditional presumption that the parents act in the best interests of their child should apply. . . . [H]owever, . . . the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment. [Furthermore] [t]he State obviously has a significant interest in confining the use of its costly mental health facilities to cases of genuine need, . . . [and] in not imposing unnecessary procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance. The *parens patriae* interest in helping parents care for the mental health of their children cannot be fulfilled if the parents are unwilling to take advantage of the opportunities because the admission process is too onerous, too embarrassing, or too contentious. . . . The State also has a genuine interest in allocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital, rather than to time-consuming procedural minuets before the admission. One factor that must be considered is the utilization of the time of psychiatrists, psychologists, and other behavioral specialists in preparing for and participating in hearings, rather than performing

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[146] Heller v. Doe, 509 U.S. 312, 321–24 (1993). Classifications neither involving fundamental rights nor proceeding along suspect lines are subject to "rational basis" review.

[147] Heller v. Doe, 509 U.S. 312, 328–29 (1993).

the task for which their special training has fitted them."[148] As to "what process protects adequately the child's constitutional rights by reducing risks of error without unduly trenching on traditional parental authority and without undercutting efforts to further the legitimate interests of both the state and the patient that are served by voluntary commitments," the Court concluded, in light of the above considerations, that "the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied. . . . That inquiry must carefully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies. Of course, the review must also include an interview with the child. . . . Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure."[149] The Court further explained that due process does not require that "the neutral and detached trier of fact be law trained or a judicial or administrative officer. . . . Thus, a staff physician will suffice, so long as he or she is free to evaluate independently the child's mental and emotional condition and need for treatment. . . . It is not necessary that the deciding physician conduct a formal or quasi-formal hearing. . . . [D]ue process is not violated by use of informal, traditional medical investigative techniques. . . . [A] formalized, factfinding hearing [would also pose the danger] for significant intrusion into the parent-child relationship. . . . A confrontation over such intimate family relationships would distress the normal adult parents, and the impact on a disturbed child almost certainly would be significantly greater. . . . In general, . . . an independent medical decisionmaking process, which includes the thorough psychiatric investigation described earlier, followed by additional periodic review of a child's condition, will protect children who should not be admitted; . . . the risks of error in that process would [not] be significantly reduced by a more formal, judicial-type hearing."[150] Finally, although the situation of civil commitment of a ward of the state differs from the one where a child's natural parents request his admission to a state mental hospital, the two situations do not justify requiring different procedures at the time of the child's initial admission to the hospital, considering the valid statutory presumption that the state acts in the child's best interest. Yet, it is possible that the procedures required in reviewing a ward's need for continuing care should be different from those used to review the need of a child with natural parents, for a ward of the state may be "lost in the shuffle."[151]

iii. Conditions of Confinement

[D49] Due process requires that the conditions and duration of confinement bear some reasonable relation to the purpose for which persons are committed.[152] A mentally ill or retarded person, involuntarily committed to a state mental institution, has

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148 Parham v. J.R., 442 U.S. 584, 599–606 (1979).

149 *Id.* at 606–07. *See also* Sec'y of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 442 U.S. 640 (1979).

150 *Id.* at 607–13.

151 *Id.* at 618–19.

152 Seling v. Young, 531 U.S. 250, 265 (2001). The statutory features of civil commitment may affect how a confinement scheme is evaluated to determine whether it is civil or punitive, but a confinement scheme's civil nature cannot be altered based merely on vagaries in the authorizing statute's implementation. *Id.* at 263.

constitutionally protected liberty interests, under the Due Process Clause of the Fourteenth Amendment, to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and "minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[153] Yet, these interests are not absolute; indeed, to some extent, they are in conflict. In operating a mental institution, there are occasions in which it is necessary for the state to restrain the movement of residents—for example, to protect them, as well as others, from violence. Similar restraints may also be appropriate in a training program. Therefore, it is necessary to balance these liberty interests against the relevant state interests. The proper standard is whether professional judgment, in fact, was exercised. The relevant decision, "if made by a professional, is presumptively valid; . . . [s]uch a presumption is necessary to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function. . . . [L]iability may 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."[154]

c. Detention of Aliens Who Are Deportable or Whose Deportability or Admissibility Is Under Review

[D50] An alien who seeks admission to the United States may not do so under any claim of constitutional right. Admission of aliens to the United States is a privilege granted by the sovereign U.S. government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[155] "Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent."[156] Therefore, the Fifth Amendment entitles aliens to due process in deportations proceedings.[157] However, an alien's temporary harborage in government facilities, pending determination of his admissibility, is not to be regarded as an "entry" into the United States and bestows no additional rights; in such cases, aliens are still treated, for constitutional purposes, as if stopped at the border.[158]

[D51] The question of the procedures due a returning resident alien arose in *Kwong Hai Chew*.[159] There, the regulations permitted the exclusion of an arriving alien without a hearing. The Court interpreted those regulations not to apply to Chew, a permanent resident alien who was returning from a five-month voyage abroad as a crewman on an American merchant ship, reasoning that for purposes of his constitutional right to due process, Chew's status was "assimilate[d] . . . to that of an alien continuously

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153 Youngberg v. Romeo, 457 U.S. 307, 315–19 (1982).

154 *Id.* at 319–24.

155 *See* Knauff v. Shaughnessy, 338 U.S. 537, 542–44 (1950).

156 Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

157 Reno v. Flores, 507 U.S. 292, 306 (1993).

158 *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953); United States v. Ju Toy, 198 U.S. 253, 263 (1905). *Cf.* Kaplan v. Tod, 267 U.S. 228, 230 (1925).

159 Kwong Hai Chew v. Colding, 344 U.S. 590, 596, 600–03 (1953).

residing and physically present in the United States." Then, to avoid constitutional problems, the Court construed the regulation as inapplicable. Although the holding was one of regulatory interpretation, the rationale was one of constitutional law.[160] Any doubts that *Chew* recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by *Rosenberg v. Fleuti*, where the Court described *Chew* as holding "that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him."[161]

[D52] If the permanent resident alien's absence is extended, he may lose his entitlement to assimilation of his status to that of an alien continuously residing and physically present in the United States.[162] *Mezei*, an alien seemingly born in Gibraltar of Hungarian or Romanian parents, lived in the United States from 1923 to 1948. In May of that year, he sailed for Europe, apparently to visit his dying mother in Romania. Denied entry there, he remained in Hungary for some 19 months, due to "difficulty in securing an exit permit." Finally, armed with a quota immigration visa issued by the American Consul in Budapest, he proceeded to France and boarded a ship bound for New York. Upon arrival on February 9, 1950, he was temporarily excluded from the United States. Pending disposition of his case, he was received at Ellis Island. After reviewing the evidence, the Attorney General, on May 10, 1950, ordered the temporary exclusion to be made permanent, without a hearing before a board of special inquiry, on the "basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." That determination rested on a finding that respondent's entry would be prejudicial to the public interest for security reasons. Mezei shipped out twice to return whence he came; France and Great Britain refused him permission to land. Because other nations refused to accept him, his exclusion at Ellis Island was continued for 21 months. The Court denied relief. First, it pointed out that Mezei, apparently without authorization or re-entry papers, had simply left the United States and remained behind the Iron Curtain for 19 months. Moreover, neither his harborage on Ellis Island nor his prior residence in the United States transformed the administrative proceeding against him into something other than an exclusion proceeding; Mezei was an entrant alien or "assimilated to that status" for constitutional purposes. Subsequently, the Court rejected Mezei's argument that he was entitled to due process in assessing his right to admission on his return.[163]

[D53] As noted above, the Fifth Amendment entitles aliens to due process of law in deportation proceedings. At the same time, however, detention during such proceedings is a constitutionally valid aspect of the deportation process; detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the expulsion of aliens—even juvenile aliens[164]—is not unconstitu-

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160 *See* Landon v. Plasencia, 459 U.S. 21, 33 (1982), *discussing Kwong Hai Chew.*

161 Rosenberg v. Fleuti, 374 U.S. 449, 460 (1963).

162 Landon v. Plasencia, 459 U.S. 21, 33 (1982).

163 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 207–16 (1953). According to the dissenting opinion of three members of the Court, exclusion of an alien without judicial hearing, of course, does not deny due process when it can be accomplished merely by turning him back on land or returning him by sea, but when indefinite confinement becomes the means of enforcing exclusion, due process requires that the alien be informed of its grounds and have a fair chance to overcome them. Mezei's intolerable situation was remedied after four years imprisonment only through executive action as a matter of grace.

164 *See* Reno v. Flores, 507 U.S. 292 (1993). There the Court held that alien juveniles (not

tional.[165] A statute providing for detention of deportable criminal aliens, pending their removal proceedings, necessarily serves the purpose of preventing deportable criminal aliens from fleeing and remaining at large in the Unites States, often engaging in further criminal activities. Such a provision is valid, even if the government does not show that individualized bond hearings would be ineffective, because, "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."[166] Similarly, there is no denial of due process under the Fifth Amendment in the detention of alien residents, without bail, pending determination of deportability, where there is reasonable cause to believe that their release on bail would endanger the safety and welfare of the United States. Accordingly, evidence of membership in a political party advocating the use of force and violence for the accomplishment of its aims, plus personal activity in supporting and extending the party's philosophy concerning violence, gives adequate ground for such a detention, even if the government cannot show specific acts of sabotage or incitement to subversive action.[167]

[D54] The Court has also dealt with the issue of the duration of the detention of a removable alien. In *Zadvydas*, the Court considered a due process challenge to detention of aliens under a federal law, which governed detention following a final order of removal and provided, among other things, that when an alien, who had been ordered removed, was not in fact removed during the 90-day statutory "removal period," that alien might "be detained beyond the removal period" in the discretion of the Attorney General. A five-member majority of the Court read the provision, in light of the Constitution's demands, not to permit indefinite detention but to authorize continued detention of an alien following the 90-day removal period for only such time as was "reasonably necessary to secure the alien's removal."[168] A statute permitting indefinite detention would raise serious constitutional questions. Government detention in civil proceedings, like the ones at issue, violates the Due Process Clause unless a special justification outweighs the individual's liberty interest. Yet the government failed to proffer sufficiently strong justification for indefinite civil detention under this statute. Preventing flight, the first justification advanced by the government, was considered to be weak or non-existent where removal seemed a remote possibility, at best. The government's relevant allegation that whatever liberty interest the aliens possessed, it was "greatly diminished" by their lack of a legal right to live at large in the United States, was rejected outright, for the choice was not between imprisonment and the alien "living at large," but between imprisonment and supervision under release conditions that might not be violated. Preventive detention based on the second justification—protecting the community—has been upheld only when limited to specially dangerous individuals and subject to strong procedural protections; when preventive detention is potentially indefinite, this dangerousness rationale must also be accompanied by some other special circumstance, such as mental illness, that helps to create the danger. The

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accompanied by their parents or other related adults) who are held in INS custody pending their deportation hearings, do not have a constitutional right to be released into the custody of other "responsible adults."

165 Demore v. Kim, 538 U.S. 510, 531 (2003).

166 *Id.* at 528.

167 Carlson v. Landon, 342 U.S. 524, 541 (1952). The Court noted that the problem of unusual delay in deportation hearings was not involved in that case.

168 Zadvydas v. Davis, 533 U.S. 678, 699 (2001).

civil confinement in question was potentially permanent, and once the flight risk justification evaporated, the only special circumstance was the alien's removable status, which bore no relation to dangerousness. Moreover, the sole procedural protections were found in administrative proceedings, where the alien had the burden of proving he was not dangerous, without significant later judicial review. The Court also examined the question of what period could be deemed reasonably necessary to bring about the alien's removal from the United States. "Reasonableness" should be measured primarily in terms of the statute's purpose of assuring the alien's presence at the moment of removal. Thus, if removal was not "reasonably foreseeable," the habeas corpus court should hold continued detention unreasonable and no longer authorized. If it was foreseeable, the court should consider the risk of the alien's committing further crimes as a factor potentially justifying continued confinement. Without abdicating their responsibility to review the detention's lawfulness, the courts could take appropriate account of such matters as the Executive Branch's greater immigration-related expertise, the Immigration and Naturalization Service's administrative needs and concerns, and the nation's need to speak with one voice on immigration. In order to limit the occasions when courts would need to make the difficult judgments called for by the recognition of this necessary executive leeway and for the sake of uniform administration in the federal courts, the Court felt that it was practically necessary to recognize a presumptively reasonable period of detention. Since there were reasons to believe that Congress doubted the constitutionality of more than six months' detention, the Court concluded that *six months* would be the appropriate period;[169] after the six-month period, once an alien provided "good reason to believe that there [wa]s no significant likelihood of removal in the reasonably foreseeable future," the government should furnish evidence sufficient to rebut that showing.[170]

d. Detention of "Enemy Combatants"[171]

[D55] The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incidents of war. The object of capture is to prevent the captured individual from serving the enemy; he is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and, in time, exchanged, repatriated, or otherwise released. And there is no bar to the "nation's holding one of its own citizens as an enemy combatant." Moreover, "it is a clearly established principle of the law of war that detention may last no longer than active hostilities."[172]

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[169] The duration at stake in *Demore v. Kim*, 538 U.S. 510 (2003), was much shorter, since the detention of removable criminal aliens lasted roughly a month and a half, in the vast majority of cases, and about five months in the minority of cases in which the alien chose to appeal.

[170] Zadvydas v. Davis, 533 U.S. 678, 690–701 (2001). In *Clark v. Martinez*, 543 U.S. 371 (2005), the Court held that the interpretation of federal rules adopted in *Zadvydas* was applicable to inadmissible aliens as well, noting *inter alia*, that, even if the statutory purpose and constitutional concerns influencing the *Zadvydas* construction were not present for inadmissible aliens, that could not justify giving the *same* statutory text a different meaning depending on the characteristics of the aliens involved. *Id.* at 380.

[171] With respect to *detention of enemy aliens abroad*, *see* paras. B40–B41.

[172] Hamdi v. Rumsfeld, 542 U.S. 507, 518–20 (2004). For purposes of this case, the government had made clear that the "enemy combatant" it sought to detain was an individual who,

[D56] *Hamdi* addressed the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Striking the proper constitutional balance under the three-factor standard articulated in *Mathews v. Eldridge*, the Court concluded that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker. In so holding, the plurality pointed out that "as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."[173]

e. Deprivation of Personal Liberty During Criminal Proceedings

i. In General

[D57] Individuals may face substantial liberty restrictions as a result of the operation of the criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists.[174] The government may detain dangerous defendants who are incompetent to

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allegedly, had been "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who had "engaged in an armed conflict against the United States" there.

[173] Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) (plurality opinion). The plurality noted *inter alia:* "The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized. . . . There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. . . . [Hamdi] unquestionably has the right to access to counsel in connection with the proceedings on remand. . . . [E]nemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant." *Id.* at 533–34.

Relatedly, Justice Souter (with whom Justice Ginsburg joined, concurring in part, dissenting in part, and concurring in the judgment) said: "I do not adopt the plurality's resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality's determinations . . . that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decision maker; nor, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel. On the other hand, I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas." *Id.* at 553–54.

[174] Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

stand trial.[175] Furthermore "[t]he duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."[176]

ii. Pre-Trial Detention of Criminally Accused Persons

[D58] *Generally.* An arrestee may be incarcerated until trial if he presents a risk of flight, for the government "has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences."[177] Furthermore, a criminal defendant may be subject to pre-trial confinement if he "presents an identified and articulable threat to an individual or the community."[178] "[F]rom a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct."[179] Such a prediction is an experienced one, which can be based on a host of variables, including the nature and seriousness of the charges; whether the charges are likely to be proved at trial; the arrestee's prior record; and, in case of a juvenile arrestee, the adequacy and effectiveness of his home supervision or his school situation.[180] Besides, the final disposition of a case is largely irrelevant to the legality of a pre-trial detention.[181]

[D59] Under the Bail Reform Act of 1984, 18 U.S.C. Section 3142(e), courts are required to detain, prior to trial, arrestees charged with certain serious felonies—crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders—if the government demonstrates by clear and convincing evidence, after an adversary hearing, that no release conditions will "reasonably assure . . . the safety of any other person and the community." The Act provides arrestees with a number of procedural rights at the detention hearing, including the right to request counsel, to testify, to present witnesses, to proffer evidence, and to cross-examine other witnesses. The Act also specifies the factors to be considered in making the detention decision, including the nature and seriousness of the charges, the substantiality of the government's evidence, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by his release. Under the Act, a decision to detain must be supported by written findings of fact and a statement of reasons and is immediately reviewable. Such a regulatory scheme is not considered to be facially invalid under the Due Process Clause, given its legitimate and compelling purpose and the procedural protections it offers.[182] In so holding, the Court pointed out that "the

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[175] *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 731–39 (1972). *See, in extenso*, paras. D45–D46.

[176] Hurtado v. United States, 410 U.S. 578, 588, n.9 (1973), *quoting* Stein v. New York, 346 U.S. 156, 184 (1953). The government "may compel witnesses to testify at trial or before a grand jury, on pain of contempt, so long as the witness in not the target of the criminal case in which he testifies." *See* Chavez v. Martinez, 538 U.S. 760, 767–68 (2003), *citing* Kastigar v. United States, 406 U.S. 441, 443 (1972).

[177] Bell v. Wolfish, 441 U.S. 520, 534 (1979).

[178] United States v. Salerno, 481 U.S. 739, 751 (1987).

[179] Schall v. Martin, 467 U.S. 253, 278 (1984).

[180] *Id.* at 279.

[181] *Id.* at 273, *citing* Baker v. McCollan, 443 U.S. 137, 145 (1979)

[182] United States v. Salerno, 481 U.S. 739, 752 (1987). Furthermore, according to the same opinion of the Court, the provisions at issue are not facially unconstitutional as violative of the Excessive Bail Clause of the Eighth Amendment, since "the Eighth Amendment does not require release on bail." *Id.* at 755.

pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."[183]

[D60] *Preventive Detention of Juveniles.* The Constitution does not preclude preventive detention of juveniles. A state statute authorizing a brief pre-trial detention of an accused juvenile delinquent, based on a finding that there is a "serious risk" that the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime," has been upheld as valid, under the Due Process Clause of the Fourteenth Amendment. Preventive detention under the statute served "the legitimate state objective, held in common with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime. . . . [Moreover,] the terms and conditions of confinement [we]re compatible with" that objective.[184] Detained juveniles were entitled to an expedited factfinding hearing. The maximum possible detention of a youth accused of a serious crime, was 17 days and, for less serious crimes, six days; these time frames were "suited to the limited purpose of providing the youth with a controlled environment and separating him from improper influences pending the speedy disposition of his case." Besides, a detained juvenile could not, absent exceptional circumstances, be sent to a prison or lockup where he would be exposed to adult criminals but was screened by an "assessment unit" of the Department of Juvenile Justice. Finally, the procedural safeguards afforded by the statute in question provided sufficient protection against erroneous and unnecessary deprivations of liberty. Notice, a hearing, and a statement of facts and reasons were given to the juvenile prior to any detention, and a formal probable cause hearing was then held within a short time thereafter, if the factfinding hearing was not itself scheduled within three days. Moreover, the post-detention procedures—habeas corpus review, appeals, and motions for reconsideration—provided a sufficient mechanism for correcting, on a case-by-case basis, any erroneous detention.[185]

[D61] *Confinement Conditions.* Under the Due Process Clause, "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[186] A

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[183] *Id.* at 748. The Court noted in this regard: "Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals, [but] perceived pretrial detention as a potential solution to a pressing societal problem. . . . There is no doubt that preventing danger to the community is a legitimate regulatory goal. . . . Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. . . . The arrestee is entitled to a prompt detention hearing, . . . and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act. . . . Moreover, . . . the conditions of confinement envisioned by the Act 'appear to reflect the regulatory purposes relied upon by the' Government. . . . [T]he statute at issue here requires that detainees be housed in a 'facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.'" *Id.* at 747–48. The Court intimated no view "as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *Id.* at 747, n.4.

[184] Schall v. Martin, 467 U.S. 253, 274, 269 (1984).

[185] Schall v. Martin, 467 U.S. 253, 270–281 (1984).

[186] Bell v. Wolfish, 441 U.S. 520, 535 (1979). A sentenced inmate, on the other hand, may be punished, although that punishment may not be "cruel and unusual" under the Eighth Amendment. The Court recognized this distinction in *Ingraham v. Wright*, 430 U.S. 651, 671, n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . Where the

person lawfully committed to pre-trial detention has not been adjudged guilty of any crime. Thus, in evaluating the constitutionality of conditions or restrictions of pre-trial detention, "the proper inquiry is whether those conditions amount to punishment of the detainee. . . . Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense, however. . . . Loss of freedom of choice and privacy are inherent incidents of pretrial confinement; . . . the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.' . . . Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on 'whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.' . . . [Therefore,] if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon [pretrial] detainees. . . . [I]n addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment."[187]

[D62] Certain inmates filed, in federal district court, a petition for a writ of habeas corpus, challenging the constitutionality of numerous conditions of confinement and practices in the Metropolitan Correctional Center (MCC), a federally operated short-term custodial facility in New York City, designed primarily to house pre-trial detainees. The MCC differed markedly from the familiar image of a jail, since it was intended to include the most advanced and innovative features of modern design of detention facilities; there were no barred cells, dank, colorless corridors, or clanging steel gates. The district court enjoined, *inter alia*, the practice of housing, primarily for sleeping purposes, two inmates in individual rooms, of approximately 75 square feet, originally intended for single occupancy ("double-bunking"). The court relied on two factors for its conclusion: (1) the fact that the rooms were designed to house only one inmate, and (2) that confining two persons in one room or cell of this size constituted a "fundamental denial of decency, privacy, personal security, and, simply, civilized humanity." The court of appeals agreed with the district court and noted that the lack of privacy inherent in double-celling in rooms intended for one individual was a far more compelling consideration than a comparison of square footage or the substitution of doors for bars, carpet for concrete, or windows for walls. The Supreme Court disagreed with both the district court and the court of appeals that there is "some sort of 'one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment." The Court emphasized that, "[w]hile confining a given number of people in a given amount

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State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.").

[187] Bell v. Wolfish, 441 U.S. 520, 535–40 (1979). In determining whether restrictions or conditions are reasonably related to the government's interest in maintaining security and order and operating the institution in a manageable fashion, courts should ordinarily defer to the expert judgment of corrections officials in such matters. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 827 (1974).

of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship" was shown by the record of the case. Detainees were required to spend only seven or eight hours each day in their rooms, during most or all of which they presumably were sleeping. The rooms provided more than adequate space for sleeping. During the remainder of the time, the detainees were free to move between their rooms and the common area. And nearly all of the detainees were released within 60 days. The Court concluded that requiring a detainee to share toilet facilities and this admittedly rather small sleeping place with another person for generally a maximum period of 60 days did not violate the Constitution.[188]

[D63] Similarly, the conditions of preventive detention of accused juvenile delinquents must be compatible with the relevant legitimate state objective of protecting both the juvenile and society from the hazards of pre-trial crime. In *Schall v. Martin*, the Court upheld a state law authorizing pre-trial detention of juveniles. It noted, among other things, that a detained juvenile could not, absent exceptional circumstances, be sent to a prison or lockup where he would be exposed to adult criminals. Instead, the child was screened by an "assessment unit" of the Department of Juvenile Justice, which placed the child in either non-secure or secure detention. Non-secure detention involved an open facility in the community, a sort of "halfway house," without locks, bars, or security officers where the child received schooling and counseling and had access to recreational facilities. In secure detention, children were assigned to separate dorms based on age, size, and behavior; they were wearing street clothes provided by the institution and were partaking in educational and recreational programs and counseling sessions run by trained social workers; misbehavior was punished by confinement to one's room. The Court concluded that, although secure detention was more restrictive, it was not imposed for the purpose of punishment and was "still consistent with the regulatory and *parens patriae* objectives relied upon by the State."[189]

6. The Right to Keep and Bear Arms

[D64] The Second Amendment provides that "[a] well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." The Second Amendment must be interpreted and applied with the view of maintaining a militia. In *United States v. Miller*, the Court upheld a federal law making criminal the shipment in inter-state commerce of a sawed-off shotgun, for there was no evidence that a sawed-off shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia;" such a weapon was not shown to be "ordinary military equipment" that could "contribute to the common defense."[190] The Court did not, however, attempt to define, or otherwise construe, the right protected by the Second Amendment.

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[188] Bell v. Wolfish, 441 U.S. 520, 542–43 (1979). In the same case, the Court also found constitutional the enforcement of the so-called "publisher only" rule, prohibiting inmates from receiving hard-cover books that were not mailed directly from publishers, book clubs, or bookstores; the prohibition against inmates' receipt of packages of food and personal items from outside the institution; the practice of body cavity searches of inmates following contact visits with persons from outside the institution; and the requirement that pre-trial detainees remain outside their rooms during routine inspections by MCC officials.

[189] Schall v. Martin, 467 U.S. 253, 271 (1984).

[190] United States v. Miller, 307 U.S. 174, 178 (1939).

CHAPTER 5

SUBSTANTIVE GUARANTEES AGAINST CRIMINAL OR CIVIL PENALTIES

A. THE DISTINCTION BETWEEN CRIMINAL PUNISHMENTS AND CIVIL SANCTIONS OR RESTRAINTS

1. In General

[E1] The distinction between a *criminal* punishment and a *civil* penalty, remedy, or regulatory restraint is of constitutional import. The Self-Incrimination Clause of the Fifth Amendment, is expressly limited to "any criminal case." Similarly, the protections provided by the Sixth Amendment are available only in "criminal prosecutions;" proof beyond a reasonable doubt is required only in criminal cases.[1] Other constitutional guarantees, while not explicitly limited to one context or the other, have been so limited by decision of the Court. The Double Jeopardy Clause protects only against multiple criminal punishments for the same offense.[2] Since 1798 the Court has considered the *Ex Post Facto* Clause[3] to apply only in the criminal context.[4] Similarly, the Eighth Amendment's prohibition of cruel and unusual punishments applies only to criminal penalties.[5] On the contrary, the Excessive Fines Clause of the Eighth Amendment is not expressly limited to criminal cases, and its history does not require such a limitation.[6]

[E2] The question whether a statutory scheme "is civil or punitive in nature is initially one of statutory construction. . . . A court must first ascertain whether the legislature intended the statute to establish civil proceedings."[7] The court considers the "statute's text and structure to determine the legislative objective."[8] The court must first ask "whether the legislature indicated either expressly or impliedly a preference for one

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1 United States v. Regan, 232 U.S. 37, 47–48 (1914). *See also* One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235 (1972) (*per curiam*) (the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of *collateral estoppel*).

2 *See, e.g.*, Helvering v. Mitchell, 303 U.S. 391, 399 (1938); Hudson v. United States, 522 U.S. 93, 99 (1997). As noted in *Helvering v. Mitchell, supra*, at 399, "Congress may impose both a criminal and a civil sanction with respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."

3 U.S. Const. art. I, § 9, cl. 3; art. I, § 10, cl. 1.

4 Calder v. Bull, 3 Dall. 386, 390–92 (1798). *See also, e.g.*, Collins v. Youngblood, 497 U.S. 37, 41, n.2 (1990).

5 *See*, in particular, Ingraham v. Wright, 430 U.S. 651, 664–68 (1977).

6 Austin v. United States, 509 U.S. 602, 608–09 (1993).

7 Seling v. Young, 531 U.S. 250, 261 (2001).

8 Smith v. Doe, 538 U.S. 84, 92 (2003).

label or the other."[9] "If the intention of the legislature was to impose punishment, that ends the inquiry."[10] If, however, the intention was to enact a regulatory scheme that is civil, the court must further examine whether the statutory scheme is "so punitive in form,"[11] "purpose or effect as to negate [the State's] intention to deem it civil."[12] Because "the courts "ordinarily defer to the legislature's stated intent,"[13] "only the clearest proof will suffice to override that intent and transform what has been denominated a civil remedy into a criminal penalty."[14]

[E3] In examining the legislature's intent, the fact that the statute under review contains two separate and distinct provisions imposing sanctions, and that these appear in different parts of the statutory scheme, is relevant in determining the character of the provisions and may support the conclusion that one sanction is criminal and the other is civil.[15] The same is true when a provision for sanctions is meant to be broader in scope than a statute providing for criminal punishment.[16] The fact that the sanction in question is not contained in the criminal code may also be taken into account.[17] Nevertheless "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one."[18] Also telling is the fact that the statute does not require the procedures adopted to contain any safeguards associated with the criminal process. "By contemplating 'distinctly civil procedures,' the legislature indicate[s] clearly that it intended a civil, not a criminal, sanction."[19] And if "the State has indicated quite clearly its intent that certain proceedings be civil in nature[,] its decision to provide some of

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9 Hudson v. United States, 522 U.S. 93, 99 (1997).

10 Smith v. Doe, 538 U.S. 84, 92 (2003).

11 *See* United States v. Ursery, 518 U.S. 267, 290 (1996); Hudson v. United States, 522 U.S. 93, 104 (1997).

12 Kansas v. Hendricks, 521 U.S. 346, 361 (1997), *quoting* United States v. Ward, 448 U.S. 242, 248–49 (1980).

13 Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

14 Hudson v. United States, 522 U.S. 93, 100 (1997).

15 *See* Helvering v. Mitchell, 303 U.S. 391, 404 (1938); One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 236–37 (1972); United States v. Ward, 448 U.S. 242, 250 (1980).

16 United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364–65 (1984). "[A] State can address a major social problem both by way of an administrative scheme and through penal sanctions. Administrative statutes and penal laws may have the same ultimate purpose of remedying the social problem, but they have different subsidiary purposes, and prescribe different methods of addressing the problem. An administrative statute establishes how a particular business in a 'closely regulated' industry should be operated, setting forth rules to guide an operator's conduct of the business and allowing government officials to ensure that those rules are followed. Such a regulatory approach contrasts with that of the penal laws, a major emphasis of which is the punishment of individuals for specific acts of behavior." *See* New York v. Burger, 482 U.S. 691, 712–13 (1987).

17 *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

18 *See Smith v. Doe*, 538 U.S. 84, 94 (2003), where the provisions at issue—found civil—were codified in Alaska's Code of Criminal Procedure. *See also United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), where the Court held a forfeiture provision to be a civil sanction, even though the authorizing statute was in the criminal code.

19 Smith v. Doe, 538 U.S. 84, 96 (2003), *quoting* Unites States v. Ursery, 518 U.S. 267, 289 (1996). *See also* Helvering v. Mitchell, 303 U.S. 391, 402 (1938); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984).

the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there."[20]

[E4] In making the second determination, the following factors, listed in *Kennedy v. Mendoza-Martinez*, provide useful guideposts: "[w]hether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of scienter; whether its operation will promote the traditional aims of punishment—retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned."[21] These factors must be considered in relation to the statute on its face[22] and not "as applied" to a particular case.[23] Furthermore, this list of considerations is neither exhaustive nor dispositive.[24] The purpose of deterrence may serve civil as well as criminal goals.[25] Moreover, the fact that the conduct for which statutory sanctions are imposed may also be criminal is insufficient to render the sanctions criminally punitive,[26] particularly in the double jeopardy context.[27]

2. Forfeitures[28] and Fines

[E5] On various occasions, the Court has admitted that forfeiture of property or its value and the payment of fixed or variable sums of money are enforcible by civil proceedings.

[E6] There is no constitutional objection to the forfeiture of property used in defrauding the United States of the exaction provided by a statute that imposes a "tax," greater than and including the basic tax, on all distilled "spirits diverted to beverage purposes." In such a case, "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution, it is the wrongdoer in person who is proceeded against, convicted, and punished." This forfeiture is not part of the punishment for the criminal offense and thus civil in nature.[29]

[E7] A forfeiture of imported merchandise not included in a declaration and entry pursuant to a tariff provision is not barred by a prior acquittal under a statute that—unlike the forfeiture proceeding—requires proof of an intent to defraud; nor is the forfeiture action barred by the Double Jeopardy Clause, since Congress may impose both a criminal and civil sanction respecting the same act or omission. Such a forfeiture is

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[20] Allen v. Illinois, 478 U.S. 364, 372 (1986). *See also* Kansas v. Hendricks, 521 U.S. 346, 364 (1997).

[21] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

[22] *Id.* at 169.

[23] *See* Hudson v. United States, 522 U.S. 93, 100 (1997), *disavowing* United States v. Halper, 490 U.S. 435, 447 (1989). *See also* Seling v. Young, 531 U.S. 250, 267 (2001).

[24] United States v. Ward, 448 U.S. 242, 249 (1980).

[25] Unites States v. Ursery, 518 U.S. 267, 292 (1996); Hudson v. United States, 522 U.S. 93, 105 (1997).

[26] Unites States v. Ursery, 518 U.S. 267, 292 (1996).

[27] Hudson v. United States, 522 U.S. 93, 105 (1997).

[28] *See also* paras. E143–E144.

[29] Various Items of Pers. Prop. v. United States, 282 U.S. 577, 581 (1931).

intended to aid in the enforcement of tariff regulations. "It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses." As long as the measure of recovery fixed by the legislature is not unreasonable or excessive, these proceedings establish civil remedies and not criminal penalties.[30]

[E8] *89 Firearms* involved a statute requiring forfeiture of unlicensed firearms. The owner of the defendant weapons was acquitted of charges of dealing firearms without a license. The government then brought a forfeiture action against the firearms under 18 U.S.C. Section 924(d), alleging that they were used or were intended to be used in violation of federal law. The Court announced that "unless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable." In the first stage, the Court looked to Congress' intent, and concluded that Congress had designed forfeiture under Section 924(d) as a remedial civil sanction. This conclusion was based upon several findings. First, noting that the forfeiture proceeding was *in rem*, the Court found it significant that "actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon the seizure of a physical object." Second, it found that the forfeiture provision, because it reached both weapons used in violation of federal law and those "intended to be used" in such a manner, reached a broader range of conduct than its criminal analogue. Third, the Court concluded that the civil forfeiture furthered broad remedial aims, including both "discouraging unregulated commerce in firearms" and "removing from circulation firearms that have been used or intended for use outside regulated channels of commerce." In the second stage of the inquiry, the Court observed that only one of the *Mendoza-Martinez* factors—whether or not the proscribed behavior is already a crime—supported the position that Section 924(d) imposed a criminal penalty; however, this element was too weak to lend support to the foregoing proposition, since Congress could impose both a criminal and a civil sanction with respect to the same conduct and had drafted Section 924(d) to cover a broader range of conduct than was proscribed by the relevant criminal provisions. The Court concluded that the civil forfeiture at issue was not an additional penalty for the commission of a criminal act but rather "a separate civil sanction, remedial in nature."[31]

[E9] Similarly, in *Ursery*, the Court dealt with civil forfeiture proceedings against various property that, allegedly, had been used to facilitate illegal drug transactions (21 U.S.C. Section 881(a)(7)), was the proceeds of a felonious drug transaction (21 U.S.C. Section 881(a)(6)), or had been involved in unlawful money laundering (18 U.S.C. Section 981(a)(1)(A)). Congress intended proceedings under Sections 881 and 981 to be civil, since those statutes' procedural enforcement mechanisms were themselves distinctly civil in nature. Regarding the second aspect of the analysis, the Court first noted that "requiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes" and that, "[i]n many circumstances, the forfeiture may abate a nuisance." Besides, to the extent that Section 881(a)(6) applied to "proceeds" of illegal drug activity, it served the additional non-

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[30] One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 237 (1972) (*per curiam*).

[31] United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984).

punitive goal of ensuring that persons did not profit from their illegal acts. Furthermore, the Court pointed out that (1) "*in rem* civil forfeiture has not historically been regarded as punishment;" (2) there was no requirement in the statutes under review that the government demonstrate scienter in order to establish that the property was subject to forfeiture, since the property might be subject to forfeiture even if no party filed a claim to it, and the government never showed any connection between the property and a particular person; (3) the fact that the statutes served a deterrent purpose or were tied to a criminal activity was insufficient in itself to render them punitive.[32] Consequently the Court held that the forfeitures in question were neither "punishment" nor criminal for purposes of the Double Jeopardy Clause.

[E10] The Court has "emphasized the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice."[33] In general, sanctions imposing additions to a tax, in case of a deficiency due to fraud with intent to evade tax, have a remedial character, for they "are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."[34] The same is true for monetary penalties imposed on persons who cause to be presented for payment any claim upon or against the government, knowing such claim to be fraudulent; this remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered, because Congress might have provided "for recovery of 'threefold the damages . . . sustained and the cost of suit.'"[35] Similarly a provision for liquidated damages is distinct from criminal penalty.[36] Yet, the measure of recovery fixed by the legislature may be "so unreasonable or excessive that it transform[s] what was clearly intended as a civil remedy into a criminal penalty."[37]

[E11] The civil penalty involved in *Halper* provided for a fixed monetary penalty for each false claim count on which the defendant was convicted in the criminal proceed-

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[32] Unites States v. Ursery, 518 U.S. 267, 290–92 (1996). The Court added that the case-by-case balancing test set forth in *Halper*, in which a court should compare the harm suffered by the government against the size of the penalty imposed, was inapplicable to civil forfeiture, noting that "[t]hough it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture. Hence, it is practically difficult to determine whether a particular forfeiture bears no rational relationship to the nonpunitive purposes of that forfeiture." *Id.* at 284.

[33] United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 548–49 (1943).

[34] Helvering v. Mitchell, 303 U.S. 391, 401 (1938), involving a 50-percent addition to tax. The Court also took into account that Congress had provided a distinctly civil procedure for the collection of the additional 50 percentum. *Id.* at 402.

[35] United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 550 (1943). "By the common as well as by statute law, persons are often punished for aggravated misconduct or lawless acts by means of a civil action and the damages, inflicted by way of penalty or punishment, given to the party injured." *Id.* at 550. The Court was unable to say that the provision for $2,000 plus double damages would "do more than afford the government complete indemnity for the injuries done it." *Id.* at 549. In concluding, the Court recognized that the inherent difficulty of choosing a proper specific sum, which would give full restitution, was a problem for Congress. *Id.* at 552.

[36] Rex Trailer Co., Inc. v. United States, 350 U.S. 148 (1956).

[37] *Id.* at 154. *Cf.* One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 237 (1972).

ing. The Court stressed that a civil penalty authorized by the federal civil False Claims Act might "be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." Given Halper's 65 separate violations of the Act, he appeared to be liable for a penalty of $130,000, despite the fact he had actually defrauded the government of less than $600. The Court found that the disparity between the approximation of the government's expenses ($16,000) and Halper's statutory liability was sufficiently disproportionate that the sanction provided by the Act, as applied to Halper, constituted a second punishment violative of double jeopardy.[38] However, eight years later, in *Hudson*, the Court expressly disavowed the *Halper* rationale in two key respects. First, the *Halper* Court focused on whether the sanction was so grossly disproportionate to the harm caused as to constitute "punishment," and thereby elevated to dispositive status one of the factors listed in *Kennedy v. Mendoza-Martinez*, for determining whether a statute intended to be civil was so punitive as to transform it into a criminal penalty, even though *Mendoza-Martinez* itself emphasized that no one factor should be considered controlling. Second, *Halper* assessed the character of the actual sanctions imposed, rather than evaluating the "statute on its face" to determine whether it provided for what amounted to a criminal sanction.[39] Subsequently, the *Hudson* Court, applying the traditional method of analysis, characterized as civil the monetary penalties and the sanction of occupational debarment that the Office of the Comptroller of the Currency had imposed on petitioners for violating 12 U.S.C. Sections 84(a)(1) and 375b, by causing two banks, in which they were officials, to make certain loans in a manner that unlawfully allowed Hudson to receive the loans' benefit. Similarly, the Court has held that a statute providing for the imposition of a "civil penalty" against any owner or operator of an onshore facility from which oil was discharged, in violation of the Federal Water Pollution Control Act, is civil, not criminal.[40]

[E12] "A 'tax' is an enforced contribution to provide for the support of government; a 'penalty' . . . is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable one for the other. . . . [I]f an exaction be clearly a penalty, it cannot be converted into a tax by the simple expedient of calling it such."[41] More particularly, such an exaction may be a criminal punishment.[42] That was considered to be the case in *Kurth Ranch*. Montana law enforcement officers raided the farm of the Kurth family, arrested them, and confiscated and later destroyed their marijuana plants. After the Kurths pleaded guilty to drug charges, the Revenue Department attempted, in a separate proceeding, to collect a state tax imposed on the possession and storage of dangerous drugs. That tax was collected only after any state or federal fines or forfeitures had been satisfied, and taxpayers should file a return after they were

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38 United States v. Halper, 490 U.S. 435, 442, 452 (1989).

39 Hudson v. United States, 522 U.S. 93, 101–02 (1997).

40 United States v. Ward, 448 U.S. 242, 248–51 (1980).

41 United States v. La Franca, 282 U.S. 568, 572 (1931) (the "tax" on retail liquor imposed the National Prohibition Act, providing for the assessment and collection of a "tax" in double the amount provided by law upon evidence of an illegal sale under the Act, was not a true tax, but a penalty). *See also* Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922), known as "Child Labor Tax Case" (penalty, characterized under the statute as a "tax," for unlawful employment of children); United States v. Constantine, 296 U.S. 287, 294 (1935) (provision that imposed in addition to the $25 excise tax laid on retail liquor dealers, a "special excise tax" of $1,000 on such dealers when they carried on the business contrary to local state or municipal law).

42 United States v. La Franca, 282 U.S. 568, 572 (1931).

arrested. In bankruptcy proceedings filed by the Kurths, they objected to petitioner's proof of claim for the tax and challenged the tax's constitutionality. The lower courts held that the assessment on harvested marijuana, a portion of which resulted in a tax eight times the product's market value, was a form of double jeopardy, invalid under the federal Constitution. The Court affirmed. It began by noting that neither a high rate of taxation—more than eight times the drug's market value—nor an obvious deterrent purpose automatically marked the tax under review a form of punishment, since many taxes presumed valid, such as taxes on cigarettes and alcohol, were also both high and motivated to some extent by an interest in deterrence; the Court added that although those factors were not dispositive, they were at least consistent with a punitive character. Other unusual features, however, were thought to set the statute at issue apart from most taxes: this so-called tax was conditioned on the commission of a crime; that condition was significant of penal and prohibitory intent, rather than the gathering of revenue; the tax assessment not only hinged on the commission of a crime, it also was exacted only after the taxpayer had been arrested for the precise conduct that gave rise to the tax obligation in the first place; since the taxed activity was completely forbidden, the legitimate revenue-raising purpose that might support the tax could be equally well served by increasing the fine imposed upon conviction; and although the exaction purported to be a species of property tax, yet it was levied on goods—in that case the destroyed marijuana plants—that the taxpayer neither owned nor possessed. Considering these factors, the Court drew the conclusion that Montana's "tax" was not a remedial sanction, but could fairly be characterized as a criminal punishment.[43]

3. Contempt Sanctions

[E13] The Court follows a somewhat different approach when it comes to contempt sanctions. Underlying the distinction between civil and criminal contempt sanctions is what procedural protections are due before any particular contempt penalty may be imposed. "Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required."[44] Petty, *direct* contempts—i.e., those occurring in the presence of the court—"traditionally have been subject to summary adjudication, 'to maintain order in the courtroom and the integrity of the trial process in the face of an actual obstruction of justice.' . . . In light of the court's substantial interest in rapidly coercing compliance and restoring order, and because the contempt's occurrence before the court reduces the need for extensive fact finding and the likelihood of an erroneous deprivation, summary proceedings have been tolerated."[45] "Summary adjudication becomes less justifiable once a court leaves the realm of immediately sanctioned, petty direct contempts. If a court delays punishing a direct contempt until the completion of trial, for example, due process requires that the contemnor's rights to notice and a hearing be respected."[46] "Direct contempts also cannot be punished with 'serious' criminal penalties, absent the full protections of a criminal jury trial."[47]

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43 Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 780–83 (1994).

44 Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 831 (1994).

45 *Id.* at 832.

46 *Id. citing* Taylor v. Hayes, 418 U.S. 488 (1974).

47 *Id.* at 833, *citing* Bloom v. Illinois, 391 U.S. 194, 210 (1968).

[E14] The question of the distinction between civil and criminal contempt sanctions arises mainly when it comes to *indirect* contempts, those occurring out of court.[48] Although the procedural contours of the two forms of contempt are well established,[49] the distinguishing characteristics of civil versus criminal contempts are less clear. In *Gompers*, the leading early case addressing this issue in the context of imprisonment, the Court emphasized that whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."[50] Later on, the Court held that conclusions about the civil or criminal nature of a contempt sanction are properly drawn, "from an examination of the character of the relief itself."[51]

[E15] "The paradigmatic coercive, civil contempt sanction, as set forth in *Gompers*, involves confining a contemnor indefinitely until he complies with an affirmative command such as an order 'to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance.'"[52] "Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies."[53] "In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus 'carries the keys of his prison in his own pocket.'"[54]

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[48] "Certain *indirect* contempts, are appropriate for imposition through civil proceedings. Contempts such as failure to comply with document discovery, for example, while occurring outside the court's presence, impede the *court's ability to adjudicate the proceedings before it* and thus touch upon the core justification for the contempt power. Courts traditionally have broad authority through means other than contempt—such as by striking pleadings, assessing costs, excluding evidence, and entering default judgment—to penalize a party's failure to comply with the rules of conduct governing the litigation process. . . . Such judicial sanctions never have been considered criminal, and the imposition of civil, coercive fines to police the litigation process appears consistent with this authority. Similarly, indirect contempts involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment, properly may be adjudicated through civil proceedings, since the need for extensive, impartial fact finding is less pressing." *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 833 (1994) (emphasis added).

[49] Criminal contempt sanctions are entitled to full criminal process. *See, e.g.*, Hicks v. Feiock, 485 U.S. 624, 632 (1988). For "serious" criminal contempts involving imprisonment of more than six months, the constitutional protections include the right to jury trial. *See* Bloom v. Illinois, 391 U.S. 194, 199 (1968). In contrast, "civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required." *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 827 (1994).

[50] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

[51] Hicks v. Feiock, 485 U.S. 624, 636 (1988).

[52] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828 (1994), *quoting* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911). *See also* McCrone v. United States, 307 U.S. 61, 64 (1939) (failure to testify).

[53] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828 (1994), *citing* Shillitani v. United States, 384 U.S. 364, 370, n.6 (1966).

[54] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828 (1994), *quoting* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911).

[E16] By contrast, "a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a 'completed act of disobedience,' such that the contemnor cannot avoid or abbreviate the confinement through later compliance."[55] Thus, the Court has decided that a 12-month sentence imposed on an individual for violating an anti-boycott injunction is criminal.[56]

[E17] "This dichotomy between coercive and punitive imprisonment has been extended to the fine context. A contempt fine, accordingly, is considered civil and remedial if it either 'coerces the defendant into compliance with the court's order [or] . . . compensate[s] the complainant for losses sustained.'"[57] "Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. . . . Thus, a 'flat, unconditional fine' totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance."[58]

[E18] A close analogy to coercive imprisonment is a *per diem* fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged. Less comfortable is the analogy between coercive imprisonment and suspended, determinate fines."[59] In *United Mine Workers*, the Court "held that fixed fines also may be considered purgable and civil when imposed and suspended pending future compliance;"[60] yet, in *Hicks*, the Court admitted that suspended or probationary sentences are criminal.[61]

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[55] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828–29 (1994), *quoting* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443 (1911).

[56] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442–43 (1911).

[57] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 829 (1994), *quoting* United States v. United Mine Workers of Am., 330 U.S. 258, 303–04 (1947).

[58] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 829 (1994), *citing* Penfield Co. of California v. Sec. & Exch. Comm'n, 330 U.S. 585, 588, 590 (1947).

[59] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 829 (1994).

[60] *Id.* at 829–30, *discussing* United States v. United Mine Workers of Am., 330 U.S. 258 (1947) as follows: "[The case] involved a $3,500,000 fine imposed against the Union for nationwide post-World War II strike activities. Finding that the determinate fine was both criminal and excessive, the Court reduced the sanction to a flat criminal fine of $700,000. The Court then imposed and suspended the remaining $2,800,000 as a coercive civil fine, conditioned on the union's ability to purge the fine through full, timely compliance with the trial court's order. The Court concluded, in light of this purge clause, that the civil fine operated as a 'coercive imposition upon the defendant union to compel obedience with the court's outstanding order.'"

[61] Hicks v. Feiock, 485 U.S. 624, 639 (1988). The Court adopted the following reasoning. "That a determinate sentence is suspended and the contemnor put on probation does not make the remedy civil in nature, for a suspended sentence, without more, remains a determinate sentence, and a fixed term of probation is itself a punishment that is criminal in nature. A suspended sentence with a term of probation is not equivalent to a conditional sentence that would allow the contemnor to avoid or purge these sanctions. A determinate term of probation puts the contemnor under numerous disabilities that he cannot escape by complying with the dictates of the prior orders, such as: any conditions of probation that the court judges to be reasonable and necessary may be imposed; the term of probation may be revoked and the original sentence (including incarceration) may be reimposed at any time for a variety of reasons without all the safeguards that are ordinarily afforded in criminal proceedings; and the contemnor's probationary status could affect other proceedings against him that may arise in the future (for

[E19] In its most recent decision in the field, the Court relied primarily on due process considerations. The Court stressed that for certain indirect contempts civil procedural protections may be insufficient. Especially, "[c]ontempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding. . . . Such contempts do not obstruct the court's ability to adjudicate the proceedings before it, and the risk of erroneous deprivation from the lack of a neutral fact finder may be substantial. . . . Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power."[62]

[E20] In the particular case, the Court was confronted with contempt fines that were difficult to distinguish either from determinate, punitive fines or from initially suspended, civil fines. A month after enjoining the International Union of Mine Workers of America from conducting unlawful strike-related activities against certain mining companies, a Virginia trial court held a contempt hearing, fined the union for its disobedience, and announced that the union would be fined for any future breach of the injunction. In subsequent contempt hearings, the court levied against the union over $64 million in what it termed coercive, civil fines, ordering most of the money to be paid to the Commonwealth of Virginia and the two counties affected by the unlawful activities. The Court was "not persuaded that dispositive significance should be accorded to the fact that the trial court had prospectively announced the sanctions it would impose."[63] Due process traditionally requires that criminal laws provide prior notice both of the conduct to be prohibited and of the sanction to be imposed. The trial court there simply announced the penalty that would be imposed for future contempts. "The union's ability to avoid the contempt fines was indistinguishable from the ability of any ordinary citizen to avoid a criminal sanction by conforming his behavior to the law. The fines [we]re not coercive day fines, or even suspended fines, but [we]re more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed." Instead, the Court found significant other elements of the case. The Virginia trial court "levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction. In so doing, the court effectively policed petitioners' compliance with an entire code of conduct that the court itself had imposed. The union's contumacy lasted many months and spanned a substantial portion of the State. The fines assessed were serious, totaling over $52,000,000. Under such circumstances, disinterested factfinding and evenhanded adjudication were essential."

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example, this fact might influence the sentencing determination made in a criminal prosecution for some wholly independent offense)." *Id.* at 639, n.11.

62 Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 833–34 (1994).

63 *Id.* at 836. The Court also rejected the union's argument that the sanctions were criminal, because the injunction primarily prohibited certain conduct rather than mandated affirmative acts. The Court noted that "the distinction between coercion of affirmative acts and punishment of prohibited conduct is difficult to apply when conduct that can recur is involved, or when an injunction contains both mandatory and prohibitory provisions. Moreover, in borderline cases, injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms. Under a literal application of petitioners' theory, an injunction ordering the union: "Do not strike," would appear to be prohibitory and criminal, while an injunction ordering the union: "Continue working," would be mandatory and civil. *Id.* at 835.

Thus, the contempt fines under review were criminal and constitutionally could be imposed only through a jury trial.[64]

4. Involuntary Civil Commitment of Sexually Dangerous Persons and Other Civil Measures Against Such Individuals

[E21] State statutes providing for the involuntary civil commitment of mentally abnormal persons, adjudged sexually dangerous or violent, have been considered, in several cases, as establishing civil, not criminal, proceedings.

[E22] In *Allen*, the Court first pointed out that the aim of the Illinois Sexually Dangerous Persons Act was to provide treatment, not punishment, for such persons and established a system under which committed persons might be released after a brief time of confinement. That the state could not file a sexually dangerous person petition under the Act, unless it had already filed criminal charges against the person in question and thus had chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous, did not transform a civil proceeding into a criminal one. Besides, the state should prove more than just the commission of a sexual assault; it also had to prove the existence of a mental disorder for more than one year and a propensity to commit sexual assaults, in addition to showing that propensity through sexual assault. Furthermore, the fact that the Act provided some of the safeguards applicable in criminal proceedings—rights to counsel, to a jury trial, and to confront and cross-examine witnesses, and the requirement that sexual dangerousness be proved beyond a reasonable doubt—was itself insufficient to turn the proceedings under the Act into criminal proceedings requiring the full panoply of rights applicable there. And the fact that a person adjudged sexually dangerous under the Act was committed to a maximum security institution that also housed convicts needing psychiatric care did not make the conditions of that person's confinement amount to "punishment," and thus render "criminal" the proceedings that had led to confinement.[65]

[E23] *Hendricks* involved Kansas' Sexually Violent Predator Act. Commitment under the Act was not held to implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act did not affix culpability for prior criminal conduct but used such conduct solely for evidentiary purposes. It did not make criminal conviction a prerequisite for commitment, and it lacked a scienter requirement, an important element in distinguishing criminal and civil statutes. Nor could the Act be said to act as a deterrent, since persons with a mental abnormality or personality disorder were unlikely to be deterred by the threat of confinement. And the conditions surrounding that confinement did not suggest a punitive purpose on the state's part, since an individual confined under the Act was not subject to the more restrictive conditions placed on state prisoners but instead experienced essentially the same conditions as any involuntarily committed patient in the state mental institution. Although the commitment scheme involved an affirmative restraint, the Court emphasized that such restraint of the dangerously mentally ill had been historically regarded as a legitimate non-punitive objective. And the confinement's potentially indefinite duration was linked not to any punitive objective but to the purpose of holding a person until his mental abnormality no longer caused him to be a threat to others; he was thus permit-

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64 Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 836–38 (1994).

65 Allen v. Illinois, 478 U.S. 364, 369–72 (1986).

ted immediate release upon a showing that he was no longer dangerous, and the longest he could be detained, pursuant to a single judicial proceeding, was one year. Moreover, the state's use of procedural safeguards applicable in criminal trials did not itself turn the proceedings into criminal prosecutions. Finally, the Act was not thought to be punitive, in case that treatment for a condition was not possible, because the state had a legitimate interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions.[66]

[E24] *Young* was committed as a sexually violent predator at a special center, under the Washington State's Community Protection Act of 1990. The Act was strikingly similar to, and in fact was the pattern for, the Kansas Act upheld in *Hendricks*. Thus, it was considered to be civil. Moreover, in affirming *Hudson*'s method of analysis, the Court pointed out that a statute, found to be civil, cannot be deemed punitive "as applied" to a single individual and provide cause for release. "The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute."[67] But this did not mean that Young had no remedy for the alleged conditions and treatment regime at the center. Since the Act was civil in nature, designed to incapacitate and to treat, due process required that "the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons [we]re committed."[68]

[E25] The Court also characterized as civil the Alaska Sex Offender Registration Act. Under this Act, any sex offender or child kidnaper incarcerated in the state must register with the Department of Corrections within 30 days before his release, providing his name, address, and other specified information. If the individual was at liberty, he should register with local law enforcement authorities within a working day of his conviction or of entering the state. If he had been convicted of a single, non-aggravated sex crime, the offender must provide annual verification of the submitted information for 15 years. If he had been convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. The offender's information was forwarded to the Department of Public Safety, which maintained a central registry of sex offenders. Some of the data, such as fingerprints, driver's license number, anticipated change of address, and whether the offender had had medical treatment afterwards was kept confidential. The offender's name, aliases, address, photograph, physical description, driver's license number, motor vehicle identification numbers, place of employment, date of birth, crime, date and place of conviction, length and conditions of sentence, and a statement as to whether the offender was in compliance with the Act's update requirements or could not be located were, however, published on the Internet. Both the Act's registration and notification requirements were retroactive. The Court admitted that the Alaska legislature's intent was to create a civil, non-punitive scheme designed to protect the public from harm. The Act did not involve a traditional means of punishing and imposed no affirmative disability or restraint. Offenders subject to the Act were free to move where they wished and to live and work as other citizens, with no supervision. While registrants must inform the authorities after they changed their facial features, borrow a car, or seek psychiatric treatment, they were not required to seek permission to do so. Moreover, the Act had a rational connection

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66 Kansas v. Hendricks, 521 U.S. 346, 362–69 (1997).

67 Seling v. Young, 531 U.S. 250, 263 (2001).

68 *Id.* at 265.

to a legitimate non-punitive purpose, "public safety, which [wa]s advanced by alerting the public to the risk of sex offenders in their community." That the Act might not be narrowly drawn to accomplish the stated purpose was not dispositive, since "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." Such imprecision "does not suggest that the Act's nonpunitive purpose is a 'sham or mere pretext.'"[69] And the regulatory scheme was not excessive with respect to the Act's purpose. The state's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, did not render the Act punitive. The duration of the reporting requirements was not excessive, since empirical research on child molesters, for instance, had shown that most reoffenses did not occur within the first several years after release but might occur as late as 20 years following release. Furthermore, the wide dissemination of offender information did not render the Act excessive, given the general mobility of the population. Therefore, the regulatory means chosen were reasonable in light of the non-punitive objective of the Act. Subsequently, the Court found the Act civil and upheld it against a constitutional challenge based on the *Ex Post Facto* Clause.[70]

5. Other Cases

[E26] In *Cummings*, the Court struck down a provision of the Missouri post-Civil War Reconstruction Constitution that barred persons from various professions unless they stated under oath that they had not given aid or comfort to persons engaged in armed hostility to the United States and had never "been a member of, or connected with, any order, society, or organization, inimical to the government of the United States." The Court recognized that the oath was required not as a means of ascertaining whether parties were qualified for their professions but rather to effect a punishment for having associated with the Confederacy. The provisions at issue "[did] not, in terms, define any crimes or declare that any punishment should be inflicted, but they produce[d] the same result upon the parties against whom they [we]re directed as though the crimes had been defined and the punishment had been declared." So they were found to be criminal, in substance, and therefore violative of the *Ex Post Facto* Clause.[71] In *Trop*, the Court held unconstitutional a statute providing for the expatriation of one who had been sentenced by a court-martial to dismissal or dishonorable discharge for wartime desertion. The majority of the Court characterized the statute as punitive. However, no single opinion commanded the support of a majority. "The plurality opinion rested its determination, at least in part, on its inability to discern any alternative purpose which the statute could be thought to serve. . . . The concurring opinion found in the specific historical evolution of the provision in question compelling evidence of punitive intent."[72] Likewise, in *Mendoza-Martinez*, the Court, considering the legislative and judicial history of the challenged provision and their predecessors, held expatriation for remaining outside the country to avoid military service to constitute impermissible punishment without a criminal trial.[73]

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[69] Smith v. Doe, 538 U.S. 84, 103 (2003).

[70] *Id.* at 104–06.

[71] Cummings v. Missouri, 4 Wall. 277, 327–28 (1867).

[72] *See* Flemming v. Nestor, 363 U.S. 603 (1960), *discussing* Trop v. Dulles, 356 U.S. 86, 97, 107–09 (1958).

[73] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[E27] On the contrary, termination of old-age benefits payable to deportable aliens was not found to amount to punishment, mainly because the disqualification of certain deportees from receipt of Social Security benefits while they were not lawfully in the United States had a rational connection to the purposes of the legislation of which it was a part.[74] "[N]or is deportation a punishment; it is simply a refusal by the government to harbor aliens whom it does not want."[75] Furthermore, in *Zadvydas*, involving the detention of deportable aliens, the Court observed that the proceedings at issue there were civil and assumed that they were non-punitive in purpose or effect.[76]

B. THE BILL OF ATTAINDER CLAUSE

[E28] The Constitution provides that "[n]o Bill of Attainder . . . shall be passed" by Congress (Article I, Section 9, Clause 3) or the states (Article I, Section 10, Clause 1). "In forbidding bills of attainder, the draftsmen of the Constitution sought to prohibit the ancient practice of the Parliament in England of punishing without trial specifically designated persons or groups."[77] The Bill of Attainder Clauses were intended "to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments" of government and "also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons."[78] Historically, bills of attainder generally named the persons to be punished. However, "[t]he singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons."[79] "When past activity serves as 'a point of reference for the ascertainment of particular persons ineluctably designated by the legislature' for punishment, . . . the Act may be an attainder."[80] Nonetheless, the prohibition against bills of attainder "was not intended to serve as a variant of the equal protection doc-

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74 Flemming v. Nestor, 363 U.S. 603, 617 (1960).

75 *See* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952), *quoting* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (opinion of Justice Holmes).

76 Zadvydas v. Davis, 533 U.S. 678, 690 (2001). Similarly in *United States v. Salerno*, 481 U.S. 739 (1987), the Court rejected the allegation that pre-trial detention of dangerous arrestees, authorized by the Bail Reform Act of 1984, constituted impermissible punishment, under the Due Process Clause. *Id.* at 746–48. The Act's legislative history clearly indicated that Congress had formulated the detention provisions not as punishment for dangerous individuals but as a potential solution to the pressing societal problem of crimes committed by persons on release. Moreover, the incidents of detention under the Act were not found to be excessive in relation to that goal, since the Act carefully limited the circumstances under which detention might be sought to the most serious of crimes, the maximum length of detention was limited by the Speedy Trial Act, and detainees should be housed apart from convicts. Thus, the Act was considered to constitute permissible regulation rather than impermissible punishment.

77 Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 847 (1984).

78 United States v. Brown, 381 U.S. 437, 444–45 (1965).

79 Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 86 (1961).

80 Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 848 (1984), *quoting* Cummings v. Missouri, 4 Wall. 277, 324 (1867)

trine, invalidating every Act by Congress or the States that burdens some persons or groups but not all other plausible individuals. . . . [W]hile the Bill of Attainder Clause serves as an important bulwark against tyranny, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all."[81]

[E29] The proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group. In deciding whether a statute inflicts forbidden punishment, the Court has "recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes;' and (3) whether the legislative record 'evinces a legislative intent to punish.'"[82] In determining whether a statute inflicts punishment within the proscription against bills of attainder, "the severity of a sanction is not determinative of its character as punishment."[83] "Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct."[84] "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also be imposed as punishment."[85] "It is thus apparent that, though the governing criteria for an attainder may be readily indicated, each case has turned on its own highly particularized context."[86]

[E30] *Cummings* involved the constitutionality of amendments to the Missouri Constitution of 1865, which provided that no one could engage in a number of specified professions (Cummings was a priest) unless he first swore that he had taken no part in the rebellion against the Union. Although the state Constitution did not mention the persons or groups required to take the oath by name, the Court concluded that, in creating a qualification having no possible relation to their fitness for their chosen professions, the Constitution was intended "to reach the person, not the calling."[87] On the same day that it decided *Cummings*, the Court struck down a similar oath that was

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81 Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 471 (1977).

82 Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852 (1984), *citing and quoting* Nixon v. Adm'r of Gen. Servs, 433 U.S. 425, 473, 475–76, 478 (1977). *See also* De Veau v. Braisted, 363 U.S. 144, 160 (1960): "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession."

83 Flemming v. Nestor, 363 U.S. 603, 616, n.9 (1960).

84 Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 851–52 (1984), *citing* United States v. Brown, 381 U.S. 437, 458–59 (1965), which *overruled* Am. Communications Ass'n v. Douds, 339 U.S. 382, 413 (1949).

85 United States v. Brown, 381 U.S. 437, 448 (1965), *quoting* Cummings v. Missouri, 4 Wall. 277, 320 (1867).

86 Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852 (1984).

87 Cummings v. Missouri, 4 Wall. 277, 320 (1867).

required for admission to practice law in the federal courts. "Like the oath considered in *Cummings*, the oath 'operate[d] as a legislative decree of perpetual exclusion' from the practice of law, since past affiliation with the Confederacy prevented attorneys from taking the oath without perjuring themselves."[88]

[E31] The next extended discussion of the Bill of Attainder Clause came in *Lovett*, where the Court invalidated a law that prohibited payment of further salary, to three named federal employees, as a bill of attainder. The Court found that the purpose of the Act was not merely to cut off respondents' compensation through regular disbursing channels, but permanently to bar them from government service; the Act's language, as well as the circumstances of its passage, showed that it was designed to force the employing agencies to discharge respondents and to bar their being hired by any other governmental agency, because Congress deemed them guilty of "subversive activities," and therefore "unfit" to hold a federal job. "This permanent proscription from any opportunity to serve the Government [wa]s punishment, and of a most severe type."[89]

[E32] In *Douds*, the Court upheld a law that conditioned trade union access to the facilities of the National Labor Relations Board upon the submission of non-Communist affidavits by officers of the union. Although the requirement undoubtedly discouraged unions from choosing officers with Communist affiliations, it did not prohibit their election. Moreover, the Court noted that the union officers involved were not being punished for past actions but were "subject to possible loss of position only because there [wa]s substantial ground for the congressional judgment that their beliefs and loyalties would be transformed into future [disruptive] conduct."[90]

[E33] However, the latter argument was disavowed some years later in *Brown*. Brown was convicted under Section 504 of the Labor-Management Reporting and Disclosure Act of 1959, which made it a crime for one who belonged to the Communist Party, or who had been a member thereof during the preceding five years, willfully to serve as a member of the executive board of a labor organization. The five-member majority of the Court rejected the claim that the Act did not constitute a bill of attainder, because its aim was not retributive—to punish past acts—but preventive; the majority stressed that "[i]t would be archaic to limit the "'punishment,' [within the meaning of the Bill of Attainder Clause,] to 'retribution.'"[91] Furthermore, it reasoned that although Congress undoubtedly possessed power under the Commerce Clause to enact legislation designed to keep from positions affecting inter-state commerce persons who might use such positions to bring about political strikes, in Section 504 Congress had exceeded the authority granted it by the Constitution. The statute did not set forth "a generally applicable rule decreeing that any person who commit[ted] certain acts or possesse[d] certain characteristics (acts and characteristics which, in Congress' view, ma[de] them likely to initiate political strikes) [should] not hold union office, and leav[ing] to courts and juries the job of deciding what persons ha[d] committed the specified acts or pos-

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88 *See Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 848 (1984), *discussing and quoting* Ex parte *Garland*, 4 Wall. 333, 327, 377 (1867), where the Court pointed out, *inter alia*, that admission or exclusion of lawyers was the exercise of judicial power, since attorneys and councelors were officers of the court, whose duties related almost exclusively to proceedings of a judicial nature.

89 United States v. Lovett, 328 U.S. 303, 316 (1946).

90 Am. Communications Ass'n v. Douds, 339 U.S. 382, 413 (1950).

91 United States v. Brown, 381 U.S. 437, 458 (1965).

sess[ed] the specified characteristics. Instead, it designate[d] in no uncertain terms the persons who possess[ed] the feared characteristics and therefore [could not] hold union office without incurring criminal liability—members of the Communist Party. . . . Even assuming that Congress had reason to conclude that some Communists would use union positions to bring about political strikes, it [could not] automatically be inferred that all members share[d] their evil purposes or participate[d] in their illegal conduct."[92]

[E34] In *Garner*, the Court upheld a city's charter that required the municipal employees to execute affidavits disclosing whether or not they were or ever had been members of the Communist Party or the Communist Political Association. The Court construed the charter as barring from the city's public service persons who, since its adoption in 1941, advocated the violent overthrow of the government or who were or became affiliated with any group doing so. Such provisions constituted a reasonable regulation to protect the municipal service. Since they merely provided standards of qualification and eligibility for public employment and did not inflict punishment, they were not a bill of attainder.[93]

[E35] In 1961, the Court dealt with a case involving an appeal from an order by the Control Board ordering the Communist Party to register as a "Communist action organization," under the Subversive Activities Control Act of 1950, which defined the "Communist action organization" as "any organization in the United States . . . which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement." The Court considered that the Act was not a bill of attainder, mainly because "[i]t attache[d] not to specified organizations, but to described activities in which an organization might or might not engage. . . . [The Act required] the registration only of organizations which, after the date of the Act, [we]re found to be under the direction, domination, or control of certain foreign powers and to operate primarily to advance certain objectives. This finding must be made after full administrative hearing, subject to judicial review which open[ed] the record for the reviewing court's determination whether the administrative findings as to fact were supported by the preponderance of the evidence. . . . [And] [t]he fact that activity engaged in prior to the enactment of the legislation [might] be regarded administratively and judicially as relevant to a determination that an organization [was then] presently foreign controlled and . . . work[ed] to advance the objectives of the world Communist movement [did] not alter the operative structure of the Act."[94]

[E36] *De Veau* involved a New York statute that prohibited any labor organization representing waterfront employees from collecting dues if any of its officers or agents had been convicted of a felony and had not subsequently been pardoned or cleared by the Parole Board. The Court pointed out that the statute embodied no further implications of appellant's guilt than were contained in his previous judicial conviction and that barring convicted felons from certain employments is a reasonable legislative device "to insure against corruption in specified vital areas. . . . New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the

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92 Id. at 450, 456.

93 Garner v. Bd. of Pub. Works of Los Angeles, 341 U.S. 716, 720–24 (1951).

94 Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 86–87 (1961).

waterfront, and, for the effectuation of that scheme, it became important whether individuals had previously been convicted of a felony." So the statute could not be deemed as a bill of attainder.[95]

[E37] In 1974 Congress passed the Presidential Recordings and Materials Preservation Act, directing the General Services Administrator to take custody of Nixon's presidential materials and have them screened by government archivists in order to return to Nixon those personal and private in nature and to preserve those having historical value and to make the materials available for use in judicial proceedings subject to "any rights, defenses or privileges which the Federal Government or any person might invoke." The Act's specificity in referring to Nixon by name did not automatically offend the Bill of Attainder Clause. Since, at the time of the Act's passage, Congress was only concerned with the preservation of Nixon's materials—the papers of former Presidents already were housed in libraries—Nixon constituted a legitimate class of one. Moreover, the Act did not "inflict punishment" within the historical meaning of bills of attainder, and there was no evidence in the legislative history or in the provisions of the Act showing a congressional intent to punish appellant. In addition, the law was an act of non-punitive legislative policymaking, for it aimed to preserve the availability of historically significant materials and judicial evidence for the Watergate-related crimes. Thus, the Act did not violate the *Ex Post Facto* Clause.[96]

[E38] In 1984 the Court confronted a statute denying federal financial assistance to male students between the ages of 18 and 26 who failed to register for the draft, in violation of a presidential proclamation requiring young men to register for the draft within 30 days of their 18th birthday. The Court held that the statute was not a bill of attainder. On the one hand, the law did not single out non-registrants and make them ineligible for aid based on their past conduct, i.e., failure to register. The statutory requirements were not irreversible, but could be met readily by either timely or late registration. One the other hand, the challenged statute did not inflict "punishment," given, among other things, that it left open perpetually the possibility of qualifying for aid. Besides the statute furthered non-punitive legislative goals. Conditioning receipt of financial aid on draft registration was "a rational means to improve compliance with the registration requirements." And it also promoted "a fair allocation of scarce federal resources by limiting [the] aid to those who [we]re willing to meet their responsibilities to the United States by registering for the draft when required to do so."[97]

C. NON-RETROACTIVITY

1. In the Criminal Context

a. The *Ex Post Facto* Clauses

[E39] The Constitution precludes Congress (Article I, Section 9, Clause 3) and the states (Article I, Section 10, Clause 1) from passing *ex post facto* laws.[98] The *Ex Post Facto*

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95 De Veau v. Braisted, 363 U.S. 144, 158–60 (1960).

96 Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 472–84 (1977).

97 Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 854 (1984).

98 A bill of attainder may also be a forbidden *ex post facto* law. *See, e.g.*, Cummings v. Missouri, 4 Wall. 277 (1867); *Ex parte* Garland, 4 Wall. 333 (1867).

Clauses not only ensure that individuals have "fair warning" about the effect of criminal statutes,[99] but also "restricts governmental power by restraining arbitrary and potentially vindictive legislation."[100] The *ex post facto* prohibition "cannot be avoided merely by adding to a law notice of the obvious fact that it might be changed."[101] The prohibition applies only to criminal laws;[102] for example, it is inapplicable to retroactive tax penalties[103] or to the deportation of convicted aliens.[104] As the text of the clauses makes clear, "it is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government."[105]

[E40] The foregoing prohibition is not directed against procedural changes,[106] even if application of the new rule operates to a defendant's disadvantage in a particular case. Thus, the *Ex Post Facto* Clauses are inapplicable with respect to intervening procedural statutes that allow reformation of improper verdicts;[107] or require, in principle, a joint trial of persons jointly indicted for a felony;[108] or establish different methods employed in determining whether the death penalty is to be imposed, without any alterations in the quantum of punishment attached to the crime.[109] Furthermore, the constitutional inhibition on *ex post facto* laws is not to obstruct mere alterations in the conditions of infliction of humane punishment.[110]

[E41] To fall within the *ex post facto* prohibition, a criminal law must apply to events occurring before its enactment[111] and disadvantage the offender affected by it.[112] There

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[99] A person must receive fair notice not only of the punishable conduct but also of the severity of the punishment prescribed for the crime. *See, e.g.*, Miller v. Florida, 482 U.S. 423, 431 (1987).

[100] Weaver v. Graham, 450 U.S. 24, 28–29 (1981).

[101] Miller v. Florida, 482 U.S. 423, 431 (1987).

[102] Calder v. Bull, 3 Dall. 386, 390–92 (1798).

[103] Bankers Trust Co. v. Blodgett, 260 U.S. 647, 652 (1923).

[104] Mahler v. Eby, 264 U.S. 32, 39 (1924); Marcello v. Immigration and Naturalization Serv., 349 U.S. 302, 314 (1955).

[105] Rogers v. Tennessee, 532 U.S. 451, 456 (2001), *quoting* Marks v. United States, 430 U.S. 188, 191 (1977), *citing*, in turn, Frank v. Mangum, 237 U.S. 309, 344 (1915).

[106] The distinction between (procedural) laws involving "substantial protections" and those that are merely "procedural" was disavowed in *Collins v. Youngblood*, 497 U.S. 37, 45–52 (1990). A legislature does not immunize a law from scrutiny under the clauses simply by labeling the law "procedural." *Id.* at 46.

[107] Collins v. Youngblood, 497 U.S. 37 (1990) (new statute allowing an appellate court to reform an improper verdict assessing a punishment not authorized by law).

[108] Beazell v. Ohio, 269 U.S. 167, 170 (1925).

[109] Dobbert v. Florida, 432 U.S. 282, 293–97 (1977) (new statute requiring, upon the conviction of a capital felon, a separate sentencing hearing before the trial judge and jury, at which the jury would render an advisory decision, not binding on the judge, whereas, under the previous statute, the jury determined, without review by the trial judge, whether the death penalty should be imposed).

[110] Malloy v. S. Carolina, 237 U.S. 180, 183 (1915) (statute not changing the penalty of death for murder but only the place of execution and the mode of producing death).

[111] Whether an offense against a temporary Act may be punished after the Act has expired depends upon the legislative purpose. The *Ex Post Facto Clause* does not come into play in such a case. *See* United States v. Powers, 307 U.S. 214, 216–18 (1939).

[112] *See, e.g.*, Weaver v. Graham, 450 U.S. 24, 29 (1981).

is no *ex post facto* violation, if, "in the light of reason and common sense,"[113] the changes are, on the whole,[114] favorable to the offender. A law that enlarges the period of confinement prior to the actual execution of the criminal is ameliorative, because, on the one hand, the giving of three months' additional time to live, after the rendition of judgment, is clearly to his advantage, for the Court assumes that every rational person desires to live as long as he may, and, on the other hand, the extension of the time to live, increases the opportunity of the accused to obtain a pardon from the governor of the state before his execution.[115]

[E42] There are four categories of *ex post facto* criminal laws.[116]

[E43] First, *"[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action."*[117] A statute by which "whoever has been twice convicted of crime . . . for terms of not less than three years each shall, upon conviction of a felony committed . . . after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state prison for twenty-five years" imposes a punishment on none but future crimes and is not *ex post facto.*[118] Similarly, a state law making it unlawful for a person to possess intoxicating liquors that, previous to its enactment, he had lawfully acquired for consumption as a beverage in his home, and subjecting them to seizure and destruction, is not an *ex post facto* law, for it does not fix a penalty for the owner for having become possessed of the liquor, but it imposes a punishment for continuing to possess the liquor after the enactment of the law.[119]

[E44] Second, *"[e]very law that aggravates a crime, or makes it greater than it was, when committed."*[120] This category refers, particularly, to a statute that inflicts punishments, where the party was not, by law, liable to any punishment. Hence, it is thought to include a law enacted after expiration of a previously applicable limitations period, when it is applied to revive a previously time-barred prosecution.[121]

[E45] Third, *"[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."*[122] In *Lindsey*, the sentencing provision in effect at the time the petitioners committed their crimes provided for a maximum sentence of "not more than fifteen years." Before they were sentenced, however, a new statute was passed that required the judge to sentence the petitioners to the 15-year maximum; under the new statute, the petitioners could secure an earlier release only through the grace of the Parole Board. The Court held that the application of this statute to petitioners violated the *Ex Post Facto* Clause, because the measure of punish-

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113 Rooney v. N. Dakota, 196 U.S. 319, 325 (1905).

114 *See* Dobbert v. Florida, 432 U.S. 282, 294–97 (1977); Garner v. Jones, 529 U.S. 244, 252 (2000).

115 Rooney v. N. Dakota, 196 U.S. 319, 325–26 (1905).

116 Justice Chase set out these categories in *Calder v. Bull*, 3 Dall. 386 (1798). The Court has endorsed this understanding, including the fourth category. *See*, in particular, Carmell v. Texas, 529 U.S. 513, 525 (2000).

117 Calder v. Bull, 3 Dall. 386, 390 (1798) (emphasis added).

118 McDonald v. Massachusetts, 180 U.S. 311, 313 (1901).

119 Samuels v. McCurdy, 267 U.S. 188, 193 (1925).

120 Calder v. Bull, 3 Dall. 386, 390 (1798) (emphasis added).

121 *See* Stogner v. California, 539 U.S. 607 (2003).

122 Calder v. Bull, 3 Dall. 386, 390 (1798) (emphasis added).

ment, prescribed by the later statute, was more severe than that of the earlier.[123] The statute at issue in *Miller* contained a similar defect. Florida's sentencing scheme had established "presumptive sentencing ranges" for various offenses, which sentencing judges were required to follow in the absence of "clear and convincing reasons" for a departure. At the time that Miller committed his crime, his presumptive sentencing range would have been three and a half to four and a half years. Before his sentencing, however, the state legislature altered the formula for establishing the presumptive sentencing range for certain sexual offenses by increasing the "primary offense points" assigned to those crimes. As a result, petitioner's presumptive range jumped from five and a half to seven years. The Court held that the resulting increase in the "quantum of punishment" violated the *Ex Post Facto* Clause.[124]

[E46] In *Weaver*, the petitioner had been sentenced to 15 years in prison for his crime of second-degree murder. Both at the time of his crime and at the time his sentence was imposed, state statutes provided a formula for mandatory reductions to the terms of all prisoners who complied with certain prison regulations and state laws. The challenged statute retroactively reduced the amount of "gain time" credits available to prisoners under this formula. Though the statute preserved the possibility that some prisoners might win back these credits if they convinced prison officials to exercise their discretion to find that they were especially deserving, it was invalidated, since "it effectively eliminated the lower end of the possible range of prison terms."[125] Likewise, in *Lynce*, the Court struck down a statute that retroactively canceled all early release credits awarded to prison inmates convicted of murder and attempted murder, for the new statute *objectively* lengthened the period that someone in petitioner's position should spend in prison.[126]

[E47] In *Morales*, a California statute changed the default frequency of reconsideration for parole from every year to up to every three years, for prisoners convicted of more than one homicide, without altering the substantive standards for determining either the initial date for parole eligibility or an inmate's suitability for parole. The Court emphasized that not every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited. The question is "a matter of degree;" the controlling inquiry is whether retroactive application of the change in parole provisions creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes."[127] The amended California law was not found to violate this standard, since it created "only the most speculative and attenuated possibility of increasing the measure of punishment for covered crimes." First, the amendment applied only to those who had taken more than one life, a class of prisoners for whom the likelihood of release on parole was quite remote. Second, it affected the timing only of subsequent hearings and did so only when the Board made specific findings in the

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123 Lindsey v. Washington, 301 U.S. 397 (1937).

124 *See* Miller v. Florida, 482 U.S. 423 (1987), as *discussed in* California Dep't of Corr. v. Morales, 514 U.S. 499, 506 (1995).

125 *See* California Dep't of Corrs. v. Morales, 514 U.S. 499, 506 (1995), *discussing* Weaver v. Graham, 450 U.S. 24 (1981).

126 Lynce v. Mathis, 519 U.S. 433 (1997). The fact that the generous gain-time provisions in the earlier 1983 statute were motivated more by the interest in avoiding overcrowding than by a desire to reward good behavior, was not relevant to that inquiry.

127 California Dep't of Corrs. v. Morales, 514 U.S. 499, 509 (1995)

first hearing. Moreover, the Board had the authority to tailor the frequency of subsequent hearings to the particular circumstances of the individual prisoner. Since the rule did not, by its own terms, show a significant risk of increased incarceration, the convict should demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application would result in a longer period of incarceration than under the earlier rule. Still Morales offered no support for his speculation that prisoners might experience an unanticipated change that would be sufficiently monumental to alter their suitability for parole, or that such prisoners might be precluded from receiving a subsequent expedited hearing.[128]

[E48] The retroactive application of a statute that authorizes a district court to impose an additional term of supervised release, following the reimprisonment of those who violate the conditions of an initial term, would run counter the *Ex Post Facto* Clause, because post-revocation penalties are attributable to the original conviction, not to convicts' new offenses for violating their supervised release conditions.[129]

[E49] *Dobbert* was convicted of three murders committed between December 31, 1971, and April 8, 1972. During that period of time, the Florida legislation provided that a person convicted of a capital felony was to be punished by death unless the verdict included a recommendation of mercy by a majority of the jury. On June 22, 1972, in *Furman*, the U.S. Supreme Court struck down a Georgia death penalty statute as violative of the Eighth and Fourteenth Amendments. Shortly thereafter, the Florida supreme court found the 1971 Florida death penalty statutes inconsistent with *Furman*. Late in 1972, Florida enacted a new death penalty statute under which Dobbert was sentenced to death. Dobbert invoked the constitutional prohibition against *ex post facto* laws, arguing there was no death penalty "in effect" in Florida at the time of the murder, because the earlier statute in effect at such time was later held invalid by the Florida supreme court. The majority of the Court rejected the claim, noting that the existence of the earlier statute at the time of the murder served as an "operative fact" to warn petitioner of the penalty that Florida would seek to impose on him if he were convicted of first-degree murder, and this was sufficient compliance with the *ex post facto* provision of the Constitution, notwithstanding the subsequent invalidation of the statute.[130] Three mem-

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[128] *Id.* at 509–13. *See also Garner v. Jones*, 529 U.S. 244 (2000), involving the retroactive application of a Georgia law permitting the extension of intervals between parole considerations. The Georgia law was *prima facie* qualified, since it vested the Board of Paroles with discretion as to how often to set an inmate's date for reconsideration, with an eight-year maximum, and the Board's policies permitted expedited reviews in the event of a change in circumstance or new information. The case was remanded, as the court of appeals had erred in not considering the Board's internal policy statements, along with the Board's actual practices, factors that would provide important instruction as to how the Board interpreted its enabling statute and regulations and, therefore, whether, as a matter of fact, the amendment under review created a significant risk of increased punishment. In relation to the above inquiry, the Court observed that, absent a demonstration to the contrary, it should be presumed the Board followed its statutory commands and internal policies in fulfilling its obligations.

[129] Johnson v. United States, 529 U.S. 694, 700–01 (2000).

[130] Dobbert v. Florida, 432 U.S. 282, 298 (1977). The Court also held that the imposition of the death sentence upon petitioner pursuant to the new statute did not deny him equal protection of the laws. Having been neither tried nor sentenced prior to *Furman*, he was not similarly situated to those whose death sentences were commuted, and it was not irrational for Florida to relegate him to the class of those prisoners whose acts could properly be punished under the new statute that was in effect at the time of his trial and sentence.

bers of the Court dissented, stressing, *inter alia*, that, since at the time of petitioner's offense, there was no constitutional procedure for imposing the death penalty in Florida, the possibility of such capricious punishment was not "fair warning," under any meaningful use of those words.[131]

[E50] The fourth category comprises *"[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender."*[132] "A law reducing the quantum of evidence required to convict is as grossly unfair as retrospectively eliminating an element of the offense, increasing punishment for an existing offense, or lowering the burden of proof."[133] Accordingly, "[r]equiring only the victim's testimony to convict, rather than that testimony plus corroborating evidence, is surely 'less testimony required to convict'" and falls within the scope of the prohibition.[134] The Court has also indicated that, since "a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict, . . . to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient."[135]

b. Retroactive Judicial Decisionmaking[136]

[E51] The *Ex Post Facto* Clauses are directed against legislative action only. But the essential principle on which the clauses are based—the notion that persons have a right to "fair warning" of conduct that will give rise to criminal penalties—is fundamental to the concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth and Fourtheenth Amendments. "Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids."[137] If legislatures are prohibited from passing such laws, it must follow that courts are "barred by the Due Process Clause from achieving precisely the same result by judicial construction."[138] "If a judicial construction of a criminal statute is unexpected and indefensible by reference to the law that had been expressed prior to the conduct in issue, it must not be given retroactive effect" to the defendant's detriment.[139] Hence, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[140]

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131 *Id.* at 309.
132 Calder v. Bull, 3 Dall. 386, 390 (1798) (emphasis added).
133 Carmell v. Texas, 529 U.S. 513, 532 (2000).
134 *Id.* at 530–31 (case involving a conviction for sexual offenses).
135 Stogner v. California, 539 U.S. 607, 615–16 (2003).
136 *See also* paras. A67–A68 (*retroactive effect of the Supeme Court's decisions in criminal cases*).
137 Bouie v. City of Columbia, 378 U.S. 347, 353 (1964).
138 *Id.* at 353–54.
139 *Id.* at 354.
140 United States v. Lanier, 520 U.S. 259, 266 (1997).

[E52] In *Bouie*, the leading case in the field, the petitioners had refused to leave a restaurant after being asked to do so by the restaurant's manager. Although the manager had not objected when the petitioners entered the restaurant, the petitioners were convicted of violating a South Carolina trespass statute proscribing "entry upon the lands, of another . . . after notice from the owner or tenant prohibiting such entry." The South Carolina court construed the statute to extend to patrons of a drug store who had received no notice prohibiting their entry into the store but had refused to leave the store when asked. Prior to the court's decision, South Carolina cases construing the statute had uniformly held that conviction under the statute required proof of notice before entry. None of those cases, moreover, had given the slightest indication that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave. Consequently, the Court decided that the South Carolina court's retroactive application of its construction violated due process.[141]

[E53] In *Marks*, petitioners were convicted of transporting obscene materials in violation of a federal statute, providing that "whoever knowingly transports in inter-state or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, . . . or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both." The Court held that the retroactive application of the obscenity standards announced in *Miller*,[142] to the potential detriment of the petitioner, violated the Due Process Clause, because, at the time that the defendant committed the challenged conduct, the Court's decision in *Memoirs*[143] provided the governing law.[144]

[E54] A trial court's construction of the term "arrest" as including a traffic citation, and application of that construction to defendant to revoke his probation, was judged unforeseeable and thus violated due process.[145] By contrast, *Rogers* found that the Tennessee court's abolition of the "year and a day" common law rule—under which no defendant could be convicted of murder unless his victim died by the defendant's act within a year and a day of the act—was not unexpected and indefensible, because advances in medical and related science had so undermined the rule's usefulness as to render it, without question, obsolete, the rule had been legislatively or judicially abolished in the vast majority of jurisdictions, and it had never once served as a ground of decision in any murder prosecution in Tennessee.[146]

[E55] Apart from that, a new *constitutional* rule announced by the Supreme Court in the criminal context applies retroactively to all cases, state or federal, not yet final.[147]

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141 Bouie v. City of Columbia, 378 U.S. 347 (1964).

142 *Miller v. California*, 413 U.S. 15 (1973), under which the appropriate test was "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

143 *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), under which expressive material was constitutionally protected unless it was "utterly without redeeming social value."

144 Marks v. United States, 430 U.S. 188 (1977).

145 Douglas v. Buder, 412 U.S. 430 (1973) (*per curiam*).

146 Rogers v. Tennessee, 532 U.S. 451 (2001). The Court concluded that far from a marked and unpredictable departure from prior precedent, the Tennessee court's decision was a routine exercise of common law decisionmaking that brought the law into conformity with reason and common sense.

147 *See*, in particular, Hamling v. United States, 418 U.S. 87, 102 (1974) and Griffith v. Kentucky, 479 U.S. 314, 323 (1987).

After the Court has announced a new rule in the case selected for review, the integrity of judicial review requires the Court to apply that rule to all similar cases pending on direct review. In addition, selective application of a new rule would violate the principle of treating similarly situated defendants the same.[148]

2. In the Civil Context[149]

[E56] In certain civil cases, usually involving fraud, malice, willful and wanton conduct, or recklessness, the plaintiff may be awarded *punitive damages*, as a means of punishing the defendant for his behavior. The very label of "punitive" damages, as well as the rationale supporting them, demonstrate that they share key characteristics of criminal sanctions, and therefore would raise a serious question under the *Ex Post Facto* Clause if retroactively imposed.[150]

[E57] "The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation."[151] Retrospective civil legislation may offend due process, if it is "particularly harsh and oppressive;"[152] that standard does not differ from the prohibition against arbitrary and irrational legislation.[153] A justification sufficient to validate a statute's prospective application under the clause may not suffice to warrant its retroactive application.[154] Indeed, the Court has announced that it would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness."[155]

D. DEFINITENESS AND THE "FAIR WARNING" DOCTRINE

1. In the Criminal Context

a. In General

[E58] Before criminal liability may be imposed for violation of any penal law, due process requires "fair warning . . . of what the law intends."[156] There are three related

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[148] Griffith v. Kentucky, 479 U.S. 314, 320–26 (1987). A new rule of criminal law can be retroactive to cases on *collateral review* only if it places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe, or if it prohibits a certain category of punishment for a class of defendants because of their status or offense, or if it constitutes a watershed rule of criminal procedure, implicating the fundamental fairness and accuracy of the criminal proceeding. *See, e.g.*, O'Dell v. Netherland, 521 U.S. 151, 157 (1997). *See also* para. A68.

[149] *See also* para. A68 (*retroactivity of the Court's decisions in civil cases*).

[150] Landgraf v. USI Film Prods., 511 U.S. 244, 281 (1994). *Cf.* De Veau v. Braisted, 363 U.S. 144, 160 (1960).

[151] Lynce v. Mathis, 519 U.S. 433, 439 (1997), *quoting* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).

[152] United States Trust Co. v. New Jersey, 431 U.S. 1, 17, n.13 (1977), *quoting* Welch v. Henry, 305 U.S. 134, 147 (1938).

[153] Pension Benefit Guar. Co. (PBGC) v. R. A. Gray & Co., 467 U.S. 717, 733 (1984).

[154] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976), *cited in* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).

[155] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976). *Cf.* United States v. Peltier, 422 U.S. 531, 542 (1975).

[156] McBoyle v. United States, 283 U.S. 25, 27 (1931). There is no adequate warning if nei-

manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of a statute that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[157] Second, "as a sort of 'junior version of the vagueness doctrine,' . . . the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."[158] "The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. . . . [It] does not require distortion of the fair import of the statutory language or nullification of the purpose of the legislation. Nor does it demand that a statute be given the 'narrowest meaning;' it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers."[159] Third, "although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[160] "In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."[161]

b. The "Void for Vagueness" Doctrine

i. Generally

[E59] "[T]he rule of law implies equality and justice in its application."[162] In this context, the void for vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[163] "The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables indi-

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ther the existence nor the publication of the rule is proved. *See, e.g.*, Wright v. Georgia, 373 U.S. 284 (1963).

157 Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

158 United States v. Lanier, 520 U.S. 259, 266 (1997), *citing* Liparota v. United States, 471 U.S. 419, 427 (1985). *See also* United States v. Mersky, 361 U.S. 431, 440 (1960). The rule of lenity is applicable only if there is a "grievous ambiguity or uncertainty" in the statute. *See* Chapman v. United States, 500 U.S. 453, 463 (1991), *quoted in* Muscarello v. United States, 524 U.S. 125, 138–39 (1998).

159 United States v. Brown, 333 U.S. 18, 25–26 (1948), *quoted in* United States v. Turkette, 452 U.S. 576, 588, n.10 (1981) and United States v. Moore, 423 U.S. 122, 145 (1975).

160 United States v. Lanier, 520 U.S. 259, 266 (1997). *See, in extenso*, paras. E51 *et seq.*

161 United States v. Lanier, 520 U.S. 259, 267 (1997).

162 Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972).

163 Kolender v. Lawson, 461 U.S. 352, 357 (1983). The Court pointed out that, although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, the more important aspect of the vagueness doctrine is not actual notice but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. *See also* Smith v. Goguen, 415 U.S. 566, 574 (1974).

viduals to conform their conduct to the requirements of law, and permits meaningful judicial review."[164] "[T]he constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*;"[165] indeed, "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."[166]

[E60] Nonetheless, "lack of precision is not itself offensive to the requirements of due process."[167] "The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for 'in most English words and phrases there lurk uncertainties.'"[168] Consequently, "no more than a reasonable degree of certainty can be demanded."[169] "'The Constitution does not require impossible standards;' all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'"[170]

[E61] "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action."[171] Furthermore, "[b]ecause of the factors differentiating military society from civilian society, . . . Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter."[172] Subsequently, the proper standard of review for a vagueness challenge to rules of the Uniform Code of Military Justice defining military offenses is the same that applies to criminal statutes regulating economic affairs.[173] Conversely, "[w]here a statute's literal scope is capable of reaching expression sheltered by the First Amendment, the [due process doctrine of vagueness] demands a greater degree of specificity than in other contexts,"[174] because of the potential "chilling effect" on free speech.[175]

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164 Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984).

165 Colautti v. Franklin, 439 U.S. 379, 395 (1979).

166 Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982), *citing* Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952).

167 Roth v. United States, 354 U.S. 476, 491 (1957).

168 Rose v. Locke, 423 U.S. 48, 49–50 (1975) (*per curiam*). *See also See* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("condemned to the use of words, we can never expect mathematical certainty in our language").

169 Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952).

170 Roth v. United States, 354 U.S. 476, 491 (1957), *quoting* United States v Petrillo, 332 U.S. 1, 7–8 (1947) (*per curiam*).

171 Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

172 Parker v. Levy, 417 U.S. 733, 756 (1974).

173 *Id.*

174 Smith v. Goguen, 415 U.S. 566, 573 (1973).

175 *Cf.* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871–72 (1997) (the vagueness of a regulation based on the undefined terms "indecent" and "patently offensive," coupled with its increased deterrent effect as a criminal statute, raises special First Amendment concerns because of its obvious chilling effect on free speech).

[E62] "[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. . . . And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, th[e] Court is under a duty to give the statute that construction."[176]

[E63] This was the course adopted in *Screws*. In that case, the Court dealt with a statute that imposed criminal penalties to whoever, under color of law, "willfully" subjected any persons to the deprivation "of any rights" protected by the Constitution. The plurality construed the word "willfully" in its setting to mean the doing of an act with "a specific intent" to deprive an individual of a constitutional right; indeed, one who acted with such specific intent was aware that what he did was precisely that which the statute forbade. Furthermore, it held that the specific intent required by the Act was an intent to deprive a person of a "right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." Accordingly, when broad constitutional requirements, such as the ones under the Due Process Clause, have been "made specific" by the text or settled interpretations, willful violators "certainly are in no position to say that they had had no adequate advance notice that they would be visited with punishment." Thus, *Screws* limited the statute's coverage to rights fairly warned of, having been announced and defined by the time of the charged conduct.[177] More recently, in *Lanier*, involving the similar criminal provision of 18 U.S.C. Section 242, the Court held that not only its own opinions, but decisions of other courts, also could provide the required warning; and such precedents need not have been applied to a "fundamentally similar" factual situation.[178]

ii. Vagrancy Laws

[E64] The Court has struck down, as impermissibly vague, several "vagrancy" statutes, the common justification of which was to prevent "suspicious" persons from criminal activities. *Lanzetta* involved a criminal provision against "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons." The statute was indefinite and uncertain as to the meaning of the word "gang" and the expression "known to be a member." And since it condemned no act or omission, it was found repugnant to the Due Process Clause.[179] Likewise, in *Morales*, a Chicago ordinance, prohibiting criminal street gang members from remaining in any public place with no apparent purpose, was held to violate the requirement that a legislature establish minimal guidelines to govern law enforcement; in particular, the ordinance failed to establish any standard for the police by which it could be judged if an individual had an "apparent purpose."[180]

[E65] *Palmer* was convicted of violating a municipal "suspicious person ordinance," that is, of being a "person who wanders about the streets or other public ways or who

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176 United States v. Harriss, 347 U.S. 612, 618 (1954). Nevertheless, the Court has no authority to construe the language of a state statute more narrowly than the state's highest court. *See* Chicago v. Morales, 527 U.S. 41, 61 (1999), *citing* Smiley v. Kansas, 196 U.S. 447, 455 (1905).

177 Screws v. United States, 325 U.S. 91, 104–05 (1945).

178 United States v. Lanier, 520 U.S. 259, 268–70 (1997).

179 Lanzetta v. New Jersey, 306 U.S. 451 (1939).

180 Chicago v. Morales, 527 U.S. 41 (1999).

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." The ordinance was found unconstitutionally vague, as applied to Palmer, since it gave insufficient notice to the average person that discharging a friend at an apartment house and then talking on a car radio while parked on the street was enough to show him to be without any visible or lawful business.[181] In *Papachristou*, a similar ordinance was held void for vagueness, since it provided no standards governing the exercise of the discretion it granted. The Court pointed out that a "presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold . . . or who look suspicious to the police are to become future criminals is too precarious for a rule of law."[182] In *Kolender*, the Court dealt with a California statute requiring persons who loiter or wander on the streets to identify themselves and to account for their presence when requested by a peace officer. The California court had defined "credible and reliable" identification as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." The statute, as drafted and as construed by the state court, was judged to be unconstitutionally vague on its face, because "it encourage[d] arbitrary enforcement, by failing to describe with sufficient particularity" what a suspect should do in order to provide a "credible and reliable" identification; although due process does not require "impossible standards" of clarity, "this was not a case where further precision in the statutory language [wa]s either impossible or impractical."[183]

iii. Restrictions on Expression—Generally

[E66] "[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."[184] For example, a penal law prohibiting distribution of a magazine, "principally made up of news or stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes" is impermissibly vague and indefinite.[185]

[E67] *Goguen* was convicted of violating the provision of the Massachusetts flag-misuse statute, for wearing a small U.S. flag sewn to the seat of his trousers; the provision at issue subjected to criminal liability anyone who publicly treated contemptuously the flag of the United States. Taking into consideration that casual treatment of the flag in many contexts had become a widespread phenomenon and that the foregoing controversial phrase was devoid of a narrowing state court interpretation at the relevant time

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[181] Palmer v. City of Euclid, 402 U.S. 544 (1971) (*per curiam*).

[182] Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972). The statute provided: "Rogues and vagabonds, or dissolute persons who go about begging; common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses 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 shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished."

[183] Kolender v. Lawson, 461 U.S. 352, 362 (1983).

[184] Smith v. California, 361 U.S. 147, 151 (1959).

[185] Winters v. New York, 333 U.S. 507, 518 (1948).

in the case, the Court recognized that the challenged statutory language was void for vagueness, since, by failing "to draw reasonably clear lines between the kinds of nonceremonial treatment of the flag that [we]re criminal and those that [we]re not," it did not provide adequate warning of forbidden conduct, and set forth "a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag."[186]

iv. Breach of the Peace—"Fighting" Words

[E68] The Court has upheld, as sufficiently definite, a statute that punishes the use in a public place of offensive words directly tending to cause a breach of the peace by provoking the addressee to acts of violence.[187] Conversely, a state law, providing that "any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor" that has not been narrowed by the state courts to apply only to "fighting" words, "which by their very utterance . . . tend to incite an immediate breach of the peace," is on its face unconstitutionally vague.[188] Similarly, a conviction for criminal libel, defined at trial as the publication of a writing calculated to disturb the peace, may not stand, for it is based on an unconstitutionally vague standard, which "involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*."[189]

[E69] *Grayned* concerned an ordinance that prohibited persons near schools from "disturbing the peace" of the schools. The Court held that, given the "particular context" of the ordinance, it gave fair notice of its scope: "although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted."[190] Moreover, in *Kovacs*, the plurality rejected a vagueness challenge to a city ordinance forbidding "loud and raucous" sound amplification, noting that these "abstract words ha[d] through daily use acquired a content that convey[ed] to any interested person a sufficiently accurate concept of what [wa]s forbidden."[191]

v. Protection of Public Morals—Obscenity Laws[192]

[E70] A criminal statute, inhibiting conspiracy "to commit acts injurious to public morals," does not provide reasonable standards of guilt and may lead to conviction for agreement to do almost any act that a judge and jury might find contrary to his or its

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186 Smith v. Goguen, 415 U.S. 566, 574, 578 (1973).

187 Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). The appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace. *Id.* at 574.

188 Gooding v. Wilson, 405 U.S. 518, 525–28 (1972).

189 Ashton v. Kentucky, 384 U.S. 195, 200 (1966). *Cf.* Edwards v. S. Carolina, 372 U.S. 229, 236–38 (1963).

190 Grayned v. City of Rockford, 408 U.S. 104, 112 (1972). Likewise, a statute permitting dispersal of congregations directed at an embassy, when the police reasonably believe that the embassy's "security or peace" is threatened, "is crafted for a particular context, and, given that context, it is apparent that the prohibited quantum of disturbance is whether normal embassy activities have been or are about to be disrupted. The statute communicates its reach in words of common understanding." *See* Boos v. Barry, 485 U.S. 312, 332 (1988).

191 Kovacs v. Cooper, 336 U.S. 77, 79, 87–89 (1949).

192 *See also* paras. E86, I135.

notions of what was good for morals or order.[193] Still, a statute proscribing "crime against nature" was held not unconstitutionally vague as applied to cunnilingus.[194]

[E71] Moreover, on various occasions, the Court upheld obscenity laws against a due process challenge that the definitions of obscenity were too vague.[195] In *Roth*,[196] the leading case in the area, a federal statute (18 U.S.C. Section 1461) made punishable the mailing of material that was "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character" and a California statute criminalized the keeping, for sale or advertising, material that was "obscene or indecent." Although the Court recognized that such terms were not precise, nevertheless, it noted that these words, applied according to the proper standard for judging obscenity, specified by the Court,[197] gave adequate warning of the conduct proscribed; the fact that there might be marginal cases in which it would be difficult to determine the side of the line on which a particular fact situation fell was no sufficient reason to hold the language too ambiguous to define a criminal offense. Besides, the possibility that different juries might reach different conclusions as to the same material did not render the statutes unconstitutional.[198] This approach was implicitly affirmed by a five-member majority in *Paris Adult Theatre*.[199] There, three members of the Court, in dissent, noted that the relative standards established by the Court, such as "prurient interest," "patent offensiveness," or "serious literary value," constituted "indefinite concepts," the meaning of which "necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them," and suggested that limitation of the state regulatory power to the distribution of sexually oriented material to juveniles and offensive exposure of such material to unconsenting adults would introduce a large measure of clarity to this area.[200]

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193 Musser v. Utah, 333 U.S. 95 (1948).

194 Rose v. Locke, 423 U.S. 48 (1975) (*per curiam*).

195 Obscene material is not protected by the First Amendment. *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973).

196 Roth v. United States, 354 U.S. 476, 491 (1957).

197 In *Roth v. United States*, 354 U.S. 476, 489 (1957), the Court held that the standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, was "whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeal[ed] to prurient interest." Under *Miller v. California*, 413 U.S. 15, 24 (1973), the appropriate standard is "(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* disavowed the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966). In *Hamling v. United States*, 418 U.S. 87, 116–17 (1974), the Court held that *Miller*'s rejection of *Memoirs*' "social value" formulation did not mean that 18 U.S.C. Section 1461 was unconstitutionally vague at the time of petitioners' convictions, because it did not provide them with sufficient guidance as to the proper test of "social value," since that formula had been rejected not for vagueness reasons but because it departed from *Roth*'s obscenity definition and entailed a virtually impossible prosecutorial burden.

198 Roth v. United States, 354 U.S. 476, 492, n.30 (1957) ("it is common experience that different juries may reach different results under any criminal statute"). *See also* Miller v. California, 413 U.S. 15, 26, n.9 (1973); Smith v. United States, 431 U.S. 291, 309 (1977).

199 Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

200 *Id.* at 84, 113–14.

vi. Prohibition of Assemblies[201]

[E72] A state statute, prohibiting picketing near a courthouse, certainly lacks specificity in the word "near." Nevertheless, this lack of specificity may not render the statute unconstitutionally vague, "at least as applied to a demonstration within the sight and hearing of those in the courthouse."[202] On the contrary, an ordinance making it a criminal offense for three or more persons to assemble on any of the sidewalks and there conduct themselves in a manner "annoying" to persons passing by, which has not been narrowed by any construction of the state courts, is on its face unconstitutionally vague, in the sense that no standard of "annoying" conduct is specified at all.[203]

vii. Anti-Communist Criminal Legislation—Loyalty Oaths

[E73] The issue of clarity also arose with respect to anti-Communist laws. The Smith Act, making it a crime for any person knowingly or willfully to advocate the overthrow or destruction of the government of the United States by force or violence, to organize or help to organize any group that does so, or to conspire to do so, was held not to violate the Fifth Amendment because of indefiniteness.[204]

[E74] An oath of office may not be so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. If the meaning of the required oath is vague and uncertain, the state cannot, consistently with the Due Process Clause, force an employee either to take such an oath, at the risk of subsequent prosecution for perjury or face immediate dismissal from public service. "Concern for vagueness in the oath cases has been especially great because uncertainty as to an oath's meaning may deter individuals from engaging in constitutionally protected activity conceivably within the scope of the oath."[205] *Cramp* involved an oath "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." The provision of such an oath, which says nothing of advocacy of violent overthrow of state or federal government, completely lacks in terms "susceptible of objective measurement."[206] Similarly, the Court has invalidated an oath requiring a state teacher to swear that he is not one who commits an act or who advises, teaches, abets, or advocates, by any means, another person to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration, of the constitutional form of government by revolution, force, or violence.[207] An oath exacting a prom-

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[201] *See also* para. E69.

[202] Cox v. Louisiana, 379 U.S. 559, 568 (1965). Such a provision implies "a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it. . . . This administrative discretion to construe the term 'near' concerns a limited control of the streets and other areas in the immediate vicinity of the courthouse, and is the type of narrow discretion which th[e] Court recognizes as the proper role of responsible officials in making determinations concerning the time, place, duration, and manner of demonstrations." *Id.* at 568–69.

[203] Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

[204] Dennis v. United States, 341 U.S. 494, 516 (1951).

[205] Cole v. Richardson, 405 U.S. 676, 681 (1972)

[206] Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 286 (1961). For example, could one who had ever cast his vote for a Communist Party candidate safely subscribe to this legislative oath? Or could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his "support"? *Id.* at 286.

[207] Baggett v. Bullitt, 377 U.S. 360, 367–70 (1964).

ise that the affiant will "by precept and example, promote respect for the flag and the institutions of the United States of America and the State of Washington . . . and undivided allegiance to the government of the United States" equally offends due process because of vagueness. The range of activities, which are or might be deemed inconsistent with the required promise, is very wide indeed. "Even criticism of the design or color scheme of the state flag or unfavorable comparison of it with that of a sister State or foreign country could be deemed disrespectful, and therefore violative of the oath. And what are 'institutions' for the purposes of this oath? . . . It is likewise difficult to ascertain what might be done without transgressing the promise to 'promote undivided allegiance to the government of the United States.'"[208]

[E75] The Constitution clearly permits the requirement of oaths by officeholders to uphold the Constitution itself (compare Article II, Section 1, Clause 8, Article VI, Clause 3). An oath that contains a promise "to oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method" has been upheld as "a commitment not to use illegal and constitutionally unprotected force to change the constitutional system."[209]

viii. Contempt of a Congressional Investigatory Committee

[E76] The law may make it a crime for any person, summoned as a witness by either House of Congress or a committee thereof, to refuse to answer "any question pertinent to the question under inquiry." In such a case, fundamental fairness demands that the witness be informed "what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." Due process requires that a witness before a congressional investigating committee should not be compelled to decide, at peril of criminal prosecution, whether to answer questions propounded to him without first knowing the "question under inquiry" "with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."[210]

ix. Abortion Laws

[E77] Furthermore, the Court has been presented with the "void for vagueness" question in the field of abortion laws. A state statute making abortions criminal, unless done as necessary for the preservation of the mother's life or "health," is not unconstitutionally vague. The term "health," in accord "with general usage and modern understanding," includes psychological as well as physical well-being and, as thus construed, cannot be deemed as overly vague; indeed, "whether a particular operation is necessary for a patient's physical or mental health is a professional judgment that physicians are obvi-

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[208] *Id.* at 371.

[209] Cole v. Richardson, 405 U.S. 676, 684 (1972). The Court noted that, since violation of the oath was punishable only by a prosecution for perjury and, since perjury is a knowing and willful falsehood, the constitutional vice of punishment without fair warning could not occur there.

[210] Watkins v. United States, 354 U.S. 178, 215, 209 (1957). There the Court found that the meaning of "un-American" propaganda activities in the resolution defining the Committee's authority was so vague that it was "difficult to imagine a less explicit authorizing resolution." Likewise, the Chairman's statement that the Sub-Committee was investigating "subversion and subversive propaganda" was woefully inadequate to convey sufficient information as to the pertinency of the questions to the topic under inquiry, since this was a subject at least as broad and indefinite as the authorizing resolution of the Committee.

ously called upon to make routinely whenever surgery is considered."[211] Likewise, a statutory requirement that a physician's decision to perform an abortion must rest upon "his best clinical judgment" of its necessity is not unconstitutionally vague, since that judgment "may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient."[212]

[E78] The case is thought to be different if a criminal law requires every person who performs an abortion to make a determination "based on his experience, judgment or professional competence" that the fetus is not viable; and if such person determines that the fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable," then he must exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive, and must use the abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different technique is not necessary to preserve the mother's life or health. The viability determination requirement contains a double ambiguity. "First, it is unclear whether the statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard. . . . In other words, it is ambiguous whether there must be 'sufficient reason' from the perspective of the judgment, skill, and training of the attending physician, or 'sufficient reason' from the perspective of a cross-section of the medical community or a panel of experts. . . . Second, it is uncertain whether the phrase 'may be viable' simply refers to viability, as that term has been defined in *Roe* . . . [potential ability of the fetus to live outside the mother's womb, albeit with artificial aid] or whether it refers to an undefined penumbral or 'gray' area prior to the stage of viability. . . . The vagueness of the viability determination requirement is compounded by the fact that the statute subjects the physician to potential criminal liability without regard to fault. . . . [T]he standard of care provision is [likewise] impermissibly ague. . . . It is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival. . . . [W]here conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions."[213]

[E79] The Court also has struck down, as impermissibly vague, a penal statute that requires physicians performing abortions to ensure that fetal remains are disposed of in a humane and sanitary manner. The phrase "humane and sanitary" did suggest a possible intent to mandate some sort of decent burial of an embryo at the earliest stages of formation. However, this level of uncertainty is fatal for statutes imposing criminal liability.[214]

x. Economic Regulation[215]

[E80] The early cases dealing with the issue of vagueness involved criminal statutes regulating economic affairs. In *Cohen Grocery*, a due process attack was mounted upon

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[211] United States v. Vuitch, 402 U.S. 62, 71–72 (1971).

[212] Doe v. Bolton, 410 U.S. 179, 192 (1973).

[213] Colautti v. Franklin, 439 U.S. 379, 391, 394, 397, 400–01 (1979).

[214] Akron v. Akron Ctr. for Reprod. Health, Inc. (*Akron I*), 462 U.S. 416, 451 (1983).

[215] It must be reminded that economic regulation is subject to a less strict vagueness standard. *See* para. E61.

a section of the Food Control Act of 1917 that attached a penalty of fine or imprisonment to the making by any person of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" and was construed as forbidding and penalizing the exaction of an excessive price upon the sale of a commodity. The Court invalidated the section, since its words fixed no ascertainable standard of guilt and forbade no specific or definite act.[216] Similarly in *Connally*, a state criminal statute imposing severe punishments upon contractors with the state who paid their workmen less than the "current rate of per diem wages in the locality" where the work was performed, was held void for vagueness. The provision presented a double uncertainty, fatal to its validity. In the first place, the words "current rate of wages" did not "denote a specific or definite sum, but minimum, maximum, and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done." In the second place, additional obscurity was imparted to the statute by the use of the qualifying word "locality," for no one could say with accuracy what areas constituted the locality where a given piece of work was being done; in other connections or under other conditions, the term "locality" might be definite enough, but not so in such a statute.[217] Conversely, an Act making it a crime, by the use or threat of use of force, violence, intimidation, or duress, to coerce, compel, or constrain or attempt to coerce, compel, or constrain a radio broadcasting licensee to employ or agree to employ, in connection with the conduct of the licensee's broadcasting business, any person or persons "in excess of the number of employees needed by such licensee to perform actual services," was not found so vague, indefinite or uncertain as to violate the Due Process Clause of the Fifth Amendment.[218]

[E81] In *Boyce Motor Lines*, the Court considered a statute that punished anyone who "knowingly" violated a regulation requiring trucks transporting dangerous items to avoid "so far as practicable . . . driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." The Court read "knowingly" to mean that the driver knew that there was such a practicable, safer route, and yet deliberately took the more dangerous route through the tunnel, or that he willfully neglected to exercise his duty under the regulation to inquire into the availability of such an alternative route. Furthermore it stressed that "safer practicable route" was not an expression too vague to be understood, for it found adequate interpretation in common usage and understanding. Consequently, it rejected a vagueness challenge against the statute.[219]

[E82] A law criminalizing the selling of goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is not unconstitutionally vague or indefinite as applied to sales made below cost without any "legitimate commercial objective, such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor," and with specific predatory intent.[220] Likewise, a state statute that generally prohibits the sale on Sunday of all merchandise, but exempts, *inter alia*, the retail sale of "merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, amusement parks,

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216 United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921).

217 Connally v. Gen. Constr. Co., 269 U.S. 385, 393–95 (1926).

218 United States v. Petrillo, 332 U.S. 1, 6–8 (1947).

219 Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340–42 (1952).

220 United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 36–37 (1963).

etc., is not so vague as to violate the due process clause of the Fourteenth Amendment, since "business people of ordinary intelligence . . . would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county."[221]

[E83] More recently the Court dealt with a federal law providing that it is unlawful for any person to knowingly make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell "drug paraphernalia," defined as any equipment "primarily intended or designed for use" in consuming specified illegal drugs, "such as . . . ," followed by a list of 15 items constituting *per se* drug paraphernalia and another list of eight objective factors that might be considered "in addition to all other logically relevant factors" in "determining whether an item constitutes drug paraphernalia." The provision was not found unconstitutionally vague as applied to persons convicted of using an inter-state conveyance as part of a scheme to sell, among other things, pipes, bongs, scales, roach clips, and drug diluents, since the statute was sufficiently determinate with respect to the items it listed as constituting *per se* drug paraphernalia, including many of the items involved in the specific case, set forth objective criteria for assessing whether items constituted drug paraphernalia, and since the scienter requirement assisted in avoiding any vagueness problem. However, the Court added that application of the challenged provision to multiple-use items—such as scales, razor blades, and mirrors—might raise more serious concerns, for such items can be used for legitimate, as well as illegitimate, purposes, and a certain degree of ambiguity necessarily surrounds their classification.[222]

xi. Military Rules

[E84] "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[223] For the reasons that differentiate military from civilian society, Congress is permitted to legislate "both with greater breadth and with greater flexibility" when prescribing rules for the former than when prescrib-

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[221] McGowan v. Maryland, 366 U.S. 420, 428 (1961).

[222] Posters 'n' Things, Ltd. v. United States, 511 U.S. 513, 526 (1994). Compare *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499–503 (1982), involving an ordinance that required a business to obtain a license if it sold any items that were "designed or marketed for use with illegal cannabis or drugs" and provided guidelines for defining such items. There, the Court rejected the facial vagueness challenge, because appellee did not show that the ordinance was impermissibly vague in all of its applications. The ordinance's language "designed . . . for use" was not found unconstitutionally vague on its face, since it was clear that such standard encompassed at least an item that was principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer. As to the "marketed for use" standard, the guidelines referred to the display of paraphernalia and to the proximity of covered items to otherwise uncovered items, and thus that standard required scienter on the part of the retailer. Under this test, appellee had ample warning that its marketing activities required a license, and by displaying a certain magazine and certain books dealing with illegal drugs physically close to pipes and colored rolling paper, it was in clear violation of the guidelines, as it was in selling "roach clips."

[223] Parker v. Levy, 417 U.S. 733, 758 (1974). *See also* Middendorf v. Henry, 425 U.S. 25, 38 (1976) (much of the conduct proscribed by the military is not "criminal" conduct in the civilian sense of the word).

ing rules for the latter.[224] The Uniform Code of Military Justice (UCMJ) "cannot be equated to a civilian criminal code. It . . . regulate[s] aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community."[225] A provision of the UCMJ is void for vagueness if one "could not reasonably understand that his contemplated conduct is proscribed. . . . In determining the sufficiency of the notice, [the] statute must . . . be examined in the light of the conduct with which a defendant is charged."[226]

[E85] In *Parker v. Levy*, the Court dealt with a conviction based on Articles 133 and 134 of the UCMJ, which punish a commissioned officer for "conduct unbecoming an officer and a gentleman" and for "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Each provision had been construed by the U.S. Court of Military Appeals or by other military authorities so as to limit its scope (e.g., the reach of Article 134 had been limited to conduct that was "directly and palpably prejudicial to good order and discipline," and Article 133 had been interpreted as inhibiting any conduct that offended "so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time [wa]s of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession"), thus narrowing the very broad reach of the literal language of the articles. At the same time the Manual for Courts-Martial supplied considerable specificity by way of examples of the conduct that these articles covered (e.g., examples of punishable acts under Article 134 were utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing the American form of government). Subsequently the Court held that Articles 133 and 134 were not unconstitutionally vague, as applied to an officer convicted for making public statements urging African-American enlisted men to refuse to obey orders to go to Vietnam and referring to Special Forces personnel as "liars and thieves," "killers of peasants," and "murderers of women and children." Indeed, Levy could have had no reasonable doubt that his statements were punishable under the above rules.[227]

2. In the Civil Context

[E86] Regardless of whether a statute permitting the deprivation of one' s property or liberty is "penal" or "civil," it must meet the due process requirement of sufficient definiteness.[228] The elementary notion of fairness enshrined in the Court's constitu-

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[224] Parker v. Levy, 417 U.S. 733, 756 (1974).

[225] *Id.* at 749.

[226] *Id.* at 757, *quoting* United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32–33 (1963).

[227] Parker v. Levy, 417 U.S. 733, 752–57 (1974).

[228] *See* Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966). A state law permitting jurors to "determine, by their verdict, whether the [acquitted] defendant shall pay the costs" and providing for his commitment to jail in default of payment or security, is unconstitutionally vague; and the absence of any statutory standards is not cured by judicial interpretations that allow juries to impose costs on a defendant where they find the defendant's conduct, though not unlawful, was "reprehensible" or "improper," or where the jury finds that the defendant committed "some misconduct." *Id.* at 403–04.

tional jurisprudence dictates that a person receives fair notice of the conduct that will subject him to punishment and the severity of the penalty that a state may impose also in the civil context. Although "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, . . . the basic protection against 'judgments without notice' afforded by the Due Process Clause, . . . is implicated by civil penalties."[229] The Court has "expressed greater tolerance of enactments with civil, rather than criminal, penalties because the consequences of imprecision are qualitatively less severe."[230] In this context, the Court has held, that, "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code" and found that two days' suspension from school "does not rise to the level of a penal sanction calling for the full panoply of due process protections applicable to a criminal prosecution."[231]

E. OTHER DUE PROCESS RESTRICTIONS

1. In the Criminal Context

a. Entrapment

[E87] "[T]here can be no dispute that the Government may use undercover agents to enforce the law. 'It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.'"[232] "In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute."[233] "[A] valid entrapment defense has two related elements: government inducement of the crime and a lack of predis-

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[229] BMW of N. America, Inc. v. Gore, 517 U.S. 559, 574, n.22 (1996). Three guideposts, each of which indicated that BMW had not received adequate notice of the magnitude of the sanction that Alabama might impose to it for not advising its dealers, and hence their customers, of pre-delivery damage to new cars, when the cost of repair did not exceed 3 percent of the car's suggested retail price, led the Court to the conclusion that the award against BMW of punitive damages 500 times the amount of the actual harm was grossly excessive: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 574.

[230] Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99, n.13 (1982), *citing* Winters v. New York, 333 U.S. 507, 515 (1948) ("[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement").

[231] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986). The Court also found that the school disciplinary rule proscribing "*obscene*" language and the pre-speech admonitions of teachers had given adequate warning to Fraser that his lewd speech could subject him to sanctions.

[232] Jacobson v. United States, 503 U.S. 540, 548 (1992), *quoting* Sorrells v. United States, 287 U.S. 435, 442 (1932).

[233] Jacobson v. United States, 503 U.S. 540, 548 (1992), *citing* Sorrells v. United States, 287 U.S. 435, 442 (1932); Sherman v. United States, 356 U.S. 369, 372 (1958).

position on the part of the defendant to engage in the criminal conduct."[234] "Where the Government has induced an individual to break the law and the defense of entrapment is at issue, the prosecution must prove beyond reasonable doubt that the defendant was an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime."[235] Yet, that kind of defense is not of a constitutional dimension.[236] Therefore, "Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable."[237]

[E88] However, the Constitution does not tolerate the conviction of persons who were affirmatively misled by the responsible administrative agency into believing that the law did not apply in their situation. In *Raley*, the Court held that "due process precluded the conviction of individuals for refusing to answer questions asked by a state investigating commission which itself had erroneously provided assurances, express or implied, that the defendants had a privilege under state law to refuse to answer."[238] Similarly in *Cox*, it was held that "an individual could not be punished for demonstrating 'near' a courthouse where the highest police officials of the city had advised the demonstrators that they could meet where they did without violating the statutory proscription against demonstrations 'near' the courthouse."[239] In both cases the Court emphasized that to sustain the challenged convictions "would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him," in violation of the Due Process Clause.[240]

b. Arbitrary Penalties

[E89] A person who has been convicted for a crime is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense[241] "so long as that penalty is not cruel and unusual . . . and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause. In this context, . . . an argu-

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[234] Mathews v. United States, 485 U.S. 58, 63 (1988). In that case the Court held that, "even if the defendant in a federal criminal case denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Id.* at 62.

[235] Jacobson v. United States, 503 U.S. 540, 548–49 (1992).

[236] United States v. Russell, 411 U.S. 423, 433 (1973).

[237] *Id.*

[238] *See* United States v. Caceres, 440 U.S. 741, 753, n.15 (1979), *discussing* Raley v. Ohio, 360 U.S. 423, 437–38 (1959).

[239] *See* United States v. Caceres, 440 U.S. 741, 753, n.15 (1979), *discussing* Cox v. Louisiana, 379 U.S. 559 (1965).

[240] Raley v. Ohio, 360 U.S. 423, 426 (1959); Cox v. Louisiana, 379 U.S. 559, 571 (1965).

[241] "Legislatures have extremely broad discretion . . . in setting the range of permissible punishments for each offense." *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 432 (2001). It is not impermissible for judges to exercise discretion in imposing a sentence within the range prescribed by statute. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 481 (2000). Judicial decisions that operate within the legislatively enacted guidelines are typically reviewed for abuse of discretion. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 432 (2001).

ment founded on equal protection essentially duplicates an argument based on due process."[242]

[E90] In *Chapman*, petitioners were convicted for selling ten sheets (1,000 doses) of blotter paper containing LSD (a pure dose of LSD is so small that it must be sold to retail customers in a "carrier" created by dissolving pure LSD and, *inter alia*, spraying the resulting solution on paper), in violation of 21 U.S.C. Section 841, which called for a five-year mandatory minimum sentence for the offense of distributing more than one gram of "a mixture or substance containing a detectable amount" of LSD. Although petitioners' pure LSD weighed only 50 milligrams, the district court included the total weight of the paper and LSD, 5.7 grams, in calculating their sentences, thus requiring the imposition of the mandatory minimum sentence. The Court held that this statutory construction was not unconstitutional. Determining the lengths of sentences in accordance with the LSD carrier's weight was not arbitrary and, thus, did not violate due process. The penalty scheme was intended to punish severely large-volume drug traffickers at any level, and it increased the penalty for such persons by measuring the quantity of the drugs according to their street weight in the diluted form in which they were sold, not their active component's net weight. Thus, it was rational for Congress to set penalties based on the weight of blotter paper, the chosen tool of the trade for those trafficking in LSD. Congress was also justified in seeking to avoid arguments about the accurate weight of pure drugs that might have been extracted from the paper if it had chosen to calibrate sentences according to that weight. And, since the blotter paper seemed to be the carrier of choice, the vast majority of cases would do exactly what the sentencing scheme was designed to do—punish more heavily those dealing in larger amounts of drugs.[243]

c. Mandatory Non-Capital Sentences[244]

[E91] The legislature "has the power to define criminal punishments without giving the courts any sentencing discretion."[245] A sentencing scheme providing for "individualized sentences rests not on constitutional commands, but on public policy enacted into statutes."[246] Hence, a statute imposing a fixed sentence for distributing any quantity of LSD, in any form, without considering *individual* degrees of culpability, would clearly be constitutional.[247]

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[242] Chapman v. United States, 500 U.S. 453, 465 (1991), *citing* Jones v. United States, 463 U.S. 354, 362, n.10 (1983).

[243] Chapman v. United States, 500 U.S. 453, 464–66 (1991).

[244] Mandatory *death penalty* statutes are unconstitutional. *See* para. E112. With respect to mandatory *life sentence* schemes, see paras. E134, E136–E139.

[245] Chapman v. United States, 500 U.S. 453, 467 (1991), *citing ex parte* United States, 242 U.S. 27 (1916).

[246] Chapman v. United States, 500 U.S. 453, 467 (1991), *quoting* Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (plurality opinion).

[247] *See* Chapman v. United States, 500 U.S. 453, 467 (1991).

d. Conditions of Imprisonment

[E92] A prisoner has a constitutionally protected interest in not being arbitrarily subjected to unwelcome medical treatment.[248] Apart from that, challenged prison conditions cannot give rise to a due process violation unless those conditions constitute "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[249] A 30-day disciplinary segregation for misconduct has been held not to fall within this standard.[250]

2. In the Civil or Quasi-Criminal Context

a. In General

[E93] The Fourteenth Amendment's Due Process Clause makes the Eighth Amendment's prohibition against excessive fines applicable to the states; the Due Process Clause, of its own force, also prohibits the states from imposing "grossly excessive" punishments on tort-feasors.[251] In the same context, it has been held that the Due Process and Equal Protection Clauses protect individuals from sanctions that are "downright irrational."[252]

[E94] In early cases, the Court stated that the Due Process Clause of the Fourteenth Amendment imposed substantive limits beyond which penalties might not go[253] and that it would not review state action fixing the penalties for unlawful conduct unless the fines imposed were "so grossly excessive as to amount to a deprivation of property without due process of law."[254] Indeed, in *Southwestern Telegraph & Telephone Co.*, the Court set aside a penalty imposed on a telephone company, on the ground that, since there was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct on the part of the company, the penalty was so "plainly arbitrary and oppressive" as to violate the Due Process Clause.[255]

b. Excessive Punitive Damages[256]

[E95] Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former

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[248] Vitek v. Jones, 445 U.S. 480, 493 (1980); Washington v. Harper, 494 U.S. 210, 221–22 (1990).

[249] Sandin v. Conner, 515 U.S. 472, 484 (1995). *See also* McKune v. Lile, 536 U.S. 24, 37 (2002).

[250] Sandin v. Conner, 515 U.S. 472, 485–87 (1995). The Court found that the disciplinary punishment at issue did not work a major disruption in Conner's environment.

[251] Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 433 (2001), *citing* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996) and TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453–55 (1993) (plurality opinion).

[252] Hudson v. United States, 522 U.S. 93, 103 (1997).

[253] Seaboard Air Line Ry. Co. v. Seegers, 207 U.S. 73, 78 (1907). *See also* St. Louis I. M. & S. Ry. Co. v. Williams, 251 U.S. 63, 66–67 (1919); Standard Oil Co. of Indiana v. Missouri, 224 U.S. 270, 286 (1912). In each of those cases, the Court actually found no constitutional violation.

[254] Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909).

[255] Sw. Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 490–91 (1915).

[256] The Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awards in cases between private parties and does not constrain such an award when the

"are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."[257] The latter, which have been described as "quasi-criminal,"[258] "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing."[259] "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding."[260] Thus, "punitive damages pose an acute danger of arbitrary deprivation of property," which is "heightened when the decisionmaker is presented with evidence having little bearing on the amount that should be awarded."[261]

[E96] "While States possess discretion over the imposition of punitive damages, it is well established that there are substantive constitutional limitations on these awards."[262] The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on tort-feasors.[263] "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."[264] In deciding whether the relevant constitutional line has been crossed, courts reviewing punitive damages must consider three guideposts:

(1) the degree of reprehensibility of the defendant's misconduct;

(2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

(3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.[265]

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government neither has prosecuted the action nor has any right to recover a share of the damages awarded. *See* Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262–76 (1989).

257 Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

258 *See* Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting).

259 Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 432 (2001), *citing* Gertz v. Robert Welch, Inc. 418 U.S. 323, 350 (1974). "A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation." *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

260 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

261 *Id.* at 417–18.

262 *Id.* at 416.

263 The reason is that "elementary notions of fairness . . . dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996), *quoted in* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

264 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

265 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003). Due process guarantees judicial review of the amount awarded. *See* Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 432 (1994). Appellate courts should apply a *de novo* standard when reviewing trial court determinations of the constitutionality of punitive damages awards. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 436 (2001).

[E97] "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[266] In making this determination, courts must inquire whether: "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."[267] "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."[268] "A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. . . . Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. . . . A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis. . . . [And although] repeated misconduct is more reprehensible than an individual instance of malfeasance, . . . in the context of civil actions, courts must ensure the conduct in question replicates the prior transgressions."[269]

[E98] With respect to the second guidepost (the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award), the Court has observed that "single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range . . . of 145 to 1."[270] "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than [four-to-one] may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"[271] A higher ratio may also be justified in cases in which "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."[272] "The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory

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266 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

267 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003), *citing* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576–77 (1996).

268 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003), *citing* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

269 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421–23 (2003).

270 *Id.* at 425.

271 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003), *quoting* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

272 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

damages, can reach the outermost limit of the due process guarantee."[273] Furthermore, it must be taken into account that compensatory damages for emotional distress already contain a punitive element.[274] Besides, the wealth of a defendant may provide "an open-ended basis for inflating awards, . . . [but it] cannot make up for the failure of other factors, such as reprehensibility, to constrain significantly an award that purports to punish a defendant's conduct."[275]

[E99] The third guidepost is the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases. In *Haslip*, the Court also looked to criminal penalties that could be imposed.[276] "The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. . . . Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."[277]

[E100] In *Haslip*, the Court declared that imposing exemplary damages on an insurance corporation, under the doctrine of respondeat superior, when one of its agents commits intentional fraud within the scope of his employment, is not fundamentally unfair, for it rationally advances the state's interest in deterring fraud and creates a strong financial incentive for vigilance by insurers. In that case, the Court upheld a punitive damages award that was more than four times the amount of compensatory damages and more than 200 times the out-of-pocket hospital expenses of respondent Haslip, noting that, while the monetary comparisons were wide and might be close to the constitutional line, the challenged award "did not lack objective criteria."[278]

[E101] In *TXO*, the Court considered a punitive award of $10 million, which was 526 times greater than the amount of actual damages awarded. In upholding the challenged judgment, the plurality remarked that petitioner's malicious behavior was part of a larger pattern of fraud, trickery, and deceit. Furthermore, it relied heavily on the harm to the victim that would have ensued if the tortious plan had succeeded, that is the *potential* harm that might have resulted from the defendant's conduct and also took account of the fact that TXO was a large, wealthy company.[279]

[E102] *Gore* involved a punitive award of $2 million, whereas compensatory damages were $4,000, for non-disclosure of the pre-sale repainting of a new BMW. The harm inflicted on Gore was purely economic; the pre-sale repainting had no effect on the car's performance, safety features, or appearance. BMW's conduct evinced no indifference to, or reckless disregard for, the health and safety of others. Moreover, BMW could reasonably have interpreted the relevant state statutes as establishing safe harbors for non-disclosure of presumptively minor repairs, and there was no evidence that BMW

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[273] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

[274] *Id.* at 426.

[275] *Id.* at 427–428, *quoting* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 591 (1996) (Breyer, J., concurring).

[276] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991).

[277] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003).

[278] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991).

[279] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993). The case involved a fraudulent course of action on the part of TXO to win back the lucrative stream of royalties that it had ceded to Alliance.

had acted in bad faith, or that it had persisted in its course of conduct after it had been adjudged unlawful, or that it had engaged in deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive. In addition, the award was 500 times the amount of Gore's actual harm and substantially greater than Alabama's applicable $2,000 fine and the penalties imposed in other states for similar malfeasance. And, in the absence of a BMW history of non-compliance with known statutory requirements there was no basis for assuming that a more modest sanction would not have been sufficient. In light of the foregoing considerations, a five-member majority concluded that the award against BMW was grossly excessive and therefore violative of the Due Process Clause.[280]

[E103] Similarly, in *State Farm*, the Court struck down a punitive damages award of $145 million, 145 times higher than the compensatory award—$1 million for a year and a half of emotional distress suffered by the Campbells—imposed on State Farm Automobile Insurance Company because of its mishandling of the claims against the Campbells, who had been involved in a fatal car accident. State Farm's conduct was, indeed, reprehensible: it had disregarded the overwhelming likelihood of liability, declined to settle the ensuing claims for the $50,000 policy limit, ignored its own investigators' advice, taken the case to trial, leading to a judgment of $185,849, and initially refused to cover the $135,849 in excess liability. However, the state courts had used the case as a platform to expose and punish the perceived deficiencies of State Farm's nationwide operations, which bore no relation to the Campbells' harm. Moreover, the Campbells had shown no conduct similar to that which had harmed them. In addition, the challenged punitive award was 145 times the awarded amount of compensatory damages, a portion of which already contained a punitive element, since the actual damage was related to emotional distress. The Court concluded that the punitive award of $145 million was "neither reasonable nor proportionate to the wrong committed" and noted that, in light of the substantial compensatory damages awarded, due process likely would justify a punitive damages award at or near the amount of compensatory damages.[281]

F. THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

1. In General

[E104] The Eighth Amendment prohibits the infliction of cruel and unusual punishments.[282] Only criminal penalties fall within the scope of this prohibition.[283] Hence, the Eighth Amendment is not applicable to the deportation of aliens[284] or corporal punishment of pupils by their teachers,[285] not even to conditions of confinement of pretrial detainees.[286]

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[280] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).

[281] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003).

[282] The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 666 (1962); Wilson v. Seiter 501 U.S. 294, 296–97 (1991).

[283] Ingraham v. Wright, 430 U.S. 651, 664–71 (1977).

[284] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Mahler v. Eby, 264 U.S. 32 (1924).

[285] Ingraham v. Wright, 430 U.S. 651, 668–71 (1977).

[286] *Cf.* Bell v. Wolfish, 441 U.S. 520 (1979)

[E105] The Cruel and Unusual Punishments Clause embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," against which the Court evaluates penal measures[287] and requires observance of the *"evolving standards of decency that mark the progress of a maturing society."*[288] In assessing contemporary values, the Court relies on "objective factors to the maximum possible extent."[289] "[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[290] The Court also has been guided by the sentencing decisions of juries, because "they are a significant and reliable objective index of contemporary values."[291] In addition to objective evidence,[292] the Constitution contemplates that, in the end, the Court will bring its own judgment to bear on the question whether "there is reason to disagree with the judgment reached by the citizenry and its legislators."[293]

[E106] The Clause circumscribes the criminal process in three ways:

(1) It limits the kinds of punishment that can be imposed on those convicted of crimes;

(2) It proscribes punishment grossly disproportionate to the severity of the crime;[294] and

(3) It imposes substantive limits on what can be made criminal and punished as such.

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[287] Estelle v. Gamble, 429 U.S. 97, 102 (1976).

[288] Trop v. Dulles, 356 U.S. 86, 101 (1958) (emphasis added). *See also, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 821 (1988).

[289] Atkins v. Virginia, 536 U.S. 304, 312 (2002), *quoting* Harmelin v. Michigan, 501 U.S. 957, 1000 (1991).

[290] Atkins v. Virginia, 536 U.S. 304, 312 (2002), *quoting* Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

[291] McCleskey v. Kemp, 481 U.S. 279, 300 (1987).

[292] Other objective indicia have been considered to be the views expressed by respected professional organizations—such as the American Bar Association or the American Law Institute—and the international community. *See* Thompson v. Oklahoma, 487 U.S. 815, 830, n.31 (1988) (plurality opinion). In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Court noted that "[t]he opinion of the world community [against the juvenile death penalty], while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."

Opinion surveys indicating strong public opposition to a specific kind of punishment are not thought to establish a societal consensus, absent some legislative reflection of the sentiment expressed therein. *See* Penry v. Lynaugh, 492 U.S. 302, 334–35 (1989).

[293] Atkins v. Virginia, 536 U.S. 304, 313 (2002), *quoting* Coker v. Georgia, 433 U.S. 584, 597 (1977).

[294] Where the minimum sentence that the court might impose is cruel and unusual, the fault is in the law, not in the sentence, and if there is no other statute under which sentence can be imposed, the law must be declared void. Where sentence cannot be imposed under any law except that declared unconstitutional, the case cannot be remanded for new sentence, but the judgment must be reversed with directions to dismiss the proceedings. *See* Weems v. United States, 217 U.S. 349, 367, 382 (1910).

2. Kind or Method of Punishment

a. The Death Penalty[295]

[E107] Until *Furman*,[296] the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution.[297] Although this issue was presented and addressed in *Furman*, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional *per se*; two Justices would have reached the opposite conclusion; and three Justices left open the question whether such punishment may ever be imposed. Still, four years later, in *Gregg* and its companion cases, seven Justices recognized that the imposition of the death penalty is not *per se* cruel and unusual punishment in violation of the Eighth Amendment.[298] However, the Court has erected serious constitutional barriers to the imposition of capital punishment.

[E108] *First*, the death penalty, which is "unique in its severity and irrevocability,"[299] may be imposed only in murder cases.[300] The sentence of death for the crime of rape is forbidden as grossly disproportionate and excessive punishment.[301] While robbery is a serious crime deserving serious punishment, it is not a crime "so grievous an affront to humanity that the only adequate response may be the penalty of death;" the culpability of a robber who did not kill or intend to kill is different from that of the robbers who killed, and, under the Eighth Amendment, it is impermissible for the state to treat them alike.[302] Nevertheless, the Eighth Amendment does not prohibit the death penalty as disproportionate where "the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of . . . reckless indifference to human life."[303] Indeed, "the reckless disregard for human life, implicit in knowingly engaging in criminal activities known to carry a grave risk of death, represents a highly culpable mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result."[304]

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[295] *See also* para. K38 (*discriminatory administration of a capital sentencing scheme*).

[296] Furman v. Georgia, 408 U.S. 238 (1972).

[297] Before *Furman*, the Court, on a number of occasions, had both assumed and asserted the constitutionality of capital punishment. In several cases, that assumption had provided a necessary foundation for the decision, as the Court had been asked to decide whether a particular method of carrying out a capital sentence would have been allowed to stand under the Eighth Amendment. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947); *In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 134–35 (1879).

[298] Gregg v. Georgia, 428 U.S. 153 (1976).

[299] *Id.* at 187.

[300] *Cf.* Enmund v. Florida, 458 U.S. 782 (1982).

[301] Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion of four Justices).

[302] Enmund v. Florida, 458 U.S. 782, 797–98 (1982). The majority noted that it "would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." *Id.* at 799.

[303] Tison v. Arizona, 481 U.S. 137, 154, 158 (1987) (upholding a death penalty on two brothers who planned and carried out the armed prison breakout of their father and another convicted murderer, helped them to hijack a passing car containing a family of four, and witnessed the murder of the family by their father and the other escapee).

[304] *Id.* at 157–58.

[E109] *Second*, the capital punishment may be deemed as cruel for some particular categories of offenders. First, the Constitution prohibits a state from carrying out a sentence of death upon a prisoner who is insane; "[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."[305]

[E110] In *Penry*, the Court decided that the Eighth Amendment did not—then—categorically prohibit the execution of mentally retarded capital murderers.[306] The two state statutes prohibiting execution of the mentally retarded, even when added to the 14 states that rejected capital punishment completely, did not provide sufficient evidence of a national consensus against executing mentally retarded capital murderers. Moreover, all mentally retarded people of petitioner's ability (having an IQ between 50 and 63, a mental age of a six-and-a-half-year-old and a social maturity, or ability to function in the world, of a nine-year-old)—"by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility"—were not found to "inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." In addition to the varying degrees of mental retardation, the consequences of a retarded person's mental impairment, including the deficits in his or her adaptive behavior, might be ameliorated through education and habilitation. And the concept of "mental age" was an insufficient basis for a categorical Eighth Amendment rule, since it was imprecise and did not adequately account for individuals' varying experiences and abilities. The Court concluded that, while a national consensus against execution of the mentally retarded might someday emerge, reflecting the "evolving standards of decency that mark the progress of a maturing society," there was insufficient evidence of such a consensus at that time.[307] Indeed, 13 years later, in *Atkins*,[308] the Court revisited the issue and reversed course, finding that much had changed since the foregoing conclusion. After *Penry*, 16 more states had concluded that death was not a suitable punishment for a mentally retarded criminal; this fact reflected the consistency of the direction of change. The Court stressed that, because of the impairments and diminished culpability of the mentally handicapped, its death penalty jurisprudence provides two reasons consistent with the legislative consensus that such persons should be categorically excluded from execution. First, there is a serious question whether either justification recognized as a basis for the death penalty—retribution and deterrence of capital crimes—applies to mentally retarded offenders.[309] As to retribution, the severity of the appropriate punishment

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[305] Ford v. Wainwright, 477 U.S. 399, 410 (1986). The Court noted that it left to the states the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.

[306] Insanity defense includes mental defect or disease.

[307] Penry v. Lynaugh, 492 U.S. 302, 330–40 (1989). The Court noted that the sentencing body should be allowed to consider mental retardation as a mitigating circumstance in making the individualized determination whether death is the appropriate punishment in a particular case. *Id.* at 338–39.

[308] Atkins v. Virginia, 536 U.S. 304 (2002).

[309] "Unless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.'" *See* Atkins v. Virginia, 536 U.S. 304, 319 (2002), *quoting* Enmund v. Florida, 458 U.S. 782, 798 (1982).

necessarily depends on the offender's culpability. The Court has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. "If the culpability of the average murderer is insufficient to justify imposition of death, culpability of the mentally retarded offender surely does not merit that form of retribution."[310] As to deterrence, "the same cognitive and behavioral impairments that make mentally retarded defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the death penalty's deterrent effect with respect to offenders who are not mentally retarded."[311] In addition, mentally retarded defendants face a special risk of wrongful execution because of the possibility of false confessions and their lesser ability to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. "Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."[312]

[E111] In 1988, in *Thompson v. Oklahoma*, a four-Justice plurality held that the Eighth Amendment, prohibited the execution of a person who was under 16 years of age at the time of his or her offense. The plurality based its opinion on (1) the relevant state statutes; (2) the behavior of juries as evidenced by statistics; (3) the views expressed by the international community and professional organizations; (4) the juvenile's reduced culpability; and (5) the fact that the application of the death penalty to this class of offenders does not measurably contribute to retribution and deterrence.[313] The next year, a five-member majority found, in *Stanford*, that the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age did not constitute cruel and unusual punishment under the Eighth Amendment, considering that the pattern of federal and state laws revealed no national consensus forbidding the imposition of capital punishment on 16- or 17-year-old murderers.[314] Nonetheless, 16 years later, a divided Court reached a different conclusion in *Roper v. Simmons*. The objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of states (30 states prohibited the juvenile death penalty, comprising 12 that rejected the death penalty altogether, and 18 maintained it but, by express provision or judicial interpretation, excluded juveniles from its reach); the infrequency of its use even where it

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[310] Atkins v. Virginia, 536 U.S. 304, 319 (2002).

[311] *Id.* at 320.

[312] *Id.* at 320–21.

[313] Thompson v. Oklahoma, 487 U.S. 815, 821–38 (1988). Justice O'Connor concurred in vacating the challenged sentence, on the ground that, since the available evidence suggested a national consensus forbidding the imposition of capital punishment for crimes committed before the age of 16, there was considerable risk that, in enacting a statute authorizing capital punishment for murder without setting any minimum age, the Oklahoma legislature either had not realized that its actions would effectively render 15-year-olds death-eligible, or had not given the question serious consideration, whereas the Eighth Amendment required special care and deliberation in decisions that might lead to the imposition of the death penalty.

[314] Stanford v. Kentucky, 492 U.S. 361, 365–74 (1989). The majority noted that 22 of the 37 death penalty states permitted the death penalty for 16-year-old offenders, and, among these 37 states, 25 permitted it for 17-year-old offenders.

remained on the books; and the consistency in the trend toward abolition of the practice—provided sufficient evidence that contemporary society viewed juveniles, as categorically less culpable than the average criminal. Moreover, there are three general differences between juveniles under 18 and adults. First, a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. . . . The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[315] As the Court pointed out, "[t]hese differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult. . . . Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. . . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. . . . Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults."[316] Under these considerations, the Court concluded that the death penalty cannot be imposed upon juvenile offenders. In so holding, the Court also noted that the opinion of the world community against the juvenile death penalty, "while not controlling the outcome, [did] provide respected and significant confirmation for [its] conclusions."[317]

[E112] *Third*, mandatory death penalty statutes are unconstitutional.[318] "[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[319] This principle applies "even where the crime of first-degree murder is narrowly defined;" the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance but cannot justify a law allowing for no consideration of particularized mitigating factors in deciding whether the death sentence should be imposed.[320] Similarly a statute that mandates

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315 Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

316 *Id.* at 570–71.

317 *Id.* at 578.

318 Woodson v. N. Carolina, 428 U.S. 280, 303–05 (1976) (plurality opinion); Roberts Stanislaus v. Louisiana, 428 U.S. 325, 333–36 (1976) (plurality opinion).

319 Woodson v. N. Carolina, 428 U.S. 280, 304 (1976) (plurality opinion). "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.*

320 Roberts v. Louisiana, 431 U.S. 633, 636–37 (1977) (*per curiam*).

the death penalty for a prison inmate, who is convicted of murder while serving a life sentence without possibility of parole, violates the Eighth Amendment.[321]

[E113] *Fourth*, the sentencer, a jury or judge,[322] may not be given unbridled discretion in determining the fates of those charged with capital offenses. Central to the Court's holding in *Furman* "was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments."[323] "The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion."[324] Thus, the Court has held that a state must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[325]

[E114] To render a defendant *eligible* for the death penalty in a homicide case, the jury[326] must convict the defendant of murder and find "one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase. . . . The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor."[327] The aggravating circumstance must meet two requirements. "First, the circumstance may not apply to every defendant convicted of a murder: it must apply only to a subclass of defendants convicted of murder. . . . Second, the aggravating circumstance may not be unconstitutionally vague."[328]

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[321] Sumner v. Nevada Dep't of Prisons, 483 U.S. 66 (1987).

[322] Spaziano v. Florida, 468 U.S. 447 (1984). *See also* Harris v. Alabama, 513 U.S. 504 (1995) (the Eighth Amendment does not require the state to define the weight the sentencing judge must give to an advisory jury verdict).

[323] *See* Woodson v. N. Carolina, 428 U.S. 280, 302 (1976) (plurality opinion), *citing* Furman v. Georgia, 408 U.S. 238 (1972) at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *cf. id.* at 253–57 (Douglas, J., concurring).

[324] California v. Brown, 479 U.S. 538, 541 (1987), *citing* Gregg v. Georgia, 428 U.S. 153 (1976) and Furman v. Georgia, 408 U.S. 238 (1972).

[325] Zant v. Stephens, 462 U.S. 862, 877 (1983).

[326] Under the Sixth Amendment, capital defendants are entitled to "a jury determination of any fact on which the legislature conditions" the imposition of the death penalty. *See* Ring v. Arizona, 536 U.S. 584, 589 (2002), *overruling* Walton v. Arizona, 497 U.S. 639 (1990).

[327] Tuilaepa v. California, 512 U.S. 967, 971–72 (1994), *citing* Lowenfield v. Phelps, 484 U.S. 231, 244–46 (1988). The culpability of the average murderer is insufficient to justify imposition of death. *See* Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

[328] Tuilaepa v. California, 512 U.S. 967, 972 (1994), *citing* Arave v. Creech, 507 U.S. 463, 471, 474 (1993) (an aggravating factor is constitutionally infirm if the sentencing jury "fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty"). "When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide *some* guidance to the sentencer." *See* Bell v. Cone, 543 U.S. 447, 453 (2005) (*per curiam*), *quoting* Walton v. Arizona, 497 U.S. 639, 654 (1990).

The Eighth Amendment permits sentencing juries to consider evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family. Assessment of the harm caused by the defendant has long been an important factor in deter-

[E115] *Fifth*, in determining whether a defendant eligible for the death penalty should in fact receive that sentence (*selection* stage), the sentencer cannot be precluded from considering, as a mitigating factor, "any aspect of the defendant's character or record and any of the circumstances of the particular offense that the defendant proffers as a basis for a sentence less than death."[329] "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."[330] The rule's central requirement is that a state "may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all."[331]

[E116] "A capital sentencer need not be instructed how to weigh any particular fact in the sentencing decision."[332] Indeed, the Court's decisions suggest that complete jury discretion in this field is constitutionally permissible.[333] Nevertheless, a state is not barred from guiding the sentencer's consideration of mitigating evidence. Indeed, "there is no constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'"[334] Hence, there is no constitutional objection to a statute providing that the jury must impose the death penalty, if it decides that the aggravating circumstances "outweigh" the mitigating circumstances[335] or when it finds no such mitigating circumstances.[336]

[E117] *Sixth*, "[b]ecause the proper degree of definition of eligibility and selection factors often is not susceptible of mathematical precision, [the Court's] vagueness review is quite deferential, [and relies] on the basic principle that a factor is not unconstitutional if it has some 'common sense core of meaning that criminal juries should be capable of understanding.'"[337] The Court has found only a few factors vague, and those, in fact, are quite similar to one another: murder "especially heinous, atrocious, or cruel;"[338]

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mining the appropriate punishment, and *"victim impact"* evidence is simply another method of informing the sentencing authority about such harm. *See* Payne v. Tennessee, 501 U.S. 808, 817, 825, 827 (1991), *overruling* Booth v. Maryland, 482 U.S. 496 (1987), and S. Carolina v. Gathers, 490 U.S. 805 (1989).

329 Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990).

330 Zant v. Stephens, 462 U.S. 862, 879 (1983).

331 Johnson v. Texas, 509 U.S. 350, 361 (1993). In *Boyde v. California*, 494 U.S. 370, 380 (1990), the Court held that the standard for determining whether jury instructions satisfy these principles is whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

332 Tuilaepa v. California, 512 U.S. 967, 979 (1994), *citing* California v. Ramos, 463 U.S. 992, 1008–09 (1983).

333 *See* Buchanan v. Angelone, 522 U.S. 269, 276–77 (1998), *citing* Tuilaepa v. California, 512 U.S. 967, 978–79 (1994), and Zant v. Stephens, 462 U.S. 862, 875 (1983).

334 Johnson v. Texas, 509 U.S. 350, 362 (1993), *quoting* Boyde v. California, 494 U.S. 370, 377 (1990).

335 Boyde v. California, 494 U.S. 370, 377 (1990).

336 Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990).

337 Tuilaepa v. California, 512 U.S. 967, 973 (1994), *quoting* Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring in judgment).

338 Godfrey v. Georgia, 446 U.S. 420, 427–29 (1980).

murder "outrageously or wantonly vile, horrible or inhuman."[339] In providing for individualized sentencing, "the States may adopt capital sentencing processes that rely upon the jury, in its sound judgment, to exercise wide discretion."[340] That is evident from the numerous factors that the Court has upheld against vagueness challenges: consideration of the victim's "personal characteristics," "young age, slight stature, background," or the effect of the crime on the victim's family;[341] consideration of the "circumstances of the crime of which the defendant was convicted and the existence of any special circumstances found to be true," the "presence or absence of criminal activity involving the use or attempted use of force or violence or the express or implied threat to use force or violence," and "the defendant's age at the time of the crime;"[342] question whether the defendant was a "cold-blooded, pitiless slayer;"[343] question whether perpetrator "inflicted mental anguish or physical abuse before the victim's death" with "mental anguish including a victim's uncertainty as to his ultimate fate;"[344] question whether the crime was a "conscienceless or pitiless crime which was unnecessarily torturous to the victim;"[345] question "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[346]

[E118] In addition, the Eighth Amendment places limits on the methods of carrying out a death penalty. Burning at the stake, crucifixion or breaking on the wheel,[347] drawing, quartering, and public dissecting[348] are cruel and unusual punishments. Conversely, the Court has upheld public execution by shooting[349] and electrocution[350] as permissible modes of punishment. The Court also has tolerated execution by hanging[351] or exposure to cyanide gas,[352] as well as the execution of prisoners who have spent nearly 20 years or more on death row.[353]

[E119] An accident, although it may produce added anguish, is not, on that basis alone, to be characterized as wanton infliction of unnecessary pain. In *Louisiana ex rel. Francis*, the Court concluded that it was not unconstitutional to force a prisoner to undergo a second effort to electrocute him after a mechanical malfunction had thwarted the first attempt. A four-Justice plurality observed that "the cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment,

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339 Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988).

340 Tuilaepa v. California, 512 U.S. 967, 974 (1994).

341 Jones v. United States, 527 U.S. 373, 400 (1999) (plurality opinion).

342 Tuilaepa v. California, 512 U.S. 967, 975–80 (1994). The Court noted that "difficulty in application is not equivalent to vagueness." *Id.* at 977.

343 Arave v. Creech, 507 U.S. 463, 472–73 (1993).

344 Walton v. Arizona, 497 U.S. 639, 654 (1990).

345 Proffitt v. Florida, 428 U.S. 242, 255–58 (1976) (plurality opinion of three Justices).

346 Jurek v. Texas, 428 U.S. 262, 274–76 (1976) (plurality opinion of three members of the Court).

347 *In re* Kemmler, 136 U.S. 436, 446 (1890).

348 Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878).

349 *Id.*

350 *In re* Kemmler, 136 U.S. 436 (1890).

351 Campbell v. Wood, 511 U.S. 1119 (1994) (*per curiam*) (stay of execution denied).

352 Gray v. Lucas, 463 U.S. 1237 (1983) (writ of certiorari and stay of execution denied).

353 *See* Lackey v. Texas, 514 U.S. 1045 (1995); Elledge v. Florida, 525 U.S. 944 (1998); Moore v. Nebraska, 528 U.S. 990 (1999) (certiorari denied).

not the necessary suffering involved in any method employed to extinguish life," and considered that the second execution would not violate the Eighth Amendment, because the first attempt was an "unforeseeable accident."[354]

b. Deprivation of Citizenship

[E120] *Trop*, a native-born American, was declared to have lost his citizenship by reason of a conviction by court-martial for wartime desertion. A four-Justice plurality concluded that loss of citizenship amounted to a cruel and unusual punishment that violated the Eighth Amendment, stressing that denationalization is a form of punishment more primitive than torture, for it strips the citizen of his status in the national and international political community and deprives him "of the right to have rights."[355]

c. Prison Deprivations

i. Generally

[E121] In *Estelle v. Gamble*, the Court first acknowledged that the Cruel and Unusual Punishments Clause can be applied to some deprivations that are not specifically part of the sentence but are suffered during imprisonment.[356] "[T]he Constitution does not mandate comfortable prisons"[357] but neither does it permit inhumane ones, and it is now settled that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."[358] In its prohibition of cruel and unusual punishments, the Eighth Amendment "places restraints on prison officials, who may not, for example, use excessive physical force against prisoners."[359] "The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that prisoners receive adequate food, clothing, shelter and medical care,"[360] and are obliged "to take reasonable measures to guarantee the safety of the inmates."[361] The Court has recognized, under federal law, an implied damages remedy for the imposition of cruel and unusual punishments on prisoners.[362]

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354 Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947). Justice Frankfurter's concurrence, based solely on the Due Process Clause of the Fourteenth Amendment, concluded that, since the first attempt had failed because of "an innocent misadventure," the second would not be "repugnant to the conscience of mankind." *Id.* at 470–71. The four dissenters held that two separated, deliberate, and intentional applications of electric current were sufficiently "cruel and unusual" to be prohibited.

355 Trop v. Dulles, 356 U.S. 86, 101–02 (1958). Another member of the Court concluded that the statute authorizing deprivations of citizenship exceeded Congress' legislative powers.

356 Estelle v. Gamble, 429 U.S. 97 (1976).

357 Rhodes v. Chapman, 452 U.S. 337, 349 (1981).

358 Helling v. McKinney, 509 U.S. 25, 31 (1993).

359 Farmer v. Brennan, 511 U.S. 825, 832 (1994), *citing* Hudson v. McMillian, 503 U.S. 1, 5–12 (1992).

360 Farmer v. Brennan, 511 U.S. 825, 832 (1994). *Cf.* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

361 Hudson v. Palmer, 468 U.S. 517, 526–27 (1984).

362 Carlson v. Green, 446 U.S. 14, 18–25 (1980). However, *Bivens*-type actions may be

ii. Conditions of Imprisonment—Medical Care of Prisoners

[E122] Conditions of confinement, "alone or in combination," "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent such conditions are restrictive and even harsh, they are part of the penalty that criminals pay for their offenses against society."[363]

[E123] In the context of prison conditions, a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be "objectively, sufficiently serious;"[364] "a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'"[365] "For a claim . . . based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm."[366] Indeed, the Eighth Amendment protects against *current* unnecessary and wanton infliction of pain, as well as *future* harm to inmates. The Amendment requires that inmates be furnished with the basic human needs, one of which is reasonable safety. Thus, prison authorities may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering" in the future; the Eighth Amendment protects against exposing a prisoner to a "sufficiently substantial risk of serious damage to his future health," such as demonstrably unsafe drinking water or serious communicable diseases. An injunction cannot be denied to inmates who plainly prove an unsafe, life- or health-threatening condition, on the ground that nothing yet has happened to them.[367]

[E124] The second requirement follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment. To violate the Cruel and Unusual Punishments Clause, a prison official must have a "sufficiently culpable state of mind."[368] That state of mind is one of "deliberate indifference" to the inmates' health or safety and can be inferred from the fact that the risk of harm is obvious.[369] Subjective recklessness is the appropriate test for deliberate indifference; "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[370] Nevertheless, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately

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brought only against federal agents, not against federal agencies or private entities acting under color of federal law. *See* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 484–86 (1994); Corr. Servs. Co. v. Malesko, 534 U.S. 61 (2001).

363 Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

364 Farmer v. Brennan, 511 U.S. 825, 834 (1994), *citing* Wilson v. Seiter, 501 U.S. 294, 298 (1991).

365 Farmer v. Brennan, 511 U.S. 825, 834 (1994), *quoting* Rhodes v. Chapman, 452 U.S. 337, 347 (1981). *See also* Hudson v. McMillian, 503 U.S. 1, 8–9 (1992).

366 Farmer v. Brennan, 511 U.S. 825, 834 (1994), *citing* Helling v. McKinney, 509 U.S. 25, 35 (1993).

367 *See* Helling v. McKinney, 509 U.S. 25, 33–35 (1993). Similarly, a prisoner need not wait until he is actually assaulted before obtaining relief. *See* Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980), *discussed in* Helling v. McKinney, 509 U.S. 25, 34 (1993).

368 Hudson v. McMillian, 503 U.S. 1, 8 (1992).

369 Farmer v. Brennan, 511 U.S. 825, 834, 842 (1994).

370 *Id.* at 837.

was not averted."[371] Accordingly, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[372]

[E125] Deliberate indifference to serious medical needs of prisoners is prohibited by the Eighth Amendment. "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. . . . This conclusion does not mean, however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment. . . . [A]n inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.' Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[373]

[E126] *Rhodes v. Chapman* dealt with the practice of "double celling" of inmates at a maximum security prison. The lower courts had found the practice violative of the Eighth Amendment, resting on five considerations: (1) inmates at the prison were serving long terms of imprisonment; (2) the prison housed 38 percent more inmates than its "design capacity;" (3) the recommendation of several studies that each inmate have at least 50–55 square feet of living quarters, as opposed to the 63 square feet shared by the double celled inmates; (4) the suggestion that double celled inmates spent most of their time in their cells with their cellmates; and (5) the fact that double celling at the prison was not a temporary condition. The Court disagreed; such considerations fall far short, in themselves, of proving cruel and unusual punishment, and are weighed by the legislature and prison administration, rather than by a court.[374]

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[371] *Id.* at 844.

[372] *Id.* at 847. "One does not have to await the consummation of threatened injury to obtain preventive relief." In a suit for prospective relief, the subjective factor, deliberate indifference, "should be determined in light of the prison authorities' current attitudes and conduct, their attitudes and conduct at the time suit is brought and persisting thereafter." In making the requisite showing of subjective culpability, the prisoner may rely on developments that postdate the pleadings and pre-trial motions, as prison officials may rely on such developments to show that the prisoner is not entitled to an injunction. *Id.* at 845–47.

[373] Estelle v. Gamble, 429 U.S. 97, 104–106 (1976). Considering that four different doctors had seen respondent on 17 occasions during a three-month span and treated his injury and other problems, the Court rejected the inmate's claim in that case that prison doctors had inflicted cruel and unusual punishment by inadequately attending to his medical needs. The doctors' failure to perform an X-ray or to use additional diagnostic techniques was not found to constitute cruel and unusual punishment but, at most, medical malpractice, cognizable in the state courts.

[374] Rhodes v. Chapman, 452 U.S. 337, 348–50 (1981). Three Justices, concurring, noted that in determining when prison conditions pass beyond legitimate punishment and become cruel and unusual, the "touchstone is the effect upon the imprisoned. . . . The court must examine the effect upon inmates of the condition of the physical plant (lighting, heat, plumbing,

[E127] In *Hutto v. Finney*, the Court considered the relationship between the Eighth Amendment and conditions of confinement in "punitive isolation" in the Arkansas prison system. An average of four, and sometimes as many as ten, prisoners were crowded into small, vandalized cells. Because inmates in punitive isolation were often violently anti-social, overcrowding led to persecution of the weaker prisoners. Prisoners in isolation received fewer than 1,000 calories a day; their meals consisted primarily of four-inch squares of "grue," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan. Because of their inadequate numbers, guards assigned to the punitive isolation cells frequently resorted to physical violence, using nightsticks and mace in their efforts to maintain order. Prisoners were sometimes left in isolation for months, their release depending on their attitudes as appraised by prison personnel. The Court admitted that these conditions, "taken as a whole," violated the prohibition against cruel and unusual punishment. In addition, it noted that the length of confinement could not be ignored in deciding whether the confinement met constitutional standards; a filthy, overcrowded cell and a diet of "grue" might be tolerable for a few days and intolerably cruel for weeks or months. Subsequently it upheld the challenged district court's order placing a 30-day limitation on punitive isolation.[375]

[E128] Among the unnecessary and wanton inflictions of pain, forbidden by the Eighth Amendment, are those that are "totally without penological justification." Hope, a prison inmate, was handcuffed to a "hitching post," following his refusal to work and his consequent fight with a guard. He was shirtless all day and the sun burned his skin. He remained attached to the post for approximately seven hours. During this seven-hour period, he was given water only once or twice and was given no bathroom breaks. Furthermore, at one point, a guard taunted Hope about his thirst. The Court found that the use of the hitching post under these circumstances was offensive to human dignity and amounted to gratuitous infliction of wanton and unnecessary pain, in violation of the Eighth Amendment.[376]

[E129] Withdrawal of visitation privileges may make the prisoner's confinement unbearable and, therefore, is reviewable under the Eighth Amendment. A prison regulation providing that inmates who have committed two substance-abuse violations may receive only clergy and attorneys, but can apply for reinstatement of visitation privileges after two years, has been upheld against an Eighth Amendment challenge. Such a rule serves the legitimate goal of deterring the use of drugs and alcohol within the prisons, constitutes a rational means of effecting prison discipline, and is not a dramatic departure from accepted standards for conditions of confinement. Nevertheless, the case

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ventilation, living space, noise levels, recreation space); sanitation (control of vermin and insects, food preparation, medical facilities, lavatories and showers, clean places for eating, sleeping, and working); safety (protection from violent, deranged, or diseased inmates, fire protection, emergency evacuation); inmate needs and services (clothing, nutrition, bedding, medical, dental, and mental health care, visitation time, exercise and recreation, educational and rehabilitative programming); and staffing (trained and adequate guards and other staff, avoidance of placing inmates in positions of authority over other inmates). . . . When the *cumulative* impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration, the court must conclude that the conditions violate the Constitution." *Id.* at 364.

375 Hutto v. Finney, 437 U.S. 678, 686–87 (1978).

376 Hope v. Pelzer, 536 U.S. 730, 737–38 (2002).

might be different, if the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate.[377]

iii. Use of Excessive Force Against Inmates

[E130] "[O]fficials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force. Despite the weight of these competing concerns, corrections officials must make their decisions in haste, under pressure, and frequently without the luxury of a second chance. . . . [A]ccordingly, . . . application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"[378]

[E131] "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need to maintain or restore discipline through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that 'prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that, in their judgment, are needed to preserve internal order and discipline and to maintain institutional security.' . . . In recognition of these similarities, [the Court has held] that, whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is [the same as described above]: whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[379]

[E132] "[T]he extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation, 'or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.' . . . In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of a forceful response.' The absence of serious injury is therefore relevant to, but does not end, the Eighth Amendment inquiry. . . . When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. . . . This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical pun-

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[377] Overton v. Bazzetta, 539 U.S. 126 (2003).

[378] Hudson v. McMillian, 503 U.S. 1, 6 (1992), *discussing* and *quoting* Whitley v. Albers, 475 U.S. 312, 320–21 (1986). The latter case involved an Eighth Amendment claim of an inmate shot in the knee by a guard during a prison riot. The Court rejected the claim considering, *inter alia*, that respondent could reasonably be thought to pose a threat to the attempt of the security manager to free a hostage. *Id.* at 322–26. The Court also stated that, in the prison security context, the Due Process Clause affords no greater protection than does the Cruel and Unusual Punishments Clause. *Id.* at 327.

[379] Hudson v. McMillian, 503 U.S. 1, 6–7 (1992).

ishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. . . . [Still the Amendment does not reach] *de minimis* uses of physical force, provided that such use is not of a sort 'repugnant to the conscience of mankind.'"[380]

3. Proportionality of Sentences—Mandatory Life Imprisonment

[E133] In the landmark case of *Weems*, the Court identified a second principle inherent in the Eighth Amendment, "that punishment for crime should be graduated and proportioned to offense."[381] However, the only "clearly established" law emerging from the Court's jurisprudence in this area is that a "*gross disproportionality*" principle applies to such sentences; because the Court's cases lack clarity regarding what factors may indicate gross disproportionality, the principle's precise contours are unclear, applicable only in the "exceedingly rare" and "extreme" case.[382]

[E134] In *Rummel*, the Court held constitutional a mandatory life sentence—pursuant to Texas' recidivist statute—*with parole available within 12 years*, for the offense of obtaining $120 by false pretenses, committed by an offender with two prior felony convictions, involving small amounts of money. The Court noted that "like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction" and that "Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State." Moreover, taking into account that "parole is an established variation on

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[380] *Id.* at 7, 9–10 (1992), *quoting* Whitley v. Albers, 475 U.S. 312, 321, 327 (1986). Blows that caused bruises, swelling, loosened teeth, and a cracked dental plate, are not *de minimis* for Eighth Amendment purposes. *Id.* at 10.

[381] Weems v. United States, 217 U.S. 349, 367 (1910). This case represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. Weems, an officer of the Bureau of Coast Guard and Transportation of the U.S. Government of the Philippine Islands, was convicted of falsifying a public and official document. He was sentenced to 15 years' incarceration at hard labor with chains on his ankles, to an unusual loss of his civil rights, and to perpetual surveillance. In striking down the challenged penalty imposed, the Court examined the punishment in relation to the offense, compared the punishment to those inflicted for other crimes and to those imposed in other jurisdictions, and concluded that the punishment was excessive. The Court rejected the argument that the statutory provision of imprisonment was separable from the accessory punishment (a chain at the ankle and wrist of the offender, hard and painful labor, etc.), reasoning that the statute united the penalties of *cadena temporal*, principal and accessory, and it was not in the Court's power to separate them, even if they were separable, unless their independence was such that it could be said that their union had not been made imperative by the legislature.

In *Howard v. Fleming*, 191 U.S. 126, 136 (1903), the Court, in essence, had followed this approach. In rejecting the claim that ten-year sentences for conspiracy to defraud were cruel and unusual, the Court considered the nature of the crime, the purpose of the law, and the length of the sentence imposed.

[382] Lockyer v. Andrade, 538 U.S. 63, 71–73 (2003). In that case, the Court considered if a state court's decision to affirm Andrade's conviction to two consecutive terms of 25 years to life, under the California "three strikes" statute, was contrary to, or an unreasonable application of, the Court's clearly established federal law, within the meaning 28 U.S.C. Section 2254(d)(1).

imprisonment of convicted criminals," the five-Justice majority relied heavily on the possibility that petitioner would not actually be imprisoned for the rest of his life, since he was likely to have been eligible for parole within 12 years of his initial confinement.[383]

[E135] In *Hutto v. Davis*, the defendant was sentenced to two consecutive terms of 20 years in prison for possession with intent to distribute nine ounces of marijuana and distribution of marijuana. The Court found the sentence constitutional and stated that "federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare."[384]

[E136] In *Solem v. Helm*, the Court confronted a sentence of life imprisonment *without parole*, for the crime of writing a $100 check on a non-existent bank account, committed by an offender with six prior non-violent felony convictions, including three for burglary. A five-Justice majority recognized that courts "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes" and underlined that "no penalty is *per se* constitutional."[385] Moreover, it pointed out that three factors may be relevant to a determination of whether a sentence is so disproportionate that it violates the Eighth Amendment: "(1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions."[386] Yet, "no one factor will be dispositive in a given case."[387] Applying these factors and considering the gravity of Helm's prior offenses, the Court struck down the defendant's sentence, specifically noting the contrast between that sentence and the sentence in *Rummel*, pursuant to which the convict was eligible for parole.[388]

[E137] *Harmelin* involved a first-time offender convicted of possessing 672 grams of cocaine. He was sentenced to a mandatory term of life in prison *without possibility of parole*. A five-Justice majority of the Court rejected petitoner's claim that his sentence was so grossly disproportionate that it violated the Eighth Amendment.[389] The Court, however, could not agree on why his proportionality argument failed. Two members of the Court declined to apply gross disproportionality principles in reviewing non-capital sentences.[390] Justice Kennedy, joined by two other members of the Court, concurred in part and concurred in the judgment. Kennedy recognized that the Eighth Amendment's Cruel and Unusual Punishments Clause encompasses a "narrow proportionality principle" that applies to non-capital sentences.[391] He then identified five

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383 Rummel v. Estelle, 445 U.S. 263, 268–85 (1980).

384 Hutto v. Davis, 454 U.S. 370, 374 (1982) (*per curiam*).

385 Solem v. Helm, 463 U.S. 277, 290 (1983).

386 *Id.* at 292.

387 *Id.* at 291, n.17.

388 The Court also declined to admit that the possibility of commutation of a life sentence matches the possibility of parole. Assuming good behavior, parole is the normal expectation in the vast majority of cases and is governed by specified legal standards, whereas commutation is an *ad hoc* exercise of executive clemency that may occur at any time for any reason without reference to any standards. *Id.* at 300–301.

389 Harmelin v. Michigan, 501 U.S. 957 (1991).

390 *Id.* at 994.

391 *Id.* at 996–97 (opinion of Kennedy, J., joined by O'Connor and Souter, JJ.).

principles that give content to the uses and limits of proportionality review: (1) "the fixing of prison terms for specific crimes involves a substantial penological judgment that, as a general matter, is properly within the province of the legislature," and reviewing courts should grant substantial deference to legislative determinations; (2) "the Eighth Amendment does not mandate adoption of any one penological theory," taking into account that "the federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation, . . . and competing theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic;" (3) "marked divergences both in sentencing theories and the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure, . . . [and] differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of terms for particular crimes;" (4) "proportionality review by federal courts should be informed by objective factors to the maximum extent possible;" (5) the foregoing principles inform the final one: the Eighth Amendment does not require strict proportionality between crime and sentence, but rather "forbids only extreme sentences that are grossly disproportionate to the crime."[392] Reading *Solem, Davis, Rummel*, and *Weems*, Justice Kennedy also pointed out that "one factor may be sufficient to determine the constitutionality of a particular sentence" and stated that intra-jurisdictional and inter-jurisdictional comparative analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.[393] Taking into consideration that 650 grams of cocaine had a potential yield of between 32,500 and 65,000 doses, Justice Kennedy admitted that the Michigan legislature "could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—[wa]s momentous enough to warrant the deterrence and retribution of a life sentence without parole." Accordingly, he upheld the challenged punishment, without conducting a comparative analysis between Harmelin's sentence and sentences imposed for other crimes in Michigan and for the same crime in other jurisdictions.[394]

[E138] In the same case, Harmelin further argued that it was "cruel and unusual" to receive a mandatory sentence of such severity, without any consideration of so-called

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[392] *Id.* at 998–1001.

[393] *Id.* at 1004–05. Three Justices, in dissent, remarked that *Solem* was directly to the contrary, for there (463 U.S. at 291, n.17) the Court had made clear that "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment." *Id.* at 1019.

[394] *Id.* at 1003–05. Three members of the Court dissented, noting, among other things, that the challenged statute was not "tailored to a defendant's personal responsibility and moral guilt." To convict someone under that statute, it was only necessary to prove that the defendant knowingly *possessed* a mixture containing narcotics that weighed at least 650 grams. There was no *mens rea* requirement of intent to distribute the drugs, as there was in a parallel statute. Indeed, the presence of a separate statute, which reached manufacture, delivery, or possession with intent to do either, undermined the state's position that the purpose of the possession statute was to reach drug dealers. Although intent to deliver could be inferred from the amount of a controlled substance possessed by the accused, the inference was one to be drawn by the jury. Moreover, the statute did not require a pecuniary motive and applied equally to first-time offenders, such as petitioner, and recidivists. *Id.* at 1023–25.

mitigating factors, such as, in his case, the fact that he had had no prior felony convictions. A five-Justice majority rejected this contention, finding that it had no support in the text and history of the Eighth Amendment and stressing that "severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." Moreover, although petitioner's claim found some support in the so-called "individualized capital sentencing doctrine" of the Court's death penalty jurisprudence,[395] the majority explained that the specific doctrine might not be extended outside the capital context because of the qualitative differences between death—a punishment which is unique in its irrevocability—and all other penalties.[396]

[E139] In *Ewing*,[397] the Court dealt with a conviction under the California "three strikes" law. There a five-member majority upheld a mandatory sentence of life imprisonment, with possibility of parole after a term of 25 years, for the crime of stealing three golf clubs, priced at $399 a piece, committed by an offender previously convicted of numerous offenses, including four "serious or violent" felonies (three burglaries and a robbery). Once more, the majority was divided. Two Justices agreed that the Eighth Amendment's Cruel and Unusual Punishments Clause contains no proportionality principle. Three members of the Court applied the proportionality principles set forth in Justice Kennedy's concurrence in *Harmelin* and concluded that the challenged sentence was not grossly disproportionate, for it was justified by the state's public-safety interest in incapacitating and deterring recidivist felons and amply supported by Ewing's long, serious criminal record.[398] The same five-member majority also held that, in applying the gross disproportionality principle, for 28 U.S.C. Section 2254(d)(1) purposes,[399] it was not unreasonable for a California court to affirm a sentence of two consecutive terms of 25 years to life in prison—carrying a 50-year minimum before parole eligibility—for the offense of stealing $150 worth videotapes, committed by an 37-year-old man with five prior felony and misdemeanor convictions (for transportation of marijuana, first-degree residential burglary, and theft).[400]

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[395] *See* para. E112.

[396] Harmelin v. Michigan, 501 U.S. 957, 994–96 (1991). *Cf.* Chapman v. United States, 500 U.S. 453, 467 (1991) (the legislature "has the power to define criminal punishments without giving the courts any sentencing discretion").

[397] Ewing v. California, 538 U.S. 11 (2003).

[398] *Id.* at 29–30. The same Justices noted that, in weighing the offense's gravity, both the sentence-triggering criminal conduct and the offender's criminal history should be placed on the scales. *Id.* at 29. The four dissenters found Ewing's sentence grossly disproportionate, even under *Harmelin's* narrow proportionality framework. Still they observed that the three-factor analysis established in *Solem*, which specifically had addressed recidivist sentencing, seemed more directly on point.

[399] This section provides that "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

[400] Lockyer v. Andrade, 538 U.S. 63 (2003).

4. Punishable Conduct

[E140] Legislatures have extremely broad discretion in defining criminal offenses.[401] Nevertheless, the Cruel and Unusual Punishment Clause of the Eighth Amendment imposes substantive limits on what can be made criminal and punished.[402] In *Robinson v. California*, the Court found unconstitutional a state statute that made the status of being addicted to a narcotic drug a criminal offense. The statute did not punish a person for the use of narcotics, for their purchase, sale or possession, or for anti-social or disorderly behavior resulting from their administration; it criminalized not an *act* but the mere "*status*" or "chronic condition" of narcotic addiction of an individual, who could be prosecuted at any time before he reformed. The Court stressed that a state may not punish a person for being mentally ill, or a leper, or afflicted with a venereal disease.[403] Considering that narcotic addiction is an illness, which, in fact, may be contracted innocently or involuntarily,[404] the Court concluded that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[405]

[E141] In *Powell v. Texas*, the Court refused to extend the above rationale to punishment of public drunkenness by a chronic alcoholic. *Robinson* was not considered controlling, since appellant had been convicted not for being a chronic alcoholic but for "public behavior which may create substantial health and safety hazards both for [him] and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community." A five-member majority, in upholding the conviction, noted that the record did not show that Powell suffered from such an irresistible compulsion to drink and to get drunk in public, that he was unable to control his performance of these acts, and thus could not be deterred from public intoxication.[406]

G. THE EXCESSIVE FINES CLAUSE

[E142] The Eighth Amendment prohibits the imposition of excessive fines. The Fourteenth Amendment's Due Process Clause makes the aforesaid prohibition applicable to the states.[407] The Eighth Amendment's text is not expressly limited to criminal cases, and its history does not require such a limitation.[408] However, the Excessive Fines Clause does not apply to punitive damages awards in cases between private parties; the

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401 Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424 (2001), *citing* Schall v. Martin, 467 U.S. 253, 268–269, n.18 (1984).

402 *Cf.* Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

403 *See also* Justice Brennan's concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 273 (1972) ("To inflict punishment for having a disease is to treat the individual as a diseased thing, rather than as a sick human being.").

404 Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth.

405 Robinson v. California, 370 U.S. 660, 665, 667 (1962).

406 Powell v. Texas, 392 U.S. 514, 532, 535 (1968).

407 Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 433–34 (2001).

408 Austin v. United States, 509 U.S. 602, 607–10 (1993). *See also* Hudson v. United States, 522 U.S. 93, 103 (1997) (the Eighth Amendment protects against excessive civil fines).

Clause "was intended to limit only those fines directly imposed by, and payable to, the government."[409]

[E143] The Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense."[410] Forfeitures—payments in kind—that constitute punishment for an offense are thus "fines,"[411] even if they also serve some remedial purpose.[412] While *in rem* forfeitures are not considered punishment, to the extent that they aim at the "guilty property" independently of the owner's conduct,[413] *in personam* criminal forfeitures have historically been treated as punitive.[414] Forfeitures under 21 U.S.C. Section 881(a)(4) and (a)(7), which provide for the forfeiture of, respectively, vehicles and real property used, or intended to be used, to facilitate the commission of certain drug-related crimes, are properly considered punishment, since both subsections clearly focus on the owner's culpability by expressly providing "innocent owner" defenses and by tying forfeiture directly to the commission of drug offenses, and since the legislative history confirms that Congress understood the provisions as serving to deter and to punish.[415] In case an individual is sentenced to a prison term and fine under the Racketeer Influenced and Corrupt Organizations Act, forfeiture of his businesses, pursuant to this Act, is a form of monetary punishment and therefore subject to the Excessive Fines Clause.[416]

[E144] The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the fine must bear some relationship to the gravity of the offense that it is designed to punish. The Court has adopted the standard of *gross* disproportionality, articulated in its Cruel and Unusual Punishments Clause precedents.[417] In *Bajakajian*, the Court considered, for the first time, the proportionality of a criminal forfeiture. Bajakajian attempted to leave the United States without reporting, as required by federal law, that he was transporting more than $10,000 in currency. Title 18 U.S.C. Section 982(a)(1) provides that a person convicted of willfully violating this reporting requirement shall forfeit to the government "any property . . . involved in such offense." The district court found, among other things, that the entire $357,144 was subject to forfeiture because it was "involved in" the offense, that the funds were not connected to any other crime, and that Bajakajian was transporting the money to repay a lawful debt. Concluding that full forfeiture would be grossly disproportional to the offense in question, and would therefore violate the Excessive Fines Clause of the Eighth Amendment, the court ordered forfeiture of $15,000, in addition to three years' probation and the maximum fine of $5,000. The

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409 Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989).

410 United States v. Bajakajian, 524 U.S. 321, 328 (1998), *quoting* Austin v. United States, 509 U.S. 602, 609–10 (1993).

411 United States v. Bajakajian, 524 U.S. 321, 328 (1998).

412 Austin v. United States, 509 U.S. 602, 610 (1993).

413 *See* paras. E6 *et seq.*

414 United States v. Bajakajian, 524 U.S. 321, 331–32 (1998).

415 Austin v. United States, 509 U.S. 602, 619–22 (1993).

416 Alexander v. United States, 509 U.S. 544, 558–59 (1993).

417 *See* United States v. Bajakajian, 524 U.S. 321, 336 (1998), *citing* Solem v. Helm, 463 U.S. 277, 288 (1983) and Rummel v. Estelle, 445 U.S. 263, 271 (1980). With respect to this standard, *see* paras. E133 *et seq.* In applying that standard, the courts of appeals should review the trial court proportionality determination *de novo. See Bajakajian, supra*, at 336–37.

Ninth Circuit came to the same conclusion. The Court, by a sharply divided vote, affirmed, on the following grounds. The essence of the Bajakajian's offense was a willful failure to report. His violation was unrelated to any other illegal activities. Bajakajian did not fit into the class of persons for whom the statute had been principally designed: money launderers, drug traffickers, and tax evaders. And the maximum penalties that could have been imposed under the federal law, a six-month sentence and a $5,000 fine, confirmed a minimal level of culpability. The harm that the offender had caused was also minimal. The failure to report affected only the government and in a relatively minor way. There was no fraud on the United States and no loss to the public fisc. Thus, there was no "articulable correlation" between the $357,144 and any government injury.[418]

H. THE DOUBLE JEOPARDY CLAUSE

1. In General

[E145] The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment,[419] provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The clause applies only in the criminal context;[420] its protections are not triggered by litigation between private parties.[421]

[E146] The Fifth Amendment guarantee against double jeopardy[422] consists of three separate constitutional protections:[423]

(1) It protects against a second prosecution for the same offense after acquittal;[424]

(2) It protects against a second prosecution for the same offense after conviction; and

(3) It protects against multiple criminal punishments for the same offense.

The clause also protects against retrial after the declaration of a mistrial in certain circumstances.[425] These protections stem from the underlying premise that a defen-

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[418] United States v. Bajakajian, 524 U.S. 321, 337–40 (1998). The four dissenters noted, *inter alia*, that the government needed the information to investigate other serious crimes and it needed the penalty to ensure compliance, regardless of the commission of another offense, related to drug trade, money laundering or tax evasion. *Id.* at 348, 351–52.

[419] Benton v. Maryland, 395 U.S. 784, 793–96 (1969), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937).

[420] *See, e.g.*, Hudson v. United States, 522 U.S. 93, 99 (1997).

[421] United States v. Halper, 490 U.S. 435, 451 (1989).

[422] The Due Process Clause does not provide greater double jeopardy protection than does the Double Jeopardy Clause. *See* Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).

[423] The Clause operates primarily as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty, even though innocent. *See* Green v. United States, 355 U.S. 184, 187–88 (1957); United States v. DiFrancesco, 449 U.S. 117, 136 (1980).

[424] *See* N. Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[425] *See* Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 307, n.6 (1984), *citing* United States v. Scott, 437 U.S. 82 (1978).

dant should not be twice tried or punished for the same offense.[426] In addition, the clause embodies the collateral estoppel doctrine, which prohibits the government from relitigating an issue of ultimate fact that has been determined by a valid and final judgment.[427]

2. Attachment and Termination of Jeopardy

[E147] The first inquiry in any double jeopardy case must be whether jeopardy has "attached."[428] The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant "is put to trial before the trier of the facts, whether the trier be a jury or a judge."[429] In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn.[430] The reason for that holding lies in the need to protect the interest of an accused in retaining a chosen jury.[431] In a non-jury trial, jeopardy attaches when the court begins to hear evidence,[432] that is, when the first witness is sworn.[433] In case of a juvenile defendant, jeopardy attaches at "a proceeding whose object is to determine whether a juvenile has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years;" therefore a juvenile is placed twice in jeopardy when, after an adjudicatory finding in juvenile court that he violated a criminal statute and a subsequent finding that he was unfit for treatment as a juvenile, he is transferred to an adult criminal court and tried and convicted for the same conduct.[434]

[E148] The protection of the Double Jeopardy Clause, by its terms, applies only if there has been some event, such as an acquittal,[435] that terminates the original jeopardy. Neither the failure of the jury to reach a verdict nor a trial court's declaration of a mistrial, following a jury's inability to agree on a verdict, terminates the original jeopardy.[436] This rule accords recognition to society's interest in giving the prosecution "one complete opportunity to convict those who have violated its laws."[437]

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426 United States v. Wilson, 420 U.S. 332, 339 (1975).

427 Ashe v. Swenson, 397 U.S. 436, 443–47 (1970). *See also* Dowling v. Unites States, 493 U.S. 342, 347–48 (1990).

428 Swisher v. Brady, 438 U.S. 204, 220 (1978).

429 United States v. Jorn, 400 U.S. 470, 479 (1971).

430 Crist v. Bretz, 437 U.S. 28, 35 (1978), *citing* Downum v. United States, 372 U.S. 734 (1963).

431 Crist v. Bretz, 437 U.S. 28, 35 (1978).

432 Serfass v. United States, 420 U.S. 377, 388 (1975).

433 Crist v. Bretz, 437 U.S. 28, 35, n.15 (1978).

434 Breed v. Jones, 421 U.S. 519, 529 (1975).

435 Acquittal may be "express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge." *See* Price v. Georgia, 398 U.S. 323, 329 (1970); Green v. United States, 355 U.S. 184, 190–91 (1957). *Cf.* Schiro v. Farley, 510 U.S. 222, 236 (1994).

In *Smith v. Massachusetts*, 543 U.S. 462 (2005), the Court held that if, after a facially unqualified *mid-trial* dismissal of one count, the trial has proceeded to the defendant's introduction of evidence on the remaining counts, the acquittal must be treated as final, unless the availability of reconsideration has been plainly established by pre-existing rule or case authority expressly applicable to mid-trial rulings on the sufficiency of the evidence.

436 Richardson v. United States, 486 U.S. 317, 322–26 (1984).

437 Arizona v. Washington, 434 U.S. 497, 509 (1978).

[E149] The question whether, under the Double Jeopardy Clause, there can be a new trial after a mistrial has been declared, without the defendant's request or consent, depends on whether "there is a manifest necessity for the mistrial, or the ends of public justice would otherwise be defeated."[438] For example, there is such necessity if a defendant has been brought to trial under a fatally deficient indictment.[439] Where a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for a mistrial, the Double Jeopardy Clause is not offended by a second prosecution, for "[s]uch a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined by the first trier of fact."[440] Similarly, when the defendant has his case dismissed and his trial terminated, not because of his assertion that the government has failed to make out a case against him, but because of a legal claim that the government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt, a new prosecution or an appeal by the government from his successful effort to do so is not barred by the Double Jeopardy Clause.[441]

[E150] It is well settled that if a defendant is convicted, but appeals the conviction and succeeds in having it set aside, jeopardy has not terminated, so that the double jeopardy guarantee does not preclude his retrial.[442] This rule rests on the premise that the original conviction has been nullified and "the slate wiped clean."[443] That a defendant's conviction is overturned on collateral, rather than direct, attack is irrelevant for that purpose.[444]

[E151] There is an important exception, however, to the aforesaid rule. A defendant may not be retried if he obtains a reversal of his conviction on the sole ground that the evidence was *insufficient* to convict.[445] The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence

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[438] United States v. Perez, 9 Wheat. 579, 580 (1824); United States v. Dinitz, 424 U.S. 600, 606 (1976).

[439] Illinois v. Somerville, 410 U.S. 458, 461 (1973).

[440] United States v. Scott, 437 U.S. 82, 93 (1978), *citing* United States v. Dinitz, 424 U.S. 600, 606–08 (1976).

[441] United States v. Scott, 437 U.S. 82, 96 (1978): Lee v. United States, 432 U.S. 23, 28–31 (1977).

[442] *See, e.g.*, United States v. Ball, 163 U.S. 662, 672 (1896); Sattazahn v. Pennsylvania, 537 U.S. 101, 106 (2003). The retrial must be limited to the offense for which the defendant was convicted at his first trial. *See* Price v. Georgia, 398 U.S. 323, 327 (1970). For example, a defendant may not be retried and convicted of first-degree murder after an earlier guilty verdict on the lesser included offense of second-degree murder is set aside on appeal. In such a case, the first jury's verdict of guilty on the second-degree murder charge is considered to be an "implicit acquittal" on the charge of first-degree murder, as long as the jury was given a full opportunity to return a verdict on that charge and instead reached a verdict on the lesser charge. *See* Green v. United States, 355 U.S. 184, 190–91 (1957). If the first conviction was limited to the lesser included offense, the retrial must be limited to that lesser offense.

[443] N. Carolina v. Pearce, 395 U.S. 711, 721 (1969).

[444] United States v. Tateo, 377 U.S. 463, 466 (1964).

[445] Burks v. United States, 437 U.S. 1, 18 (1978); Greene v. Massey, 437 U.S. 19, 24–27 (1978). *Burks* is not to be read as holding that double jeopardy protections are violated only when the prosecution has adduced no evidence at all of the crime or an element thereof. *See* Hudson v. Louisiana, 450 U.S. 40, 43 (1981).

that it failed to muster in the first proceeding. This holding is "based on the view that an appellate court's reversal for insufficiency of the evidence is, in effect, a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal, rather than submitting the case to the jury."[446] A reversal for legally insufficient evidence represents a determination that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,"[447] and, therefore, the defendant was *entitled* to a judgment of acquittal as a matter of law. "[I]t makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial."[448]

[E152] A reversal of a conviction based on "the weight of the evidence, . . . unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a 'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony. A deadlocked jury does not result in an acquittal barring retrial under the Double Jeopardy Clause. Similarly, an appellate court's disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal. A reversal based on the weight of the evidence, moreover, can occur only after the State has presented sufficient evidence to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek an acquittal. An appellate court's decision to give the defendant this second chance does not create an unacceptably high risk that the Government, with its superior resources, will wear down the defendant and obtain conviction solely through its persistence."[449]

[E153] Reversal for trial error, such as the incorrect receipt or rejection of evidence, is distinguished from evidentiary insufficiency, since "it implies nothing with respect to the guilt or innocence of the defendant [but is simply] a determination that he has been convicted through a judicial process which is defective in some fundamental respect."[450] Hence, when a reviewing court determines that a defendant's conviction must be set aside, because certain evidence was erroneously admitted against him, and also concludes that, without the inadmissible evidence, there was insufficient evidence to support a conviction, the Double Jeopardy Clause does not forbid his retrial, so long as the evidence admitted, even erroneously, by the trial court was sufficient to sustain a guilty verdict.[451]

3. The "Dual Sovereignty" Doctrine

[E154] "When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'"[452] But

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[446] Lockhart v. Nelson, 488 U.S. 33, 39 (1988), *citing* Burks v. United States, 437 U.S. 1, 16–17 (1978).

[447] Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[448] Burks v. United States, 437 U.S. 1, 17–18 (1978).

[449] Tibbs v. Florida, 457 U.S. 31, 42–43 (1982).

[450] Burks v. United States, 437 U.S. 1, 15 (1978).

[451] Lockhart v. Nelson, 488 U.S. 33, 39–42 (1988) (there is no constitutional infirmity in holding a second sentencing hearing where the first sentence was improperly based on a prior conviction for which the defendant had been pardoned).

[452] Heath v. Alabama, 474 U.S. 82, 88 (1985), *citing* United States v. Lanza, 260 U.S. 377, 382 (1922).

the dual sovereignty doctrine is limited, by its own terms, to cases where "the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of power"[453] not on whether they are pursuing separate interests.[454]

[E155] Thus, the Court has uniformly held that the states are separate sovereigns with respect to the federal government because each state's power to prosecute is derived from its own "inherent sovereignty," not from the federal government.[455] "The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment."[456] On the basis of the same reasoning, the Court has found that the Navajo Tribe, whose power to prosecute its members for tribal offenses is derived from the Tribe's "primeval sovereignty," rather than a delegation of federal authority, is an independent sovereign from the federal government for double jeopardy purposes of the dual sovereignty doctrine.[457] Conversely, the Court has held that successive prosecutions by federal and territorial courts are barred, because such courts are "creations emanating from the same sovereignty."[458] Similarly, municipalities that derive their power to try a defendant from the same organic law that empowers the state to prosecute are not separate sovereigns with respect to the state.[459]

4. Same Offense

[E156] In *Blockburger*, the Court announced that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[460] This test emphasizes the elements of the two crimes. "If *each* requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the

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[453] Heath v. Alabama, 474 U.S. 82, 88, 91–93 (1985).

[454] *See* United States v. Dixon, 509 U.S. 688, 725 (1993) (opinion of Justice White).

[455] *See, e.g.*, Abbate v. United States, 359 U.S. 187, 193–94 (1959).

[456] Heath v. Alabama, 474 U.S. 82, 89 (1985).

[457] United States v. Wheeler, 435 U.S. 313, 328 (1978). In *Duro v. Reina*, 495 U.S. 676, 684–85 (1990), the Court ruled that a tribe lacks sovereign authority to prosecute persons (even Indians) who are not tribe members and commit crimes on the reservation. Nevertheless, under *United States v. Lara*, 541 U.S. 193 (2004), Congress has the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over non-member Indians.

[458] Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937). *See also* Grafton v. United States, 206 U.S. 333, 354–55 (1907).

[459] Waller v. Florida, 397 U.S. 387, 393 (1970).

[460] Blockburger v. United States, 284 U.S. 299, 304 (1932). *See also* United States v. Dixon, 509 U.S. 688, 704 (1993), *overruling* Grady v. Corbin, 495 U.S. 508, 515–24 (1990). In *Grady*, the Court held that, in addition to passing the *Blockburger* test, a subsequent prosecution must satisfy a "same-conduct" test to avoid the double jeopardy bar. Under that test, "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," a second prosecution may not be had. *See Grady, supra*, at 510.

crimes."[461] "The greater offense is, . . . by definition, the 'same,' for purposes of double jeopardy, as any lesser offense included in it. . . . [T]he Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." For example, since, under state law, the misdemeanor of joyriding (taking or operating a vehicle without the owner's consent) is a lesser included offense in the felony of auto theft (joyriding with the intent permanently to deprive the owner of possession), a prosecution for the misdemeanor bars a second prosecution for the felony.[462] This protection applies even if the acquittal is based on an "egregiously erroneous foundation."[463]

[E157] "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Taking the previous example of joyriding and auto theft, the specification of different dates in the two charges against an individual cannot alter the fact that the theft and operation of a single car is a single offense.[464]

[E158] The Court has cautioned against "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation of a single course of conduct to the multilayered conduct, both as to time and to place, involved" in "continuing criminal enterprise" prosecutions.[465] In a closely related context, it has recognized that a substantive crime and a conspiracy to commit that crime are not the same offense for double jeopardy purposes, even if they are based on the same underlying incidents, because "the essence of a conspiracy offense is in the agreement or confederation to commit a crime."[466]

[E159] The Double Jeopardy Clause does not preclude the imposition, in a single trial, of cumulative punishments pursuant to separate criminal statutes proscribing the same conduct. "The assumption underlying the [*Blockburger*] rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent."[467] Therefore, "where . . . a legislature specifically authorizes cumulative

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461 Iannelli v. United States, 420 U.S. 770, 785, n.17 (1975) (emphasis added).

462 Brown v. Ohio, 432 U.S. 161, 168–69, (1977). An exception may exist where the state is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. *Id.* at 169, n.7.

463 Fong Foo v. United States, 369 U.S. 141, 143 (1962) (*per curiam*); Sanabria v. United States, 437 U.S. 54, 68–69 (1978). "[W]hen a jeopardy-barred conviction is reduced to a conviction for a lesser included offense that is not jeopardy-barred, the burden shifts to the defendant to demonstrate a reasonable probability [i.e., a probability sufficient to undermine confidence in the outcome] that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense. . . . [W]here it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous to order another trial as a means of curing" the double jeopardy violation. *See* Morris v. Mathews, 475 U.S. 237, 246–47 (1986).

464 Brown v. Ohio, 432 U.S. 161, 169–70 (1977).

465 *See* Garrett v. United States, 471 U.S. 773, 789 (1985).

466 United States v. Felix, 503 U.S. 378, 389–91 (1992).

467 Whalen v. United States, 445 U.S. 684, 691–92 (1980). *See also* Albernaz v. United States, 450 U.S. 333, 340 (1981) (the *Blockburger* test is a "rule of statutory construction" and because

punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end, and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."[468] "The presumption when Congress creates two distinct offenses is that it intends to permit cumulative sentences, and legislative silence on this specific issue does not establish an ambiguity or rebut this presumption."[469]

[E160] "By entering a guilty plea, an accused does not simply state that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." Hence, when a defendant pleads guilty to two indictments, he concedes guilt to two separate offenses and, consequently, relinquishes the opportunity to receive a factual hearing on a double jeopardy claim.[470]

5. The Collateral Estoppel Component

[E161] The Double Jeopardy Clause incorporates the doctrine of collateral estoppel in criminal proceedings. Collateral estoppel, or, in modern usage, issue preclusion, means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. . . . Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, the trial court must examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, or other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[471] Jury silence on a specific charge does not have collateral estoppel effect "unless the record establishes that the issue was actually and necessarily decided in the defendant's favor."[472] The burden is "on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding;" if there are "any number of possible explanations for the jury's acquittal verdict," the defendant has failed to satisfy this burden.[473] Besides, the collateral estoppel doctrine does not bar the later use of evidence relating to alleged criminal conduct for which a defendant has been acquitted, if such evidence is to be evaluated under a standard of proof less strict than that required for a conviction.[474]

6. Sentencing

[E162] "In the multiple punishments context, . . . the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than

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it serves as a means of discerning congressional purpose, the rule should not be controlling where there is a clear indication of contrary legislative intent).

468 Missouri v. Hunter, 459 U.S. 359, 368–69 (1983).

469 Garrett v. United States, 471 U.S. 773, 793 (1985).

470 United States v. Broce, 488 U.S. 563, 570, 573 (1989).

471 Ashe v. Swenson, 397 U.S. 436, 443–44 (1970). The preclusive effect of the jury's verdict is a question of federal law which the Court reviews *de novo*. *See* Schiro v. Farley, 510 U.S. 222, 232 (1994).

472 Schiro v. Farley, 510 U.S. 222, 236 (1994).

473 Dowling v. United States, 493 U.S. 342, 350, 352 (1990).

474 *Id.* at 348–50.

the legislature intended."[475] "The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed."[476] As noted above,[477] where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. "Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt. The pronouncement of sentence simply does not 'have the qualities of constitutional finality that attend an acquittal.'"[478] Consequently, the guarantee against double jeopardy does not prevent the prosecution from seeking review of a sentence.[479] Furthermore, if a defendant, after having his initial conviction overturned, is convicted again, "he constitutionally may be subjected to whatever punishment is lawful, whether or not it is greater than the sentence imposed after the first conviction,"[480] "subject only to the limitation that he receive credit for time served."[481]

[E163] However, the Court has established a "narrow exception" to the general rule that double jeopardy principles have no application in the sentencing context. Under *Bullington*, the Double Jeopardy Clause does apply to *capital*-sentencing proceedings that "have the hallmarks of the trial on guilt or innocence," such as separate sentencing proceedings at which the jury is presented with a choice between two alternatives, together with standards to guide their decision, and the prosecution is required to prove, beyond a reasonable doubt, certain statutorily defined facts in order to justify the death sentence.[482] In such cases, it must be examined whether a defendant's initial life sentence amounted to his acquittal of whatever was necessary for the imposition of the death sentence. Thus, "the relevant inquiry for double jeopardy purposes is not whether the defendant received a life sentence the first time around, but rather whether a first life

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[475] Jones v. Thomas, 491 U.S. 376, 381 (1989), *quoting* Missouri v. Hunter, 459 U.S. 359, 366 (1983).

[476] Bullington v. Missouri, 451 U.S. 430, 438 (1981).

[477] *See* para. E151.

[478] Monge v. California, 524 U.S. 721, 729 (1998), *quoting* United States v. DiFrancesco, 449 U.S. 117, 134 (1980).

[479] Monge v. California, 524 U.S. 721, 730 (1998). *See also United States v. DiFrancesco*, 449 U.S. 117, 132–39 (1980), where the Court upheld the constitutionality of a statute that allowed the United States to appeal the sentence imposed on a defendant adjudged to be a "dangerous special offender."

[480] Bullington v. Missouri, 451 U.S. 430, 442 (1981). In *Stroud v. v. United States*, 251 U.S. 15 (1919), the Court unanimously held that the Double Jeopardy Clause did not bar imposition of the death penalty at the new trial of a murderer who had been sentenced to life imprisonment at his first trial.

[481] Bullington v. Missouri, 451 U.S. 430, 442 (1981). *See also* N. Carolina v. Pearce, 395 U.S. 711, 718–19 (1969) (the constitutional guarantee against double jeopardy is violated when punishment already exacted for an offense is not fully "credited" in imposing a new sentence for the same offense, after retrial).

It would not be possible to "credit" a fine against time in prison. *See* Jones v. Thomas, 491 U.S. 376, 384 (1989). If a defendant is sentenced to a fine and imprisonment, under a statute that provides only for fine *or* imprisonment, and pays the fine, he is entitled to be released, for one valid alternative provision of the sentence has been satisfied. *See In re* Bradley, 318 U.S. 50, 52 (1943).

[482] Bullington v. Missouri, 451 U.S. 430, 437–46 (1981). *See also* Arizona v. Rumsey, 467 U.S. 203, 209–12 (1984).

sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence—i.e., findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt."[483] Subsequently, if the jury in the first proceeding was deadlocked on whether to impose the death penalty and made no findings with respect to a particular aggravating circumstance, that result cannot fairly be called an acquittal, based on findings sufficient to establish legal entitlement to a life sentence.[484] Nevertheless, a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution does not always constitute an "acquittal" of that circumstance for double jeopardy purposes. In case a defendant is sentenced to death and argues on appeal that the evidence presented at his sentencing hearing was, as a matter of law, insufficient to support the aggravating circumstances on which his death sentence was based, "the Double Jeopardy Clause does not require the reviewing court, if it sustains that claim, to ignore evidence in the record supporting another aggravating circumstance which the sentencer has erroneously rejected."[485]

[E164] The above exception is confined to the unique circumstances of capital sentencing. In many respects, a capital trial's penalty phase is a continuation of the trial on guilt or innocence of capital murder. The death penalty is unique in both its severity and its finality, and the qualitative difference between a capital sentence and other penalties calls for individualized sentencing and a greater degree of reliability when it is imposed. On these grounds, the Court has declined to extend *Bullington*'s rationale to *non-capital* sentencing proceedings, even if such proceedings have the hallmarks of the trial on guilt or innocence.[486]

[E165] "Recidivism has long been recognized as a legitimate basis for increased punishment."[487] There is no constitutional infirmity in using prior convictions to enhance sentences for subsequent convictions, "even though this means a defendant must, in a certain sense, relitigate in a sentencing proceeding conduct for which he was previously tried."[488] Under recidivist sentencing schemes, "the enhanced punishment imposed for the latter offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'"[489]

[E166] If a kidnapper who killed his victim is given a life sentence for murder and later is convicted of the separate crime of kidnapping, the sentencing court may take into account, in determining the proper sentence for the kidnapping, the fact that the kidnapping victim was murdered.[490] Therefore, the "use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning

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[483] Sattazahn v. Pennsylvania, 537 U.S. 101, 108 (2003). *See also* Arizona v. Rumsey, 467 U.S. 203, 211 (1984); Bullington v. Missouri, 451 U.S. 430, 445 (1981).

[484] Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).

[485] Poland v. Arizona, 476 U.S. 147, 156–57 (1986).

[486] Monge v. California, 524 U.S. 721, 731–34 (1998).

[487] Ewing v. California, 538 U.S. 11, 25 (2003) (opinion of Justice O'Connor).

[488] Schiro v. Farley, 510 U.S. 222, 230–31 (1994), *citing* Spencer v. Texas, 385 U.S. 554, 560 (1967) and Moore v. Missouri, 159 U.S. 673, 678 (1895).

[489] Witte v. United States, 515 U.S. 389, 400 (1995), *quoting* Gryger v. Burke, 334 U.S. 728, 732 (1948).

[490] Williams v. Oklahoma, 358 U.S. 576, 585–86 (1959).

of the Double Jeopardy Clause." In this context, it makes no difference whether the enhancement occurred in the first or second sentencing proceeding. Accordingly, double jeopardy principles do not bar "a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime."[491]

[E167] Thus, sentencing courts may constitutionally consider "a defendant's past criminal behavior, even if no conviction resulted from that behavior. . . . An acquittal is not a finding of fact; it can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences."[492] Consequently, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[493]

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491 Witte v. United States, 515 U.S. 389, 398–99 (1995).

492 United States v. Watts, 519 U.S. 148, 152, 155 (1997) (*per curiam*).

493 *Id.* at 157.

CHAPTER 6

PERSONAL OR FAMILY PRIVACY AND AUTONOMY

A. IN GENERAL

[F1] The Constitution does not explicitly mention any right of privacy. However, the Court has recognized that a right of personal privacy and autonomy, or a guarantee of certain areas or zones of privacy, does exist under the substantive due process protection of "liberty."[1] In varying contexts, the Court also has found the roots of that right in the First,[2] Fourth,[3] and Fifth[4] Amendments and in the "penumbras" of the Bill of Rights.[5]

[F2] The constitutionally protected private sphere includes "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'"[6] It involves at least three different kinds of interests. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion;[7] this interest is primarily protected by the Fourth Amendment. The Court also has held that,

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[1] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973); Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977); Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("liberty presumes an autonomy of self that includes freedom of certain intimate conduct"). The Court has announced that its obligation is "to define the liberty of all, not to mandate [its] own moral code." *See* Lawrence, *supra*, at 571, *quoting* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 850 (1992).

[2] Stanley v. Georgia, 394 U.S. 557, 564 (1969) (the First Amendment prohibits making mere private possession of obscene material a crime). The Court has stated that the principle of individual liberty in the home has special resonance when the government seeks to constrain a person's ability to speak there. *See City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994), involving the display of a residential anti-war sign.

[3] *See* California v. Ciraolo, 476 U.S. 207, 211 (1986) (wherever an individual has manifested a reasonable "expectation of privacy," he is entitled to be free from unreasonable governmental intrusion).

[4] Tehan v. Shott, 382 U.S. 406, 416 (1966), *citing* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (the privilege against self-incrimination reflects the Constitution's concern for the essential values represented by the "respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life").

[5] Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (a statute forbidding use of contraceptives violates the right of marital privacy).

[6] Roe v. Wade, 410 U.S. 113, 152 (1973). For example, there is no fundamental privacy right, implicit in the concept of ordered liberty, to watch obscene movies in places of public accommodation. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973).

[7] *Cf.* Whalen v. Roe, 429 U.S. 589, 499, n.24 (1977). A state bar committee may reasonably inquire as to the nature and extent of the actual acquaintance between an applicant for admission to practice law and the persons who certify the applicant's character and fitness. In that context, an affiant may be asked to state whether he has visited the applicant's home and, if so, how often. *See* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 160 (1971).

under the First Amendment, a state "has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[8] The second is "the individual interest in avoiding disclosure of personal matters."[9] The third is "the interest in independence in making certain kinds of important decisions,"[10] such as those relating to marriage,[11] sexual conduct,[12] procreation,[13] contraception,[14] abortion,[15] family relationships[16] or living arrangements,[17] child rearing, and education.[18] "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[19] "[A] state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all."[20]

[F3] In the same context, the Court has recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of 'liberty' protected by the Bill of Rights."[21] "Without precisely identifying every consideration that may underlie this type of constitutional protection, the Court has noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. . . . [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[22] That

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8 Stanley v. Georgia, 394 U.S. 557, 565 (1969). Nevertheless, the government may criminalize the possession of child pornography. *See* Osborne v. Ohio, 495 U.S. 103 (1990). Furthermore, the Court has negated the idea that some zone of constitutionally protected privacy follows obscene material when it is moved outside the home area. *See* United States v. Orito, 413 U.S. 139, 141–42 (1973).

9 Whalen v. Roe, 429 U.S. 589, 599 (1977). *See also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457–65 (1977).

10 Whalen v. Roe, 429 U.S. 589, 599–600 (1977).

11 Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 434 U.S. 374, 383–87 (1978).

12 Lawrence v. Texas, 539 U.S. 558 (2003).

13 Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

14 Griswold v. Connecticut, 381 U.S. 479, 481–86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453–54, 460 (1972); Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977).

15 Roe v. Wade, 410 U.S. 113, 152–154 (1973); Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 846–53 (1992).

16 Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

17 Moore v. E. Cleveland, 431 U.S. 494, 498–99 (1977) (plurality opinion).

18 Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

19 Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

20 Hodgson v. Minnesota, 497 U.S. 417, 452 (1990).

21 Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987).

22 Roberts v. United States Jaycees, 468 U.S. 609, 618–19 (1984).

constitutional protection is not restricted to relationships among family members but embraces "those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life.'"[23] Among other things, therefore, these relationships "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[24] Large groups that produce an inclusive, not exclusive membership and carry on many of their central activities in the presence of numerous strangers lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women.[25]

[F4] Privacy is intertwined with the right of every person "to be let alone,"[26] which has been characterized as "the most comprehensive of rights and the right most valued by civilized men."[27] A basic aspect of the aforesaid right is the right of an individual to be "free from [unwanted] sights, sounds and tangible matter."[28] "The right to avoid unwelcome speech has special force in the privacy of the home . . . and its immediate surroundings."[29] Thus, the intrusion into the home of an unwelcome solicitor,[30] unwanted mail,[31] excessive noise,[32] or, even, patently offensive radio broadcasts[33] may be forbidden. Similarly, the government may prohibit picketing focused on, and taking place in front of, a particular residence.[34] The same right can also be protected in a setting not relating to one's home. Hence, the government may make it a crime for any person within 100 feet of a health care facility's entrance to knowingly approach within eight feet of another person, without that person's consent, in order to display a sign

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[23] Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987), *citing* Roberts v. United States Jaycees, 468 U.S. 609, 619–20 (1984).

[24] Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

[25] *Id.* at 621–22; Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546–47 (1987). *See also* New York State Club Ass'n, Inc. v. New York City, 487 U.S. 1, 12 (1988) (the fact that a club provides "regular meal service" and receives regular payments "directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business" is also significant in defining the non-private nature of such an association, because of the kind of role that strangers play in its ordinary existence). *See also* FW/PBS, Inc. v. Dallas, 493 U.S. 215, 237 (1990) (any "personal bonds" that are formed from the use of a motel room for less than ten hours are not those that have played a critical role in the culture and traditions of the American nation by cultivating and transmitting shared ideals and beliefs).

[26] *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 716–17 (2000).

[27] *Id., quoting* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[28] Rowan v. United States Post Office Dep't, 397 U.S. 728, 736–37 (1970).

[29] Hill v. Colorado, 530 U.S. 703, 717 (2000). "The interest in privacy has the same dignity in a densely populated apartment complex . . . or in an affluent neighborhood of single-family homes. In either context, the protection of the individual interest may involve the imposition of some burdens on the general public." *See* City of Memphis v. Greene, 451 U.S. 100, 127 (1981).

[30] *See* Martin v. Struthers, 319 U.S. 141, 147–48 (1943).

[31] *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 736–37 (1970).

[32] *See* Kovacs v. Cooper, 336 U.S. 77, 87–89 (1949).

[33] *See* Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

[34] *See* Frisby v. Schultz, 487 U.S. 474, 484–85 (1988).

to, or engage in oral protest, or counseling with that person.[35] Nevertheless, the broadcasting of radio programs in public busses does not violate the privacy rights of passengers who do not wish to listen to those programs.[36]

B. PROTECTION OF PERSONAL DATA AND COMMUNICATIONS

[F5] Privacy encompasses "the individual's control of information concerning his or her person. . . . [T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information."[37]

[F6] In *Whalen v. Roe*, the Court confronted a facial challenge against a statute that allowed the state of New York to record, in a centralized computer file, the names and addresses of all persons obtaining, pursuant to a doctor's prescription, certain drugs for which there was both a lawful and an unlawful market. The challenged program was found to be a rational measure against the misuse of dangerous drugs, for the patient identification requirement could reasonably be expected to have a deterrent effect on potential violators, as well as to aid in the detection or investigation of specific instances of apparent abuse. The statute expressly prohibited public disclosure of the identity of patients and contained several security provisions: the prescription forms would be retained in a vault in a room surrounded by a locked wire fence and protected by an alarm system; in addition, the computer tapes would be kept in a locked cabinet, and the computer would be running "off-line," which meant that no terminal outside of the computer room could read or record any information. Besides, there was no support in the record for an assumption that these security provisions would be administered improperly. And the remote possibility that judicial supervision of the evidentiary use of particular items of stored information would provide inadequate protection against unwarranted disclosures was not a sufficient reason for invalidating the entire patient identification program. In light of the above, the Court upheld the statute, noting that "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient, [and] [r]equiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy."[38]

[F7] "The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity."[39] If the state decides to require a pregnant minor to obtain parental consent for an abortion, it also must provide an alternative judicial procedure, whereby authorization for the abortion can be obtained. The bypass proceeding must insure the minor's anonymity.[40] This requirement is satisfied, when state law prohibits the juvenile court from notifying the parents that the complainant is pregnant and wants an abortion, requires state courts to preserve her anonymity and the confidentiality of court papers, and makes it a crime for any state

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35 *See* Hill v. Colorado, 530 U.S. 703, 716–18 (2000).

36 *See* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 463–65 (1952).

37 Dep't of Justice v. Reporters Comm., 489 U.S. 749, 763, 770 (1989).

38 Whalen v. Roe, 429 U.S. 589, 602 (1977).

39 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 766 (1986).

40 Bellotti v. Baird, 443 U.S. 622, 644 (1979) (plurality opinion).

employee to disclose documents not designated as public records. The mere possibility of unauthorized, illegal disclosure by state employees is not dispositive. Nor is the fact that the minor is obligated to supply identifying information at the complaint form, since complete anonymity is not critical under the Court's decisions.[41]

[F8] Record keeping and reporting provisions of abortion laws "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible."[42] Reports of abortions, while not mentioning the woman's name, may not be available to the public, if they contain such detailed information about her and the circumstances under which she had an abortion that identification is likely.[43]

[F9] *Skinner* involved a regulation that mandated blood and urine tests of railroad employees who were involved in certain train accidents. When employees produced the blood and urine samples required by the regulation, they were asked by medical personnel to complete a form stating whether they had taken any medications during the preceding 30 days. The completed forms were shipped with the samples to the Federal Railroad Administration's laboratory, and this information was used to ascertain whether a positive test result could be explained by the employee's lawful use of medications. While this procedure permitted the government to learn certain private medical facts that an employee might prefer not to disclose, there was no indication that the government did not treat this information as confidential, or that it used the information for any other purpose. Under the circumstances, the Court did not view this procedure as a significant invasion of privacy.[44]

[F10] In *Nixon v. Administrator of General Services*, the Court dealt with the Presidential Recordings and Materials Preservation Act, which directed an official of the Executive Branch, to take custody of the presidential papers and tape recordings of former President Richard Nixon, and promulgate regulations providing, *inter alia*, for the orderly processing and screening by Executive Branch archivists of such materials, for the purpose of returning to Nixon those that were personal and private in nature. The materials at issue consisted of some 42 million pages of documents and some 880 tape recordings of conversations. Nixon challenged the Act's constitutionality, claiming among other things, that the Act on its face violated his privacy interests. The Court pointed out that the vast proportion of Nixon's presidential materials were official documents or records and, therefore, Nixon's privacy claim related only to a very small fraction of the massive volume of these materials and embraced, for example, extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files. Considering Nixon's status as a public figure, his lack of

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41 Ohio v. Akron Center for Reprod. Health, 497 U.S. 502, 512–13 (1990).

42 Planned Parenthood of Cent. Missouri. v. Danforth, 428 U.S. 52, 80 (1976). Similarly a pathology report requirement is constitutional, for it is reasonably related to generally accepted medical standards, and furthers important health-related state concerns. *See* Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 486–90 (1983). Although such requirements might increase the cost of abortions by a slight amount, they do not impose a substantial obstacle to a woman's choice. *See* Planned *supra* at 489; Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 901 (1992) (plurality opinion).

43 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 767 (1986).

44 Skinner v. Ray. Labor Executives' Ass'n, 489 U.S. 602, 626, n.7 (1989).

any expectation of privacy in the overwhelming majority of the presidential materials, the important public interest in preservation of these materials, the virtual impossibility of segregating the small quantity of private materials without comprehensive screening, the Act's sensitivity to Nixon's legitimate privacy interests, the unblemished record of the archivists for discretion, and the likelihood that the regulations that should be promulgated by the administrator would further moot Nixon's fears that his materials would be reviewed by "a host of persons," the Court rejected Nixon's privacy claim.[45]

[F11] As a general matter, state officials may not constitutionally punish publication of truthful information about a matter of public significance, absent a need of the highest order.[46] Privacy is an important interest but does not prohibit any such publication. Where the publisher has lawfully obtained information from a source who obtained it unlawfully, by intercepting and recording a confidential cell phone conversation, privacy concerns may give way when balanced against the interest in publishing matters of public importance.[47] The commission and investigation of a violent crime that has been reported to authorities is considered to be a matter of public significance. Hence, although the interests in protecting the privacy and safety of sexual assault victims and in encouraging them to report offenses without fear of exposure are highly significant, the state may not, consistently with the First and Fourteenth Amendments, impose civil sanctions on the accurate publication of a rape victim's name obtained from a government news release[48] or official court documents open to public inspection.[49] Furthermore, in actions for damages, where the interest at issue is privacy and the right claimed is to be free from the publication of false or misleading information about one's affairs, the target of the publication must prove knowing or reckless falsehood where the materials published, although assertedly private, are matters of public interest.[50]

C. FREEDOM TO MARRY

[F12] Marriage has been characterized as the most important relationship in life[51] and as fundamental to our very existence and survival.[52] The freedom to marry, or not to marry, has been recognized as "one of the vital personal rights essential to the orderly pursuit of happiness by free men" and is considered to be part of the fundamental right of privacy.[53] A state statute banning marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[54]

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45 Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 455–65 (1977).

46 *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).

47 *See* Bartnicki v. Vopper, 532 U.S. 514, 534 (2001).

48 Florida Star v. B.J.F., 491 U.S. 524, 536–41 (1989).

49 Cox Broad. Corp. v. Cohn, 420 U.S. 469, 487–95 (1975).

50 Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967).

51 *See* Maynard v. Hill, 125 U.S. 190, 205 (1888). The state has a legitimate interest in the creation and dissolution of the marriage contract. *See* Hodgson v. Minnesota, 497 U.S. 417, 446 (1990) (plurality opinion), *citing* Maynard v. Hill, *supra*, and Sosna v. Iowa, 419 U.S. 393, 404 (1975).

52 Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

53 Loving v. Virginia, 388 U.S. 1, 12 (1967).

54 *Id.*

[F13] A law that significantly interferes with the exercise of the right to marry cannot be upheld unless it is supported "by sufficiently important state interests and is closely tailored to effectuate only those interests."[55] In *Zablocki*, the Court dealt with a state statute conditioning the right to marry upon a court approval order, which could not be granted unless the marriage applicant submitted proof of compliance with his child support obligation under a court judgment and demonstrated that the children covered by the support judgment were not then, and were not likely thereafter, to become public charges. With respect to individuals who were unable to meet the statutory requirements, the statute merely prevented these persons from getting married, without delivering any money at all into the hands of their prior children. Moreover, the state already had numerous other means for exacting compliance with support obligations, means that were at least as effective as the measure at issue and yet did not impinge upon the right to marry; indeed court-determined support obligations could be enforced directly via wage assignments, civil contempt proceedings, and criminal penalties. And, if the state believed that parents of children out of their custody should be responsible for ensuring that those children did not become public charges, this interest might be achieved by adjusting the criteria used for determining the amounts to be paid under their support orders. Furthermore, the challenged provision was grossly underinclusive with respect to this purpose of preventing the marriage applicants from incurring new support obligations, since it did not limit in any way new financial commitments by the applicants other than those arising out of the contemplated marriage. The statutory classification was substantially overinclusive as well: given the possibility that the new spouse would actually better the applicant's financial situation, by contributing income from a job or otherwise, the statute, in many cases, might prevent affected individuals from improving their ability to satisfy their prior support obligations. And, although it was true that the applicant would incur support obligations to any children born during the contemplated marriage, preventing the marriage might only result in the children's being born out of wedlock, for the support obligation was the same whether the child was born in or out of wedlock. Consequently, the Court struck down the statute as violative of the Equal Protection Clause of the Fourteenth Amendment.[56]

[F14] Nevertheless, the Court has not suggested "that every state regulation, which relates in any way to the incidents of or prerequisites for marriage, must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."[57] In *Jobst*, the Court upheld sections of the Social Security Act providing, *inter alia*, for termination of a dependent child's benefits upon marriage to an individual not entitled to benefits under the Act. As the opinion for the Court noted, the rule terminating benefits upon marriage was not an attempt to interfere with the individual's freedom to make a decision as important as marriage. The Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and there was no evidence that the law significantly discouraged any marriages.[58]

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55 Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

56 *Id.* at 383–91.

57 *Id.* at 386.

58 Califano v. Jobst, 434 U.S. 47, 54 (1977).

[F15] An individual's right to marry survives incarceration. "Many important attributes of marriage remain after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a pre-condition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals. Taken together, . . . these elements are sufficient to form a constitutionally protected marital relationship in the prison context."[59]

[F16] A prison regulation that impinges on prisoners' right to marry is valid if it is reasonably related to legitimate penological interests; hence, the protection of prison security may require placing reasonable restrictions upon this right and may justify requiring approval of the superintendent. However, a regulation prohibiting inmate marriage, except with consent of the prison superintendent made upon proof of compelling circumstances, represents an exaggerated response to prison concerns, since allowing marriages, unless the warden finds a threat to security, order, or the public safety, represents an obvious, easy alternative that would accommodate the right to marry while imposing a *de minimis* burden on the pursuit of security objectives.[60]

[F17] Polygamy may be prohibited, even if its practice is supported by a religious creed. In *Reynolds*, the Court upheld the polygamy conviction of a Mormon, stressing that "polygamy leads to the patriarchal principle, and . . . fetters the people in stationary despotism."[61] In the nineteenth century, the Court also approved exclusions of bigamists and polygamists from the franchise, under territorial laws.[62]

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[59] Turner v. Safley, 482 U.S. 78, 95–96 (1987). The Court noted that its decision in *Butler v. Wilson*, 415 U.S. 953 (1974), *summarily affirming Johnson v. Rockefeller*, 365 F. Supp. 377 (S.D.N.Y. 1973), was not to the contrary. That case involved a prohibition on marriage only for inmates sentenced to life imprisonment; and, importantly, denial of the right was part of the punishment for crime. *See id.* at 381–82 (Lasker, J., concurring in part and dissenting in part) (asserted governmental interest of punishing crime sufficiently important to justify deprivation of the right).

[60] Turner v. Safley, 482 U.S. 78, 97–98 (1987). The Court rejected the argument that "love triangles" might lead to violent confrontations between inmates, noting that there was nothing in the record suggesting that the marriage regulation was viewed as preventing such entanglements and that there was no logical connection between the marriage restriction and the formation of love triangles.

[61] Reynolds v. United States, 98 U.S. 145, 166 (1879).

[62] *See* Murphy v. Ramsey, 114 U.S. 15 (1885); Davis v. Beason, 133 U.S. 333 (1890).

The question whether there is a constitutional *right to "same-sex" marriage*, under the Equal Protection and Due Process Clauses, has not come before the Court. However, in *Lawrence v. Texas*, 539 U.S. 558, 585 (2003), Justice O'Connor suggested that a state may legitimately distinguish between heterosexuals and homosexuals for the purpose of preserving the traditional institution of marriage.

D. SEXUAL FREEDOM[63]

[F18] In *Bowers*, the Court held that, since homosexual behavior was not deeply rooted in the nation's history and tradition or implicit in the concept of ordered liberty, a Georgia law prohibiting private consensual sodomy needed only a rational basis in order to comply with the Due Process Clause. Moral opposition to sodomy and homosexuality was considered to provide that rational basis.[64] *Bowers* was overruled 13 years later. In *Lawrence*, the Court confronted a Texas statute forbidding two persons of the same sex from engaging in certain intimate sexual conduct. A five-Justice majority observed that the issue was not simply the right to engage in certain sexual conduct. The challenged statute had "more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home;" it sought "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. . . . [I]ndividual decisions by married or unmarried persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause. . . . [And] the fact that the governing majority in a State has traditionally viewed a particular sexual practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." Under these considerations, the Court found the statute violative of the Due Process Clause of the Fourteenth Amendment.[65]

E. PARENTAL RIGHTS

1. Generally

[F19] The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents and guardians "to make decisions concerning the care, custody, and control of their children;"[66] "as a general matter, the father's interest in the welfare of the child and the mother's interest are equal."[67] The American "constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.

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63 *See also* para. K82 (*statutory rape*).

64 Bowers v. Hardwick, 478 U.S. 186, 190–96 (1986).

65 Lawrence v. Texas, 539 U.S. 558, 567, 577–78 (2003). Justice O'Connor denied to overrule *Barrows*, but agreed that the statute was unconstitutional. She based that conclusion on the Fourteenth Amendment's Equal Protection Clause, noting that a state cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution, which named, as a solitary class, persons who were homosexuals, lesbians, or bisexual either by orientation, conduct, practices, or relationships and deprived them of protection under state anti-discrimination laws, concluding that the provision had been born of animosity toward the class of persons affected and, further, that it had no rational relation to a legitimate governmental purpose.

66 *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion, *citing cases*).

67 Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 896 (1992).

More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."[68] "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[69] There is "little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the 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."[70]

2. Education of Children

[F20] Parents and guardians have the right to direct the education of their children. This liberty right may not be abridged by legislation that has no reasonable relation to some purpose within the competency of the state. "The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English" is not questionable.[71] However, the Court has held that a state law forbidding the teaching, in any private or public school, of any modern language, other than English, to any child who has not successfully passed the eighth grade, invades impermissibly the liberty guaranteed by the Fourteenth Amendment, since proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals, or understanding of the ordinary child.[72] Likewise, a state is not allowed to infringe the parent's right to choose private rather than public school education.[73] Relatedly, the government may prohibit the exclusion of racial minorities from private schools without transgressing the right of parents to send their children to such schools.[74]

[F21] Parents have a traditional interest in the religious upbringing of their children. In that context, the Court has recognized that the Amish may decline to send their children to public or private high school. In doing so, the Court has considered not only that the Amish sincerely believe that high school attendance is contrary to their religion and way of life, but also that the Amish provide continuing informal vocational education to their children, designed to prepare them for life in the rural Amish community, and that "accommodating their religious objections by forgoing one or two additional years of compulsory education [would] not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and

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68 Parham v. J.R., 442 U.S. 584, 602 (1979).

69 Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (plurality opinion), *citing* Reno v. Flores, 507 U.S. 292, 303 (1993).

70 Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

71 Meyer v. State of Nebraska, 262 U.S. 390, 402 (1923). Courts are ill-equipped to determine the "necessity" of discrete aspects of a state's program of compulsory education. Hence, "courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate concern in universal education when faced with a parent's claim for exemption from generally applicable educational requirements." *See* Wisconsin v. Yoder, 406 U.S. 205, 235 (1972).

72 Meyer v. State of Nebraska, 262 U.S. 390, 399–403 (1923).

73 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

74 Runyon v. McCrary, 427 U.S. 160, 175–79 (1976).

responsibilities of citizenship, or in any other way materially detract from the welfare of society."[75] Nevertheless, parental rights protected by the First Amendment can be limited by the state's interest in protecting the welfare of children. "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well developed men and citizens."[76] Hence, the parent cannot claim freedom from compulsory vaccination for the child on religious grounds.[77] Similarly, a Jehovah's Witness may be prosecuted under the child labor laws for allowing his children to circulate religious literature on the public streets. Such activity may create "emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[78]

3. Rights of Unwed Fathers[79]

[F22] A statutory scheme under which the children of unmarried fathers, upon the death of the mother, are automatically made wards of the state is unconstitutional. One the one hand, a father's interest in the companionship, care, custody, and management of his children is cognizable and substantial, and, on the other hand, the state's interest in caring for the children is *de minimis*, if the father is, in fact, a fit parent. The state cannot, consistently with due process requirements, merely presume that unmarried fathers, in general, are unsuitable parents. Therefore, a state is barred, as a matter of due process, from taking custody of the children of an unwed father, absent a hearing and a particularized finding that the father is an unfit parent.[80]

[F23] *Quilloin* involved the constitutionality of a state statute that authorized the adoption, over the objection of the natural father, of a child born out of wedlock. The father, in that case, had never legitimated the child, who had always been in the mother's custody. It was only after the mother had remarried and her new husband had filed an adoption petition that the natural father sought visitation rights and filed a petition for legitimation. The trial court found adoption by the new husband to be in the child's

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[75] Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972). The Court did not consider the question whether a child who expresses a desire to attend public high school, in conflict with the wishes of his parents, should not be prevented from doing so.

[76] Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

[77] *Id.* at 166, *citing* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[78] Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

[79] The mother's biological relation to the child is verifiable from the birth itself, and is documented by the birth certificate or hospital records and the witnesses to the birth. However, a father need not be present at the birth, and his presence is not incontrovertible proof of fatherhood. Hence, "[f]athers and mothers are not similarly situated with regard to proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is [not] troublesome from a constitutional perspective." Moreover, the Constitution does not require that Congress elect one particular mechanism, like DNA testing, from among many possible methods of establishing paternity. *See* Tuan Anh Nguyen v. Immigration and Naturalization Serv., 533 U.S. 53, 63–64 (2001).

[80] Stanley v. Illinois, 405 U.S. 645, 647–58 (1972). The father, in that case, had lived with his children all their lives, and had lived with their mother for 18 years.

best interests. The Court stressed that the unwed father had not at any time had, or sought, actual or legal custody of his child. Moreover, the result of the adoption was to give full recognition to a family unit already in existence, a result desired by all concerned, except the natural father of the child. Subsequently, the Court unanimously held the challenged adoption to be consistent with the Due Process Clause. The father also advanced an equal protection argument, based on the fact that the law required both parents' consent to the adoption of children born in wedlock but only the mother's consent for children born out of wedlock and not legitimated by their fathers. The Court rejected the claim, noting that the state, under any standard of review, could take into consideration that an unwed father, unlike a married, or even divorced, one, had never exercised actual or legal custody over his child and thus had never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.[81]

[F24] *Caban* involved a statute permitting an unwed mother, but not an unwed father, to block the adoption of their child simply by withholding her consent. The father, in that case, had established a substantial relationship with his children and had admitted his paternity. The Court found that the challenged sex-based distinction between unmarried mothers and unmarried fathers violated the Equal Protection Clause, because it bore no substantial relation to any important state interest. "[M]aternal and paternal roles are not invariably different in importance. Even if unwed mothers, as a class, were closer than unwed fathers to their newborn infants, the generalization concerning parent-child relations would become less acceptable to support legislative distinctions as the child's age increased. . . . [But] [i]n those cases where the father never has come forward to participate in the rearing of the child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."[82]

[F25] "The difference between the developed parent-child relationship that was implicated in . . . *Caban*, and the potential relationship involved in *Quilloin*, is significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood 'by com[ing] forward to participate in the rearing of his child,' . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. [In such a case,] it may be said that he]act[s] as a father toward his children.' . . . But the mere existence of a biological link does not merit equivalent constitutional protection. . . . '[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children . . . as well as from the fact of blood relationship.' . . . The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."[83] Therefore, a putative biological father, who has never estab-

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81 Quilloin v. Walcott, 434 U.S. 246, 254–56 (1978).

82 Caban v. Mohammed, 441 U.S. 380, 389, 392 (1979).

83 Lehr v. Robertson, 463 U.S. 248, 261–62 (1982).

lished an actual relationship with his child, does not have a constitutional right to notice of his child's adoption by the man who had married the child's mother.[84]

[F26] Nevertheless, in *Michael H.*, the Court concluded that, despite both biological parenthood and an established relationship with a young child, a father's due process liberty interest in maintaining some connection with that child was not sufficiently powerful to overcome a state statutory presumption that a child born to a married woman living with her husband, who was neither impotent nor sterile, was a child of the marriage. As a result of the presumption, which might be rebutted only by the husband or wife, the biological father could be denied even visitation with the child, because, as a matter of state law, he was not a "parent." A four-member plurality observed that the presumption expressed and implemented a substantive rule of law, based on the state legislature's determination, as a matter of overriding social policy, that the husband should be held responsible for the child and that the integrity and privacy of the family unit should not be impugned. Furthermore, it recognized that the parental liberty interest is a function not simply of isolated factors, such as biology and intimate connection, but of the broader interest in the "unitary" family. Consequently, it held that, where "the child is born into an extant marital family, the natural father's unique opportunity to develop a relationship with the child conflicts with the similarly unique opportunity of the husband of the marriage, and it is not unconstitutional for the State to give categorical preference to the latter" in favor of traditional family relationships.[85] Justice Stevens, concurring, and the four dissenters stressed that a natural father might have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth. However, Justice Stevens concluded that the statutory scheme at issue, as applied in the specific case, was consistent with the Due Process Clause, since it had not deprived the natural father of a fair opportunity to prove that he was an "other person having an interest in the welfare of the child" to whom reasonable visitation rights could be awarded under state law.[86]

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[84] *Id.* at 263–65. That case involved a New York law that automatically provided mothers of "illegitimate" children with prior notice of an adoption proceeding and the right to veto an adoption, but only extended those rights to unmarried fathers whose claim of paternity was supported by some formal public act, such as a court adjudication, the filing of a notice of intent to claim paternity, or written acknowledgment by the mother. The petitioner, an unmarried putative father, need only have mailed a postcard to the state's "putative father registry" to enjoy the same rights as the child's undisputed mother. The Court held that the statute did not invidiously discriminate between the father and mother in that case, since the state could take account of the fact that the father had never established any custodial, personal, or financial relationship with his daughter. *Id.* at 267.

[85] Michael H. v. Gerald D., 491 U.S. 110, 123, 129 (1989) (plurality opinion). For the same reasons, the plurality rejected the proposition that the child had a liberty interest in maintaining a filial relationship with her natural father. *Id.* at 131. The child's claim that her equal protection rights had been violated, because, unlike her mother and presumed father, she had had no opportunity to rebut the presumption of her legitimacy, also was found without merit, since the state's decision to treat her differently from her parents pursued the legitimate end of preventing the disruption of an otherwise peaceful union by the rational means of not allowing anyone but the husband or wife to contest legitimacy. *Id.* at 131–32.

[86] The dissenters thought that appellant had a due process right to a meaningful opportunity to be heard and support his assertion of paternity.

4. Rights of Foster Parents[87]

[F27] "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children, . . . as well as from the fact of blood relationship. [Thus,] a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. . . . But there are also important distinctions between the foster family and the natural family. First, . . . [whereas] the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, in intrinsic human rights, . . . a foster family . . . has its source in state law and contractual arrangements. . . . [W]hatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset. While liberty interests may in some cases arise from positive law sources, . . . in such a case, . . . it is appropriate to ascertain from state law the expectations and entitlements of the parties. . . . [T]he limited recognition accorded to the foster family by [state] statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family."[88] Second, the right of the natural parent of a foster child in voluntary placement must be properly taken into consideration. "It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state law recognition of the relationship and it is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents," who initially gave up their child to the state only on the express understanding that the child would be returned to them.[89]

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[87] A child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, has no substantive due process right to be placed in the custody of a private custodian rather than of a decent and humane, government-operated or government-selected, child care institution. *See* Reno v. Flores, 507 U.S. 292, 301–03 (1993).

[88] Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844–46 (1977).

[89] *Id.* at 846–47. In that case, the Court assumed that there was a protected liberty interest in the foster family relationship, without resolving the relevant questions definitively. Consequently, the Court found constitutionally adequate the challenged procedures for removal of foster children from foster homes. The Court held, *inter alia*, that due process (1) is not infringed by a removal procedure limited to the foster parents and the agency; (2) does not demand a full trial-type pre-removal hearing, if the child is being returned to his natural parents; (3) does not require an automatic hearing in every case; (4) is not violated by a provision limiting pre-removal judicial review to cases where the child has been in foster care for 18 months or more, since there is no reason to assume that the emotional attachments between a child and his foster parents ripen at less than 18 months, or indeed at any precise point. *Id.* at 851–55.

5. Visitation Rights of Third Persons

[F28] In *Troxel*, the Court dealt with a state statute allowing "any person" to petition for visitation rights "at any time" and authorizing state superior courts to grant such rights whenever visitation may serve a child's best interest. The Troxels petitioned for the right to visit their deceased son's daughters. Granville, the girls' mother, did not oppose all visitation but objected to the amount sought by the Troxels. The superior court ordered more visitation than Granville desired. A four-Justice plurality found that the statute, as applied to Granville and her family, violated her due process right to make decisions concerning the rearing of her children, since it effectively permitted a court to disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision filed a visitation petition.[90]

6. Termination of Parental Rights

[F29] "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."[91]

[F30] Application of a "fair preponderance of the evidence" standard in civil proceedings indicates both society's minimal concern with the outcome, and a conclusion that the litigants should share the risk of error in roughly equal fashion. However, "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. . . . In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. . . . Thus, at a parental rights termination proceeding, a near-equal allocation of the substantial risk of erroneous fact finding between the parents and the State is constitutionally intolerable."[92] Like civil commitment hearings, termination proceedings often require the fact finder to evaluate medical and psychiatric testimony and to decide issues difficult to prove to a level of absolute certainty (i.e., "beyond a reasonable doubt"), such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress. Therefore, due process is satisfied if the state supports its allegations by at least clear and convincing evidence.[93]

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[90] Troxel v. Granville, 530 U.S. 57, 67–73 (2000). Justice Souter concurred in the judgment, concluding that the statute was facially invalid, for it swept too broadly in authorizing any person at any time to request and a judge to award visitation rights, with the only requirement being that the visitation served the best interest of the child. Justice Thomas concurred in the judgment, noting that strict scrutiny was the appropriate standard of review to apply and that the state lacked a compelling interest in second-guessing a fit parent's decision regarding visitation with third parties.

[91] Santosky v. Kramer, 455 U.S. 745, 753–54 (1982).

[92] Santosky v. Kramer, 455 U.S. 745, 758, 768 (1982).

[93] *Id.* at 768–69. Determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts. *Id.* at 769–70.

[F31] After weighing the *Mathews* factors,[94] the Court has held that the right to appointed counsel in a case involving the threatened termination of parental rights depends upon the circumstances of each particular case. "The parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high. . . . Thus if, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak," due process would require appointment of counsel.[95]

[F32] Access to judicial processes in cases "quasi-criminal" in nature may not turn on ability to pay. The Court has placed decrees forever terminating parental rights in the category of cases in which the state may not "bolt the door to equal justice." In *M.L.B.*, the Court held that Mississippi could not, consistent with the Equal Protection and Due Process Clauses of the Fourteenth Amendment, deny an indigent parent appellate review of the sufficiency of the evidence on which a state court had based its parental termination decree. In reaching this conclusion, the Court inspected the character and intensity of the individual interest at stake, on the one hand, and the state's justification for its exaction, on the other. The state's pocketbook interest in prepayment of record preparation fees was found unimpressive when measured against the stakes for the parent. And the risk of error, was considerable, since the trial court's order, in that case, simply had recited statutory language, without describing any evidence and otherwise detailing any reasons for finding M.L.B. clearly and convincingly unfit to be a parent.[96]

F. LIVING ARRANGEMENTS

[F33] When the government intrudes on choices concerning *family* living arrangements, the usual deference to the legislature is inappropriate, and the courts "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[97] In *Moore v. East Cleveland*, the Court struck down a housing ordinance that limited occupancy of a dwelling unit to members of a single "family" as violating the Due Process Clause of the Fourteenth

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94 *See* para. C7.

95 Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 31 (1981). Three of the dissenters thought the same balancing required appointment of counsel in all such cases. *Id.* at 35. In the circumstances of that case, the five-Justice majority concluded that the trial judge had not denied petitioner due process of law in not appointing counsel for her. The record showed, *inter alia*, that the petition to terminate petitioner's parental rights contained no allegations of neglect or abuse upon which criminal charges could be based; no expert witnesses testified; the case presented no specially troublesome points of law; and the presence of counsel could not have made a determinative difference for petitioner, who had expressly declined to appear at a previous child custody hearing. *Id.* at 32–33.

96 M.L.B. v. S.L.J., 519 U.S. 102, 119–24 (1996). The Court relied primarily on the Equal Protection Clause, for due process does not independently require that the state provide a right to appeal.

97 Moore v. E. Cleveland, 431 U.S.494, 499 (1977) (plurality opinion).

Amendment. East Cleveland's ordinance selected certain categories of relatives who might live together and declared that others could not; in particular, East Cleveland's definition of "family" made a crime of a grandmother's choice to live with her grandson. In response to East Cleveland's argument that its aim was to prevent overcrowded dwellings, streets, and schools, the Court observed that the municipality's restrictive definition of family served the asserted, and undeniably legitimate, goals marginally, at best. For example, the ordinance permitted any family consisting only of husband, wife, and unmarried children to live together, even if the family contained a half dozen licensed drivers, each with his or her own car. At the same time, it forbade an adult brother and sister from sharing a household, even if both faithfully used public transportation. Besides, another ordinance specifically addressed the problem of overcrowding, tying the maximum permissible occupancy of a dwelling to the habitable floor area.[98]

[F34] In *Belle Terre*, the Court confronted a New York village ordinance that restricted land use to one-family dwellings, defining the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit. The ordinance affected only unrelated individuals and was not found to involve any rights of privacy. In sustaining the ordinance, the Court noted that desires to avoid congestion and noise from both people and vehicles were legitimate guidelines in a land use project addressed to "family needs" and that it was quite within the village's power to lay out "zones where family values, youth values, and the blessings of quiet seclusion and clean air made the area a sanctuary for people."[99]

[F35] Although a ban on inter-racial cohabitation applies to all races, the Court has established that such a classification is constitutionally impermissible. In *McLauglin*, the Court invalidated a statute prohibiting an unmarried inter-racial couple from habitually living in and occupying the same room at night. The law was held unconstitutional because it penalized individuals solely because of their race, while there was no overriding state interest requiring the proscription of the specified conduct when engaged in by members of a different race, but not otherwise.[100]

[F36] In *Lyng v. Castillo*, the Court considered a constitutional challenge to the definition of "household" in the Food Stamp Act, which treated parents, siblings, and children who lived together, but not more distant relatives or unrelated persons who did so, as a single household for purposes of defining eligibility for food stamps. Although

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[98] *Id.* at 498–500, n.7 (1977) (four-member plurality). The plurality also noted that the constitutional protection of the institution of the family is not limited to respect for the bonds uniting the members of the nuclear family; "the tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally deserving of constitutional recognition." *Id.* at 504–05. A fifth Justice concluded that the zoning ordinance constituted a taking of property without due process and without just compensation, for it had no substantial relation to the public health, safety, morals, or general welfare. *Id.* at 513–21.

[99] Vill. of Belle Terre v. Boraas, 416 U.S. 1, 7–9 (1974). The Court rejected the argument that if two unmarried people could constitute a "family," there was no reason why three or four might not, observing that every line drawn by a legislature leaves some out that might well have been included and that such exercise of discretion, however, is a legislative, not a judicial, function.

[100] McLaughlin v. Florida, 379 U.S. 184, 191–94 (1964).

the challenge in that case was brought solely on equal protection grounds, the Court was obliged to decide whether the statutory classification should be reviewed under a stricter standard than mere rational basis review, because it directly and substantially interfered with family living arrangements and thereby burdened a fundamental right. The Court noted that the statute did not order or prevent any group of persons from dining together. Indeed, in the overwhelming majority of cases, it probably had no effect at all; it was exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the costs of separate housing would almost certainly exceed the incremental value of the additional stamps. Hence, the provision could not be deemed as "directly and substantially" interfering with family living arrangements.[101]

G. PROCREATION[102]

[F37] In 1927, the Court ruled that society "can prevent those who are manifestly unfit from continuing their kind." Thus, it upheld a statute providing for the sexual sterilization of inmates of institutions supported by the state who were found to be afflicted with an hereditary form of insanity or imbecility. The Court stressed that, since the society may call upon the best citizens for their lives, it would be strange if it could not call upon those who already sap the strength of the state for lesser sacrifices, in order to prevent its being swamped with incompetence, and concluded that "three generations of imbeciles are enough."[103]

[F38] Fifteen years later, the Court recognized that, since the power to sterilize affects a "basic liberty," strict scrutiny of the classification, which a state makes in a sterilization law, is essential. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made an invidious discrimination, in violation of the Equal Protection Clause.[104]

H. CONTRACEPTION

[F39] In *Griswold*, the Court held that a statute forbidding the use of contraceptives violates the right of marital privacy. In doing so, the Court noted that the idea of allowing "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives" was repulsive to the notions of privacy surrounding the marriage relationship.[105]

[F40] The freedom to use contraceptives was later guaranteed, under the Equal Protection Clause, for unmarried persons. In *Eisenstadt v. Baird*, the Court invalidated a law that made it a felony for anyone to give away a drug, medicine, instrument, or article for the prevention of conception except in the case of a registered physician admin-

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101 Lyng v. Castillo, 477 U.S. 635, 638 (1986). *See also* Bowen v. Gilliard, 483 U.S. 587, 602–03 (1987).

102 *See also* paras. K72 *et seq.* (*pregnancy classifications*).

103 Buck v. Bell, 274 U.S. 200, 207 (1927). The fact that the provision did not reach persons outside the institutions named, did not render it obnoxious to the Equal Protection Clause. *Id.* at 208.

104 Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

105 Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

istering or prescribing it for a married person or an active registered pharmacist furnishing it to a married person presenting a registered physician's prescription. The statute could not be upheld as a deterrent to fornication or as a health measure. First, it had, at best, a marginal relation to the deterrence of premarital sex, particularly in light of the admitted widespread availability to all persons in the state, unmarried as well as married, of birth control devices for the prevention of disease, as distinguished from the prevention of conception. Moreover, in making contraceptives available to married persons without regard to their intended use, the state did not attempt to deter married persons from engaging in illicit sexual relations with unmarried persons. Second, if health were the rationale of the prohibition, the statute would be both discriminatory and overbroad. Indeed, if there was need to have a physician prescribe, and a pharmacist dispense, contraceptives, that need was as great for unmarried persons as for married persons. The statute also would be overbroad with respect to the married, since not all contraceptives are potentially dangerous. And if the legislature intended to prevent the distribution of articles, which might have undesirable or dangerous physical consequences, the challenged provision was not required, in view of the federal and state laws already regulating the distribution of harmful drugs. Third, the statute could not be sustained simply as a prohibition on contraception, which the state considered immoral. If *Griswold* was no bar to a prohibition on the distribution of contraceptives, the state could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried, but not to married, persons, for in each case, the evil, as perceived by the state, would be identical, and the underinclusion would be invidious. On the other hand, if, under *Griswold*, the distribution of contraceptives to married persons could not be prohibited, a ban on distribution to unmarried persons would be equally impermissible, since 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. Therefore, whatever the rights of the individual to access to contraceptives might be, the rights should be the same for the unmarried and the married alike.[106]

[F41] As the Court made clear in *Carey v. Population Services International*, "the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception." But it does not follow that every state regulation in this area is invalid. "The business of manufacturing and selling contraceptives may be regulated in ways that do not infringe protected individual choices. And even a burdensome regulation may be validated by a sufficiently compelling state interest."[107] Where a decision as fundamental as whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by "compelling" state interests, and must be "narrowly drawn" to express only those interests. "This is so not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing."[108]

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[106] Eisenstadt v. Baird, 405 U.S. 438, 446–55 (1972) (four-Justice majority). The majority concluded that 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.

[107] Carey v. Population Servs. Int'l, 431 U.S. 678, 685–86 (1977).

[108] *Id.* at 688.

[F42] "Limiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so. . . . The burden is, of course, not as great as that under a total ban on distribution. Nevertheless, the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition."[109] Such a provision does not serve a compelling state interest. Insofar as it applies to nonhazardous contraceptives, it bears no relation to the state's interest in protecting health. "Nor is the interest in protecting potential life implicated in state regulation of contraceptives."[110] Nor can the provision be justified by a concern that young people not sell contraceptives, or as being designed to serve as a quality control device or as facilitating enforcement of the other provisions of the statute. The first interest "hardly can justify the statute's incursion into constitutionally protected rights, and in any event, the restriction is obviously not substantially related to any goal of preventing young people from selling contraceptives." Second, such a provision is not designed to serve as a quality control device, since there is no proof "that pharmacists are particularly qualified to give advice on the merits of different nonmedical contraceptives, or that such advice is more necessary to the purchaser of contraceptive products than to consumers of other nonprescription items. . . . As to ease of enforcement, the prospect of additional administrative inconvenience is not thought to justify invasion of fundamental constitutional rights."[111]

[F43] A statute prohibiting any "advertisement or display" of contraceptives is equally unconstitutional. "[I]n addition to the substantial individual and societal interests in the free flow of commercial information, . . . [such a statute] suppresse[s] information related to activity with which, at least in some respects, the State cannot interfere." This ban cannot be justified on the ground that advertisements of contraceptive products might offend and embarrass those exposed to them. Nor can it be sustained on the basis that permitting such advertisements would legitimize sexual activity of young people, since the advertisements merely stating the availability of constitutionally protected products may not be characterized as directed to inciting or producing imminent lawless action and likely to incite or produce such action.[112]

[F44] The Court also has struck down a provision prohibiting distribution of contraceptives to persons under 16. "[T]he right to privacy in connection with decisions affecting procreation extends to minors, . . . [and] [s]ince a State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy,[113] the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is, *a fortiori*, foreclosed." The argument that minors' sexual activity may be deterred by increasing the hazards attendant on it cannot stand, for "[i]t would be plainly unreasonable to assume that the state has prescribed pregnancy and the birth of an unwanted child, or the physical and psychological dangers of an abortion, as punishment for fornication." Moreover, there is substantial

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109 Carey v. Population Servs. Int'l, 431 U.S. 678, 689 (1977).

110 *Id.* at 690.

111 *Id.* at 691.

112 *Id.* at 700–01.

113 *See* para. F59.

reason for doubt whether limiting access to contraceptives will, in fact, substantially discourage early sexual behavior. And the fact that the statute does not totally prohibit distribution of contraceptives to minors under 16, but allows such minors to be supplied with a contraceptive by a physician, does not save the aforesaid significant burden to the right to decide whether to bear children, especially when this restriction is not justified by any asserted medical necessity.[114]

I. ABORTION

1. Generally

[F45] In *Roe v. Wade*, the Court held that the right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. "Though abortion is conduct, it does not follow that the state is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition, and so, unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."[115] "Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, . . . the additional difficulties and continuing stigma of unwed motherhood may be involved."[116] Therefore, the suffering of a pregnant woman "is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role."[117]

[F46] In this context, the Court has stressed that the fetus is not a "person" within the language and meaning of the Fourteenth Amendment; accordingly, an abortion is not the termination of life entitled to Fourteenth Amendment protection.[118] And it has

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[114] Carey v. Population Servs. Int'l, 431 U.S. 678, 693–99 (1977) (plurality opinion of four members of the Court). Three Justices concurred in the result. A member of the Court found that the prohibition against distribution of contraceptives to persons under 16 could not be justified primarily because the state had not demonstrated that such prohibition measurably contributed to the purpose of deterrence of sexual relationships between juveniles that the state advanced as justification. *Id.* at 702. Another Justice concluded that this prohibition is defective both because it infringes the privacy interests of married females between the ages of 14 and 16, and because it prohibits parents from distributing contraceptives to their children, thus unjustifiably interfering with parental interests in rearing children. *Id.* at 707–08. The third Justice, who concurred, agreed that the challenged statute could not be applied to married females between the ages of 14 and 16. Furthermore, he held that the prohibition against distribution of contraceptives to persons under 16 denies such persons and their parents a choice that, if available, would reduce exposure to venereal disease or unwanted pregnancy, and that the prohibition cannot be justified as a means of discouraging sexual activity by minors. *Id.* at 713–16.

[115] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 852 (1992).

[116] Roe v. Wade, 410 U.S. 113, 153 (1973).

[117] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 852 (1992).

[118] Roe v. Wade, 410 U.S. 113, 156–57, 159 (1973). Nevertheless, the state may offer protections to unborn children in tort and probate law. *See id.* at 162.

made clear that "a State may not adopt one theory of when life begins to justify its regulation of abortions."[119]

[F47] Nevertheless, a pregnant woman "does not have an absolute constitutional right to an abortion on her demand."[120] The right to abortion "is not unqualified, and must be considered against important state interests in regulation. . . . A State may properly assert important interests in safeguarding the health of the pregnant woman, in maintaining medical standards, and in protecting potential life."[121] *Roe* established a trimester framework to govern abortion regulations. Under this construct, the state may not restrict the decision of the patient and her physician regarding abortion during the first trimester of pregnancy, because, until that point in time, "mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like. This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State. 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." Hence, during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake.[122]

[F48] In *Casey*, a sharply divided Court reaffirmed *Roe*'s essential holding as to each of its three parts. "First is a recognition of the right of the 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."[123]

[F49] However, in *Casey*, a three-Justice plurality rejected the trimester framework set forth in *Roe*. The state has a legitimate interest in ensuring that first trimester abortions are performed as safely as possible. Moreover, "[t]hough the woman has a right to

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[119] Akron v. Akron Ctr. for Reprod. Health, Inc. 462 U.S. 416, 444 (1983) (*Akron I*). *See also* Webster v. Reprod. Health Servs., 492 U.S. 490, 504–07 (1989). Hence, a statute may not require the physician to inform his patient that "the unborn child is a human life from the moment of conception." *See Akron I, supra*, at 444

[120] Doe v. Bolton, 410 U.S. 179, 189 (1973).

[121] Roe v. Wade, 410 U.S. 113, 154 (1973).

[122] *Id.* at 163–64.

[123] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage the pregnant woman to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term, and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if she chooses to raise the child herself. . . . Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."[124] An undue burden exists, and therefore a provision of law is invalid, if its "purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion" before the fetus attains viability."[125] This standard of review was reaffirmed in *Stenberg*, where a five-member majority declined to revisit the issue.[126]

2. Fetal Viability

[F50] Viability marks the earliest point at which the state's interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions. "Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support."[127] Besides, "there must be a potentiality of 'meaningful life,' . . . not merely momentary survival."[128]

[F51] *Webster* involved a state statute mandating medical tests that were useful in making subsidiary viability findings regarding an unborn child of 20 or more weeks' gestational age. A three-Justice plurality upheld the statute as reasonably designed to ensure that abortions were not performed where the fetus was viable. The provision created essentially a presumption of viability at 20 weeks, which the physician, prior to performing an abortion, should rebut with tests—including, if feasible, those for gestational age, fetal weight, and lung capacity—indicating that the fetus was not viable. The plurality noted that, while medical evidence established that a 20-week fetus was not viable, and that 23 to 24 weeks' gestation was the earliest point at which a reasonable possibility of viability existed, there might be a four-week error in estimating gestational age, which supported testing at 20 weeks.[129]

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[124] *Id.* at 872, 878 (plurality opinion of O'Connor, Kennedy and Souter, JJ.).

[125] *Id.* at 877 (emphasis added).

[126] Stenberg v. Carhart, 530 U.S. 914, 921 (2000).

[127] Colautti v. Franklin, 439 U.S. 379, 388 (1979). In that case, the Court struck down, as unconstitutionally vague, a criminal statute that governed the determination of viability. *See, in extenso,* para. E78. A statute defining viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life supportive systems" withstands constitutional attack. *See* Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 63–65 (1976).

[128] Colautti v. Franklin, 439 U.S. 379, 387 (1979), *quoting* Roe v. Wade, 410 U.S. 113, 163 (1973).

[129] Webster v. Reprod. Health Servs., 492 U.S. 490, 514–16 (1989) (plurality opinion). Justice O'Connor, concurring, stressed that the state had not attempted to substitute its judg-

3. Informed Consent of the Pregnant Woman

[F52] "The decision to abort . . . is an important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent." Therefore, a statute providing that a woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, must certify in writing her consent to the procedure and that "her consent is informed and freely given, and is not the result of coercion" is constitutionally valid.[130]

[F53] In *Akron I*, the Court held that the state's interest in ensuring that appropriate information be conveyed to the pregnant woman does "not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth." In that case, the Court confronted a city ordinance requiring that the attending physician inform his patient of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that might result from an abortion, the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth and also inform her of the particular risks associated with her pregnancy and the abortion technique to be employed. The informational requirements in the Akron ordinance were found invalid for two equally decisive reasons. First, much of the information required was designed not to inform the woman's consent, but rather to persuade her to withhold it altogether. A provision required the physician to inform his patient that "the unborn child is a human life from the moment of conception," a requirement inconsistent with the Court's holding in *Roe v. Wade* that a state may not adopt one theory of when life begins to justify its regulation of abortions. Moreover, much of the detailed description of "the anatomical and physiological characteristics of the particular unborn child" required by the statute would involve, at best, speculation by the physician. And the subsection beginning with the dubious statement that "abortion is a major surgical procedure" and proceeding to describe numerous possible physical and psychological complications of abortion, was a "parade of horribles" intended to suggest that abortion was a particularly dangerous procedure.[131] The second reason was that "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient, intruded upon the discretion of the pregnant woman's physician."[132] "By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably ha[d] placed obstacles in the path of the doctor upon whom [the woman was] entitled to rely for advice in connection with her decision."[133]

[F54] These two reasons were considered to apply with equal and controlling force to the specific and intrusive informational prescriptions of the Pennsylvania statutes

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ment for the physician's ascertainment of viability and that the marginal increase in the cost of an abortion, created by the viability testing provision, did not place an undue burden on a woman's abortion decision. *Id.* at 527–31. Justice Scalia would reconsider and explicitly overrule *Roe v. Wade*.

[130] Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 67 (1976).

[131] Akron v. Akron Ctr. for Reprod. Health, Inc. 462 U.S. 416, 444–45 (1983) (*Akron I*).

[132] *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 762 (1986), *discussing Akron I.*

[133] *Akron I*, supra, at 445.

invalidated in *Thornburgh*. Under these provisions, seven explicit kinds of information should be delivered to the woman—the five first of them should be presented by her physician—at least 24 hours before her consent was given: (1) the name of the physician who will perform the abortion; (2) the fact that there might be detrimental physical and psychological effects which were not accurately foreseeable; (3) the particular medical risks associated with the particular abortion procedure to be employed; (4) the probable gestational age; (5) the medical risks associated with carrying the child to term; (6) the fact that medical assistance benefits might be available for prenatal care, childbirth, and neonatal care; and (7) the fact that the father was liable to assist in the child's support. The woman also had to be informed that materials describing the fetus and listing agencies offering alternatives to abortion were available for her review. The materials described the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival. These materials seemed to the Court to be "nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician. The mandated description of fetal characteristics at 2-week intervals, no matter how objective, [wa]s plainly overinclusive, [since this was] not medical information always relevant to the woman's decision, and it [might] serve only to confuse and punish her, and to heighten her anxiety, contrary to accepted medical practice. Even the listing of agencies in the printed Pennsylvania form present[ed] serious problems; it contain[ed] names of agencies that well [might] be out of step with the needs of the particular woman, and thus place[d] the physician in an awkward position and infringe[d] upon his or her professional responsibilities. . . . The requirements . . . that the woman be advised that medical assistance benefits [might] be available, and that the father [wa]s responsible for financial assistance in the support of the child, similarly [we]re found to be poorly disguised elements of discouragement for the abortion decision. Much of this would be nonmedical information, and, for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the 'information' in its very rendition could be cruel. . . . [A] victim of rape should not have to hear gratuitous advice that an unidentified perpetrator was liable for support if she continued the pregnancy to term. . . . [And it is well known that] theoretical financial responsibility often does not equate with fulfillment. . . . The requirements . . . that the woman be informed by the physician of 'detrimental physical and psychological effects' and of all 'particular medical risks' compound[ed] the problem of medical attendance, increase[d] the patient's anxiety, and intrude[d] upon the physician's exercise of proper professional judgment. This type of compelled information is the antithesis of informed consent."[134]

[F55] However, *Akron I* and *Thornburgh* were later disavowed in part. In *Casey*, which involved a similar "informed consent" requirement, not applying in the case of a medical emergency,[135] a three-member plurality held that "[t]o the extent *Akron I* and

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[134] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 762–64 (1986).

[135] Under the statute, a medical emergency was "[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." If this definition foreclosed the possibility of an immediate abortion despite some significant health risks, the Court would be required to invalidate the restrictive opera-

Thornburgh find a constitutional violation when the government requires . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled."[136] The plurality also found "no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health. . . . [R]equiring that the woman be informed of the availability of information relating to fetal development and the assistance available, should she decide to carry the pregnancy to full term, is a reasonable measure to insure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion."[137] Four Justices concurred, finding that such requirements do not constitute a large burden and are rationally related to maternal health and to the state's legitimate interests in informed consent and the preservation of unborn life.[138]

[F56] In *Casey*, the Court also upheld, against a facial challenge, a 24-hour mandatory waiting period—not applying in medical emergencies—between the time that the pregnant woman received the required information and the performance of an abortion. Four Justices said that, "in providing time for reflection and reconsideration, the waiting period help[ed] ensure that a woman's decision to abort [wa]s a well-considered one, and reasonably further[ed] the State's legitimate interest in maternal health and in the unborn life of the fetus."[139] Three other members of the Court agreed that, at least in theory, the waiting period was a reasonable measure to implement the state's interest in protecting the life of the unborn. The district court had found that, for those women who had the fewest financial resources, those who should travel long distances, and those who had difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period would be "particularly burdensome." The same three Justices noted that these findings were troubling in some respects, but they did not demonstrate that the waiting period constituted an undue burden. Hence, on the record of the case, and in the context of this facial challenge, they were not convinced that the 24-hour waiting period constituted an undue burden.[140]

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tion of the provision, for the essential holding of *Roe* forbids a state from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health. Nevertheless, the court of appeals had read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman. *See* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 879–80 (1992).

136 Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 882 (1992) (opinion of O'Connor, Kennedy and Souter, JJ.).

137 *Id.* at 882–83. The plurality also noted that the doctor-patient relationship is derivative of the woman's position and does not underlie or override the woman's right to make family decisions and her right to physical autonomy.

138 *Id.* at 967–68.

139 *Id.* at 969.

140 *Id.* at 885–87.

4. Consent or Notification of the Spouse

[F57] The Court has emphasized that it "cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy when the State itself lacks that right. . . . [W]hen the wife and the husband disagree on the abortion decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." Therefore, a statute requiring the written consent of the spouse of a woman seeking a non-therapeutic abortion, during the first 12 weeks of pregnancy, is unconstitutional.[141]

[F58] A spousal notification requirement is equally impermissible, for it is "likely to prevent a significant number of women from obtaining an abortion. . . . In well functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. . . . [But] for the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to" an unconstitutional spousal veto.[142]

5. Consent or Notification of the Parents of a Pregnant Unmarried Minor

[F59] "[T]he State may not impose a blanket provision requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy."[143] "Although . . . such deference to parents may be permissible with respect to other choices facing a minor, the unique nature and consequences of the abortion decision make it inappropriate 'to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.'"[144] "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[145]

[F60] Nevertheless, it does not follow that "every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."[146] "The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely. . . . That interest, which justifies state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or enter-

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141 Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 70–71 (1976).

142 Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 892–93, 897 (1992).

143 Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976).

144 Bellotti v. Baird, 443 U.S. 622, 643 (1979), *quoting* Planned Parenthood of Cent. Missouri. v. Danforth, 428 U.S. 52, 74 (1976).

145 Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 75 (1976).

146 *Id.*

ing military service, . . . extends also to the minor's decision to terminate her pregnancy."[147] Therefore, "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."[148] Under *Bellotti*, a constitutional parental consent statute must contain a bypass provision that meets four criteria: "(1) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently; (2) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (3) ensure the minor's anonymity; and (4) provide for expeditious bypass procedures."[149] Hence, a city may not make a blanket determination that all minors under the age of 15 are too immature to make the abortion decision, or that an abortion never may be in the minor's best interests without parental approval.[150] A bypass procedure, contemplating an *ex parte* proceeding at which no one opposes the minor's testimony, does not violate due process by placing the burden of proof on the issues of maturity or best interests on the minor or by requiring a heightened (clear and convincing evidence) standard of proof, when she is assisted by an attorney and a guardian *ad litem*.[151]

[F61] A statute setting out a mere requirement of parental *notice* does not violate the constitutional rights of an *immature*, dependent minor. A state may reasonably determine that parental consultation is particularly desirable with respect to the abortion decision. Thus, such a requirement serves the important considerations of family integrity and protecting adolescents. In addition, it furthers a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician.[152]

[F62] A state statute requiring that a minor wait 48 hours after notifying a single parent of her intention to obtain an abortion, is constitutionally valid, for it reasonably furthers the legitimate state interest in ensuring that the minor's decision is knowing and

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147 Hodgson v. Minnesota, 497 U.S. 417, 444–45 (1990) (opinion of Justice Stevens).

148 *See, e.g.*, Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 899, 970–971 (1992). A State may require an "informed" parental consent. *See id.* at 899–900 (plurality opinion).

149 *See* Lambert v. Wicklund, 520 U.S. 292, 295 (1997) (*per curiam*), *discussing* Bellotti v. Baird, 443 U.S. 622, 643–44 (1979) (*Bellotti II*) (plurality opinion of four Justices). *See also* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 511–13 (1990) (*Akron II*). In *Bellotti II, supra*, at 642–56, the Court struck down a state statute requiring parental or judicial consent before an abortion could be performed on any unmarried minor. There the state's highest court had construed the statute to allow a court to overrule the minor's decision even if the court found that the minor was capable of making, and in fact had made, an informed and reasonable decision to have an abortion. The Court held that the judicial bypass provision was too restrictive and unconstitutionally burdened a minor's right to an abortion. Four Justices concluded that the flaws in the statute were that, as construed by the state court, (1) it permitted overruling of a mature minor's decision to abort her pregnancy; and (2) it required parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she was mature enough to consent or that an abortion would be in her best interests. Four other Justices concluded that the defect was in making the abortion decision of a minor subject to veto by a third party, whether parent or judge, no matter how mature and capable of informed decisionmaking the minor might be.

150 Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 439–40 (1983) (*Akron I*).

151 Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 515–16 (1990) (*Akron II*).

152 H. L. v. Matheson, 450 U.S. 398, 409–13 (1981).

intelligent. The state may properly enact laws designed to aid a parent who has assumed "primary responsibility" for a minor's well-being in discharging that responsibility. The 48-hour waiting period provides the parent the opportunity to consult with his or her daughter and spouse and a family physician. And the delay imposes only a minimal burden on the minor's rights.[153]

[F63] Although the Constitution might allow a state to demand that notice be given to *one* parent prior to an abortion, it may not require that similar notice be given to *both* parents, unless the state incorporates a judicial bypass procedure in that two-parent requirement. "A statutory requirement that both parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest. The usual justification for a parental consent or notification provision is that it supports the authority of a parent who is presumed to act in the minor's best interest, and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate. To the extent that such an interest is legitimate, it would be fully served by a requirement that the minor notify one parent, who can then seek the counsel of his or her mate or any other party when such advice and support is deemed necessary to help the child make a difficult decision. In the ideal family setting, notice to either parent would normally constitute notice to both. A statute requiring two-parent notification would not further any state interest in those instances. In many families, however, the parent notified by the child would not notify the other parent. In those cases, the State has no legitimate interest in questioning one parent's judgment that notice to the other parent would not assist the minor or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child. . . . [Moreover, a two-parent notification] disserves the state interest in protecting and assisting the minor with respect to dysfunctional families," where this requirement, ostensibly designed for the benefit of the minor, may be harmful to the minor, and often to a parent as well. In some cases, the parents are divorced and the second parent does not have custody or otherwise participate in the child's upbringing. In other instances, the second parent has either deserted or abused the child, or is not notified because of the considered judgment that notification would inflict unnecessary stress on a parent who is ill. "In these circumstances, the statute [is] not merely ineffectual in achieving the State's goals, but actually counterproductive. The focus on notifying the second parent [may] distrac[t] both the parent and minor from the minor's imminent abortion decision." There is also no merit to the argument that the two-parent requirement is justified because, in the ideal family, the minor should make her decision only after consultation with both parents, who should naturally be concerned with her welfare. The state has no legitimate interest in conforming family life to a state-designed ideal by requiring family members to talk with one another. "Nor can any state interest in protecting a parent's interest in shaping a child's values and lifestyle overcome the liberty interests of a minor acting with the consent of a single parent or court. . . . [T]he combined force of the separate interest of one parent and the minor's privacy interest must outweigh the separate interest of the second parent, . . . [and] the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child."[154]

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[153] Hodgson v. Minnesota, 497 U.S. 417, 448–49, 496–97 (1990).

[154] Hodgson v. Minnesota, 497 U.S. 417, 450–54 (1990); *id.* at 461, 497–501. One Justice

[F64] In *Akron II*, the Court upheld a statute requiring a minor to notify one parent before having an abortion, subject to a judicial bypass provision. The Court "declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional. . . . Instead, [it] held that [the challenged] bypass provision satisfied the four *Bellotti* criteria required for bypass provisions in parental *consent* statutes, and that *a fortiori* it satisfied any criteria that might be required for bypass provisions in parental notification statutes."[155] As the Court explained in *Lambert*, underlying *Akron II*, was "an assumption that a judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification is* in her best interests, as the context of the opinion, the statutory language, and the concurring opinion" all made clear.[156]

6. Methods of Abortion

[F65] "[S]ubsequent to viability, the State may regulate and even proscribe abortion except where it is necessary,[157] in appropriate medical judgment, for the preservation of the life or health of the mother."[158] "[A] State may promote but not endanger a woman's health when it regulates the methods of abortion."[159] The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially and unduly limited by a statute mandating that the procedure be approved by a hospital staff abortion committee.[160]

[F66] In *Thornburgh*, the Court dealt with a statute providing that "the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless," in the physician's good faith judgment, that technique "would present a significantly greater medical risk to the life or health of the pregnant woman." The provision was unconstitutional because it required a "trade-off" between the woman's health and fetal survival and failed to require that maternal health be the physician's paramount consideration.[161]

[F67] In the early 1970s, inducing labor through the injection of saline into the uterus was the predominant method of second trimester abortion. *Danforth* involved a

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held that two-parent notification is unconstitutional without judicial bypass, but constitutional with bypass; four Justices held that two-parent notification is constitutional with or without bypass; and four other Justices held that two-parent notification is unconstitutional with or without bypass.

155 *See* Lambert v. Wicklund, 520 U.S. 292, 295 (1997) (*per curiam*), *discussing* Ohio v. Akron Center for Reprod. Health, 497 U.S. 502, 510 (1990) (*Akron II*).

156 Lambert v. Wicklund, 520 U.S. 292, 297–98 (1997) (*per curiam*).

157 The word "necessary" does not refer to "absolute proof or require unanimity of medical opinion." *See* Stenberg v. Carhart, 530 U.S. 914, 937 (2000).

158 *See* Stenberg v. Carhart, 530 U.S. 914, 921 (2000), *quoting* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 899, 879 (1992) (plurality opinion), *quoting*, in turn, Roe v. Wade, 410 U.S. 113, 164–65 (1973).

159 Stenberg v. Carhart, 530 U.S. 914, 931 (2000). There, the Court rejected the proposition that this principle is limited "to situations where the pregnancy *itself* creates a threat to health," noting "a State cannot subject women's health to significant risks both in that context, *and also* where state regulations force women to use riskier methods of abortion." *Id.* at 931.

160 Doe v. Bolton, 410 U.S. 179, 197–98 (1973).

161 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 768–69 (1986).

statute prohibiting, after the first 12 weeks of pregnancy, the abortion procedure of saline amniocentesis as "deleterious to maternal health." The provision prohibited the most commonly used abortion procedure in the country, which was safer, with respect to maternal mortality, than even the continuation of pregnancy until normal childbirth, and forced pregnancy terminations by methods more dangerous to the woman's health than the method outlawed. Therefore, it failed as a reasonable protection of maternal health. Instead, it was found to be "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." As such, it did not withstand constitutional challenge.[162]

[F68] During recent years, the medical profession has switched from medical induction of labor to surgical procedures for most second trimester abortions. The most commonly used procedure is called "dilation and evacuation" (D&E). D&E involves (1) dilation of the cervix; (2) removal of at least some fetal tissue using non-vacuum instruments; and (3) after the 15th week, the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus. The D&E procedure carries certain risks. The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications. Nonetheless, studies show that the risks of mortality and complication that accompany the D&E procedure between the 12th and 20th weeks of gestation are significantly lower than those accompanying induced labor procedures, which are the next safest mid-second trimester procedures. A variation of D&E, known as "intact D&E," is used after 16 weeks. It involves removing the fetus from the uterus through the cervix "intact," i.e., in one pass rather than several passes. Some physicians prefer this method, because they consider that (1) it reduces the dangers from sharp bone fragments passing through the cervix, (2) minimizes the number of instrument passes needed for extraction and lessens the likelihood of uterine perforations caused by those instruments, (3) reduces the likelihood of leaving infection-causing fetal and placental tissue in the uterus, and (4) could help to prevent potentially fatal absorption of fetal tissue into the maternal circulation. The intact D&E proceeds in one of two ways, depending on whether the fetus presents head first or feet first. The feet-first method is known as "dilation and extraction" (D&X). D&X is ordinarily associated with the term "partial birth abortion." *Stenberg*[163] involved a Nebraska's statute criminalizing the performance of partial birth abortions, unless necessary to save the mother's life. It defined "partial birth abortion" as a procedure in which the doctor "partially delivers vaginally a living unborn child before killing the child" and defined the latter phrase to mean "intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the [abortionist] knows will kill the . . . child and does kill the . . . child." The Court invalidated the statute for two independent reasons. First, the law lacked any exception for the preservation of the health of the mother.[164] Second, it imposed an undue burden on a woman's ability to choose an abortion, since, even if its basic aim was to ban D&X, it also covered D&E.

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[162] Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 78–79 (1977).

[163] Stenberg v. Carhart, 530 U.S. 914, 922–40 (2000).

[164] The Court rejected Nebraska's contention that there was no need for a health exception, because safe alternatives remained available and a ban on partial-birth abortion/D&X would create no risk to women's health. Given the district court's finding that D&X obviates

7. Persons Performing Abortions

[F69] The performance of abortions may be restricted to physicians. In promoting its interest in the health of the pregnant woman, the state may define the term "physician" to mean only a physician currently licensed by the state, and may proscribe any abortion by a person who is not a physician as so defined.[165]

[F70] A statute mandating that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians is unconstitutional. "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs, and unduly infringes on the physician's right to practice."[166]

[F71] A state may require the presence of a second physician during an abortion performed after viability. The state has a compelling interest in protecting and preserving fetal life, and the second physician's presence provides assurance that the state's interest is protected more fully than with only one physician in attendance.[167] Nevertheless, a statute incorporating such a requirement is unconstitutional if it has no exception for emergency situations and "evinces no intent to protect a woman whose life may be at risk."[168]

8. Facilities in Which Abortions May Be Performed

[F72] A second trimester *hospitalization* requirement is not a reasonable health regulation. By preventing the performance of D&E abortions[169] "in an appropriate nonhospital setting, [a city imposes] a heavy and unnecessary burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure."[170]

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health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of medical opinion over whether D&X is generally safer, and an absence of controlled medical studies that would help answer these medical questions, the Court was not convinced that a health exception was never necessary to preserve the health of women. For one thing, the word "necessary" in *Casey*'s phrase "necessary, in appropriate medical judgment, for the health of the mother," cannot refer to absolute proof or require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey*'s words "appropriate medical judgment" must embody "the judicial need to tolerate responsible differences of medical opinion." For another thing, the division of medical opinion signals uncertainty. If those who believe that D&X is a safer abortion method in certain circumstances turn out to be right, the absence of a health exception will place women at an unnecessary risk; if they are wrong, the exception will simply turn out to have been unnecessary. *See* Stenberg v. Carhart, 530 U.S. 914, 936–37 (2000).

165 Roe v. Wade, 410 U.S. 113, 165 (1973); Mazurek v. Armstrong, 520 U.S. 968, 974–75 (1997) (*per curiam*).

166 Doe v. Bolton, 410 U.S. 179, 199 (1973).

167 Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 482–86, 505 (1983).

168 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 770–71 (1986).

169 *See* para. F68.

170 Akron v. Akron Ctr. for Reprod. Health, Inc. 462 U.S. 416, 438 (1983) (*Akron I*). *See also Doe v. Bolton*, 410 U.S. 179, 194–95 (1973), concerning a hospital requirement for first trimester abortions.

Conversely, a statutory requirement that second trimester abortions be performed in "licensed clinics" has been upheld as a means of protecting the woman's own health and safety that comports with accepted medical standards.[171]

9. Abortion Funding—Allocation of Public Resources

[F73] The Court has stressed that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[172] "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category."[173]

[F74] At issue in *Maher* was a Connecticut welfare regulation under which Medicaid recipients received payments for medical services incident to childbirth but not for medical services incident to non-therapeutic abortions. The regulation placed no obstacles in the pregnant woman's path to an abortion. The indigency that might make it difficult and, in some cases, perhaps, impossible—for some women to have abortions was neither created nor in any way affected by the Connecticut regulation, which was rationally related to and furthered the state's strong and legitimate interest in encouraging normal childbirth. Consequently, the Court did not find the regulation repugnant to the Due Process and Equal Protection Clauses.[174] Likewise, there is no constitutional violation by a city "in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions."[175]

[F75] In *Harris v. McRae*, the Court extended the rationale of *Maher* to Congress' refusal to fund medically necessary abortions, except those necessary to save the life of the mother. The Court emphasized that, "regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." Moreover, Congress' authorization of reimbursement for medically necessary services generally, but not for certain medically necessary abortions, was upheld against an equal protection challenge, as rationally related to the legitimate governmental goal of encouraging childbirth and protecting fetal life; indeed, no other procedure involved the purposeful termination of a potential life.[176]

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171 Simopoulos v. Virginia, 462 U.S. 506, 516–19 (1983).

172 Maher v. Roe, 432 U.S. 464, 475 (1977).

173 Harris v. McRae, 448 U.S. 297, 316 (1980).

174 Maher v. Roe, 432 U.S. 464, 473–74, 478–80 (1977). As to whether the Connecticut welfare regulation discriminated against a suspect class, under equal protection analysis, the Court observed: "This case involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to non-indigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." *Id.* at 470–71.

175 Poelker v. Doe, 432 U.S. 519, 521 (1977) (*per curiam*).

176 Harris v. McRae, 448 U.S. 297, 316, 324–25 (1980). *See also* Williams v. Zbaraz, 448 U.S. 358, 369 (1980).

[F76] If the state may make a value judgment favoring childbirth over abortion and implement that judgment by the allocation of public funds, it may also do so "through the allocation of other public resources, such as hospitals and medical staff. . . . [A state's] refusal to allow public employees to perform [non-therapeutic] abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all. [Such a provision only restricts] a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital. This circumstance is more easily remedied, and thus considerably less burdensome, than indigency. . . . Nothing in the Constitution requires States to enter or remain in the business of performing abortions."[177]

[177] Webster v. Reprod. Health Servs., 492 U.S. 490, 509–10 (1989).

CHAPTER 7

SEARCHES AND SEIZURES

A. INTRODUCTION

[G1] The Fourth Amendment secures the persons, houses, papers, and effects of the people against unreasonable searches and seizures and requires the existence of probable cause before a warrant shall issue. That Amendment is made applicable to the states through the Fourteenth;[1] it has also been held applicable to Puerto Rico.[2] However, its protections do not extend to non-resident aliens outside the territorial boundaries of the United States.[3]

[G2] The basic purpose of the Fourth Amendment is to safeguard "the privacy and personal security of individuals" against arbitrary invasions by governmental officials.[4] The Fourth Amendment's requirement that searches and seizures be reasonable "also may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation."[5]

B. SCOPE OF THE FOURTH AMENDMENT

1. Government Conduct

[G3] The evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or "writs of assistance" to authorize searches for contraband by officers of the Crown.[6] But the Court "has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, th[e] Court has long spoken of the

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1 *See Mapp v. Ohio*, 367 U.S. 643 (1961), *overruling Wolf v. Colorado*, 338 U.S. 25 (1949), and holding the Fourth Amendment's exclusionary rule applicable to state prosecutions. *See also Ker v. California*, 374 U.S. 23, 30–34 (1963), in which the Court held that the same probable cause standards were applicable to federal and state warrants under the Fourth and Fourteenth Amendments. While a state is free as a matter of its own law to impose greater restrictions on police activity than those the Court holds to be necessary, under the Fourth Amendment, state courts cannot interpret this Amendment more restrictively than interpreted by the Court. *See* Arkansas v. Sullivan, 532 U.S. 769, 772 (2001).

2 Torres v. Puerto Rico, 442 U.S. 465, 468–71 (1979).

3 nited States v. Verdugo-Urquidez, 494 U.S. 259, 264–75 (1990). There, the Court held that the Fourth Amendment does not apply to the search and seizure by U.S. agents of property owned by a non-resident alien and located in a foreign country. *See, in extenso*, para. B42.

4 *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

5 United States v. Ortiz, 422 U.S. 891, 895 (1975).

6 *See* United States v. Chadwick, 433 U.S. 1, 7–8 (1977); Boyd v. United States, 116 U.S. 616, 624–29 (1886).

Fourth Amendment's strictures as restraints imposed upon 'governmental action, that is upon the activities of sovereign authority.'"[7] Accordingly, it has held the Fourth Amendment applicable to the activities of criminal as well as civil authorities.[8] Because the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,"[9] it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[10]

[G4] On the contrary, the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, without the participation or knowledge of any government official.[11] Nevertheless, the Amendment protects against such intrusions "if the private party acted as an instrument or agent of the Government."[12]

2. What Constitutes "Search" or "Seizure"

a. Generally

i. Search

[G5] In determining whether a "search," within the meaning of the Fourth Amendment, occurs, the lodestar is *Katz*. In that case, government agents had intercepted the contents of a telephone conversation by attaching an electronic listening device to the outside of a public phone booth. The Court rejected the argument that a "search" can occur only when there has been a "physical intrusion" into a "constitutionally protected area," noting that the Fourth Amendment "protects people, not places." Because the government's monitoring of Katz's conversation "violated the privacy upon which he justifiably relied while using the telephone booth," the Court held that it constituted a Fourth Amendment search.[13]

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[7] New Jersey v. T.L.O., 469 U.S. 325, 335 (1985), *quoting* Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

[8] *See* New Jersey v. T.L.O., 469 U.S. 325, 335 (1985) (*citing* cases).

[9] Marshall v. Barlow's, Inc., 436 U.S. 307, 312–13 (1978).

[10] Camara v. Mun. Court, 387 U.S. 523, 530 (1967).

[11] Burdeau v. McDowell, 256 U.S. 465, 475 (1921); Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); United States v. Jacobsen, 466 U.S. 109, 113–14 (1984). *Such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully. See* Walter v. United States, 447 U.S. 649, 656 (1980).

[12] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989). *See, in extenso*, para. G172. In *Coolidge v. New Hampshire*, 403 U.S. 443, 487–90 (1971), the Court determined that a suspect's wife was not operating as an agent of the state when she handed over her husband's guns and clothing to the police, since the wife had not been coerced. The Court found nothing constitutionally suspect in the subjective forces that impelled the spouse to cooperate with the police, like the simple, but often powerful, convention of openness and honesty, the fear that secretive behavior would intensify suspicion and uncertainty as to what course was most likely to be helpful to the absent spouse. In *California Bankers Association v. Shultz*, 416 U.S. 21, 52–53 (1974), the Court rejected the contention that banks act as agents of the government, when they keep records of their depositors' transactions pursuant to a federal statute.

[13] Katz v. United States, 389 U.S. 347, 351–53 (1967).

[G6] Consistently with *Katz*, the Court uniformly has held that the application of the Fourth Amendment depends on whether "the person invoking its protection can claim a *'justifiable,'* a *'reasonable,'* or a *'legitimate expectation of privacy'* that has been invaded by government action."[14] This inquiry embraces two discrete questions. The first is whether the individual has "manifested a subjective expectation of privacy in the object of the challenged search;"[15] "[w]hat a person knowingly exposes to the public, even in his own home, is not a subject of Fourth Amendment protection."[16] The second question is whether "the individual's subjective expectation of privacy is one that society is willing to recognize as reasonable."[17]

[G7] In assessing the degree to which a search infringes upon individual privacy, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment,"[18] "the uses to which the individual has put a location,"[19] and the "societal understanding that certain areas deserve the most scrupulous protection from government invasion."[20] "The common law may guide consideration of what areas are protected by the Fourth Amendment by defining areas whose invasion by others is wrongful."[21]

[G8] "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities. Indeed, this distinction underlies the rule that government may utilize information voluntarily disclosed to a governmental informant, despite the criminal's reasonable expectation that his associates would not disclose confidential information to the authorities."[22] The Court "has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[23]

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[14] Smith v. Maryland, 442 U.S. 735, 740 (1979) (*citing* cases) (emphasis added). The creation of a mere potential for an invasion of privacy does not amount to search. *See* United States v. Karo, 468 U.S. 705, 712 (1984). State tort law governing unfair competition does not define the limits of the Fourth Amendment. *See* Dow Chem. Co. v. United States, 476 U.S. 227, 232 (1986).

[15] California v. Ciraolo, 476 U.S. 207, 211 (1986), *citing* Smith v. Maryland, 442 U.S. 735, 740 (1979).

[16] California v. Ciraolo, 476 U.S. 207, 213 (1986).

[17] *See* Smith v. Maryland, 442 U.S. 735, 740 (1979). *See also* California v. Ciraolo, 476 U.S. 207, 211 (1986).

[18] Oliver v. United States, 466 U.S. 170, 178 (1984), *citing* United States v. Chadwick, 433 U.S. 1, 7–8 (1977).

[19] Oliver v. United States, 466 U.S. 170, 178 (1984), *citing* Jones v. United States, 362 U.S. 257, 265 (1960).

[20] Oliver v. United States, 466 U.S. 170, 178 (1984), *citing* Payton v. New York, 445 U.S. 573 (1980).

[21] Oliver v. United States, 466 U.S. 170, 183 (1984).

[22] United States v. Jacobsen, 466 U.S. 109, 122–23 (1984), *citing* United States v. White, 401 U.S. 745, 751–52 (1971) (plurality opinion).

[23] *See* United States v. Miller, 425 U.S. 435, 443, n.5 (1976) (a customer of a bank cannot challenge on Fourth Amendment grounds the admission into evidence in a criminal prosecution of financial records obtained by the government from his bank pursuant to allegedly defective subpoenas, despite the fact that he was given no notice of the subpoenas). *Cf.* Sec. and Exch. Comm'n v. Jerry T. O'Brien 467 U.S. 735, 743 (1984). *See also* Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (when one uses his phone, one voluntarily conveys numerical information

This Amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[24]

[G9] Finally, it must be noted that a governmental intrusion into a person's legitimate expectations of privacy constitutes a "search," even if the intrusion is imposed by law as a condition of eligibility for a particular benefit, such as a promotion,[25] or an opportunity to participate in an extracurricular activity.[26]

ii. Seizure

[G10] *Seizure of Persons—In General.* The word "seizure," in the language of the Fourth Amendment, "readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. . . . It does not remotely apply, however, to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing suspect who continues to flee."[27] An *attempted* seizure is not a Fourth Amendment seizure.[28] A police car pursuing with flashing lights, or a policeman in the road signaling an oncoming car to halt, does not effect a seizure.[29] "An *arrest* requires either physical force, as described above, or, where that is absent, *submission* to the assertion of authority. Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest, followed by submission of the arrestee, constitutes an arrest. There can be no arrest without either touching or submission."[30] "[T]he test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether, in view of all the circumstances surrounding the incident, the officer's words and actions would have conveyed that to a reasonable person."[31]

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to the telephone company and assumes the risk that the company would reveal to police the numbers he dialed).

[24] Hoffa v. United States, 385 U.S. 293, 302 (1966). The question of evidentiary privileges, such as that protecting communications between an attorney and his client, is different. *Cf.* Fisher v. United States, 425 U.S. 391, 403–05 (1976).

A subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued. *See* United States v. Miller, 425 U.S. 435, 444 (1976), *citing* California Bankers Ass'n v. Shultz, 416 U.S. 21, 53 (1974).

[25] *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug test for U.S. Customs Service employees seeking transfer or promotion to certain positions).

[26] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (drug testing of student athletes).

The relevant portion of *Wyman v. James*, 400 U.S. 309, 317–18 (1971), has been implicitly overruled. This case presented the issue whether a beneficiary of the program for Aid to Families with Dependent Children may refuse a home visit by the caseworker without risking the termination of benefits. Considering that the visitation, in itself, was not forced or compelled, and that the beneficiary's denial of permission was not a criminal act, the Court found that the Fourth Amendment did not come into play.

[27] California v. Hodari D., 499 U.S. 621, 626 (1991).

[28] *See id.* at 626, n.2.

[29] *Cf.* Brower v. County of Inyo, 489 U.S. 593, 598 (1989).

[30] California v. Hodari D., 499 U.S. 621, 626–27 (1991).

[31] *Id.* at 628. Under the so-called *Mendenhall* test, formulated by Justice Stewart's opinion in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), and adopted by the Court in later cases

[G11] The protection against unreasonable seizures extends to seizures that "involve only a brief detention short of traditional arrest."[32] "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[33] For example, "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure of 'persons,'" within the meaning of the Fourth Amendment.[34] Temporary detention of the occupant of a home being lawfully searched is also subject to the Fourth Amendment guarantees.[35] This Amendment applies to involuntary detention occurring at the investigatory stage, as well as at the accusatory stage. Detentions for the sole purpose of obtaining fingerprints are subject to the constraints of the Fourth Amendment.[36] Likewise, "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest."[37]

[G12] "A Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*. . . . Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant—even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables."[38] Hence, there is no seizure in case a pursuing police car seeks to stop a suspect only by the show of authority represented by flashing lights and continuing pursuit, but the suspect is stopped by a different means—his loss of control of his vehicle and the subsequent crash. If, instead of that, the police cruiser pulls alongside the fleeing car and sideswipes it, producing the crash, then the termination of the suspect's freedom of movement would be a seizure.[39] Similarly, "a roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur."[40]

(*see, e.g.*, INS v. Delgado, 466 U.S. 210, 215 (1984); *Michigan v. Chesternut*, 486 U.S. 567, 573–74 (1988)), "[a] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." This test says that a person has been seized "only if," not that he has been seized "whenever." Hence, "it states a *necessary*, but not a *sufficient*, condition for seizure" effected through a "show of authority," as explained in *California v. Hodari D.*, 499 U.S. 621, 628 (1991).

[32] United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 215 (1984).

[33] Terry v. Ohio, 392 U.S. 1, 16 (1968).

[34] Whren v. United States, 517 U.S. 806, 809 (1996), *citing* Delaware v. Prouse, 440 U.S. 648, 653 (1979).

[35] Michigan v. Summers, 452 U.S. 692, 695–96 (1981).

[36] Davis v. Mississipi, 394 U.S. 721, 726–27 (1969).

[37] Dunaway v. New York, 442 U.S. 200, 216 (1979).

[38] Brower v. County of Inyo, 489 U.S. 593, 596–97 (1989).

[39] *Id.* at 597.

[40] *Id.* at 598. *See also* County of Sacramento v. Lewis, 523 U.S. 833, 843–44 (1998).

[G13] *Consensual Encounters with the Police.* "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. . . . Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means. . . . If a reasonable person would feel free to terminate the encounter, then he or she has not been seized."[41]

[G14] In *Kaupp*, a 17-year-old boy was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "we need to go and talk." Kaupp said "Okay." He was taken out in handcuffs, without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned. The Court found that Kaupp had been "seized." Kaupp's "Okay" in response to the officer's statement was no showing of consent under the circumstances. Kaupp was offered no choice, and "a group of police officers rousing an adolescent out of bed in the middle of the night with the words 'we need to go and talk' presents no option but 'to go.'" There was no reason to think that Kaupp's answer was anything more than "a mere submission to a claim of lawful authority." And if reasonable doubt were possible on this point, the ensuing events would resolve it—removal from one's house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene on the way to an interview room at law enforcement headquarters. Hence, when the detectives began to question Kaupp, "a reasonable person in his situation [could not] have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed."[42]

[G15] In *Mendenhall*, the respondent was walking along an airport concourse when she was approached by two federal Drug Enforcement Agency (DEA) officers. The officers asked for Mendenhall's airline ticket and some identification; the names on the ticket and identification did not match. When one of the agents specifically identified himself as attached to the DEA, Mendenhall became visibly shaken and nervous. After returning the ticket and identification, one officer asked Mendenhall if she would accompany him to the DEA airport office, 50 feet away, for further questions. Mendenhall did so, without a verbal response to the request. The Court held that Mendenhall's Fourth Amendment rights were not violated when she went with the agents from the concourse to the DEA office. She was not told that she had to go to the office but was simply asked if she would accompany the officers, and there were neither threats nor any show of force. In addition, the facts that the respondent was 22 years old, had not been graduated from high school, and was an African-American accosted by Caucasian officers, while not irrelevant, were not decisive. Hence, the totality of the evidence in this case was plainly adequate to support the district court's finding that the respondent voluntarily consented to accompany the officers to the DEA office.[43]

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41 United States v. Drayton, 536 U.S. 194, 200–01 (2002). *See also* Florida v. Bostick, 501 U.S. 429, 434 (1991) (mere police questioning does not constitute a seizure).

42 Kaupp v. Texas, 538 U.S. 626, 631–32 (2003) (*per curiam*).

43 United States v. Mendenhall, 446 U.S. 544, 557–58 (1980). Regarding the initial encounter between Mendenhall and the DEA agents, two Justices were of the view that the encounter was consensual, and that no seizure had taken place. Three other Justices assumed

[G16] In *Royer*, when Drug Enforcement Administration agents found that the respondent matched a drug courier profile, the agents approached him and asked him for his airplane ticket and driver's license, which the agents then examined. A majority of the Court believed that the request and examination of the documents did not amount to a "seizure."[44] But after the initial questioning, the detectives told Royer that he was suspected of transporting narcotics, asked him to accompany them to the police room, and seized his luggage, while retaining his airline ticket and driver's license and without indicating in any way that he was free to depart. The Court found that "[w]hat had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room." Accordingly, the Court held that the defendant's detention constituted an arrest.[45]

[G17] At issue in *Delgado* was the INS's practice of visiting factories at random and questioning employees to determine whether any were illegal aliens. Several INS agents would stand near the building's exits, while other agents walked through the factory questioning workers. The Court acknowledged that the workers may not have been free to leave their worksite, but explained that this was not the result of police activity, but was due to the workers' voluntary obligations to their employers. The Court concluded that there was no seizure, because, even though the workers were not free to leave the building without being questioned, the agents' conduct should have given employees "no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer."[46]

[G18] In *Bostick*, two police officers requested a bus passenger's consent to a search of his luggage. The passenger agreed, and the resulting search revealed cocaine in his suitcase. The Court first observed that "in order to determine whether a particular encounter constitutes a seizure, a court must consider *all the circumstances surrounding the encounter* to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."[47] It "noted next that the traditional rule, which states that a seizure does not occur so long as a reasonable person would feel free 'to disregard the police and go about his business,' . . . is not an accurate measure of the coercive effect of a bus encounter. A passenger may not want to get off a bus if there is a risk it will depart before the opportunity to reboard. . . . A bus rider's movements are confined in this sense, but this is the natural result of choosing to take the bus; it says nothing about whether the police conduct is coercive. The proper inquiry 'is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'"[48] Finally, the Court rejected Bostick's argument that he must have been seized because no reasonable person would consent to a search of luggage containing drugs. "The reasonable person test, the Court explained, is objective and

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that there had been a seizure but would have held that there was reasonable suspicion to warrant it. *Id.* at 551–57, 566.

44 Florida v. Royer, 460 U.S. 491, 502, 523, n.3 (1983).

45 *Id.*, at 501–03, 509.

46 Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 218 (1984).

47 Florida v. Bostick, 501 U.S. 429, 432, 439 (1991) (emphasis added).

48 *See* United States v. Drayton, 536 U.S. 194, 201–02 (2002), *discussing and quoting* Florida v. Bostick, 501 U.S. 429, 434–36 (1991).

'presupposes an *innocent* person.'"[49] In light of the limited record, the Court refrained from deciding whether a seizure occurred. The Court, however, identified two factors particularly worth noting on remand. First, although it was obvious that an officer was armed, he did not remove the gun from its pouch or use it in a threatening way. Second, the officer advised the passenger that he could refuse consent to the search.[50]

[G19] In *Drayton*, it was made clear that the Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to searches. The Court also reaffirmed that "[t]he fact that an encounter takes place on a bus does not, on its own, transform standard police questioning into an illegal seizure." Furthermore, it found ample grounds to conclude that the encounter at issue was cooperative and not coercive or confrontational. "There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice."[51]

[G20] *Grand Jury Subpoenas.* "Citizens generally are not constitutionally immune from grand jury subpoenas."[52] A subpoena to appear before a grand jury is not a "seizure" in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome. "The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative stop in more than civic obligation. For . . . [t]he latter is abrupt, is effected with force or the threat of it, and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court."[53] "Although the powers of the grand jury are not unlimited, and are subject to the supervision of a judge, the longstanding principle that the public has a 'right to every man's evidence,' except for those persons protected by a constitutional, common law, or statutory privilege, . . . is particularly applicable to grand jury proceedings."[54] "'The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.' . . . And while the duty may be 'onerous' at times, it is 'necessary to the administration of justice.'"[55]

[G21] *Seizure of Property.* A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property."[56] A purchase of obscene magazines is not a seizure, since it involves a voluntary transfer of the seller's possessory interests in the magazines to the purchaser upon the receipt of the

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49 *See* United States v. Drayton, 536 U.S. 194, 202 (2002), *discussing and quoting* Florida v. Bostick, 501 U.S. 429, 437–38 (1991).

50 *See* Florida v. Bostick, 501 U.S. 429, 432 (1991).

51 United States v. Drayton, 536 U.S. 194, 204 (2002).

52 Branzburg v. Hayes, 408 U.S. 665, 682 (1972).

53 *See* United States v. Dionisio, 410 U.S. 1, 10 (1973)

54 *Id.* at 9, *quoting* Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

55 *Id.* at 10, *quoting* Blair v. United States, 250 U.S. 273, 281 (1919).

56 United States v. Jacobsen, 466 U.S. 109, 113, 124–25 (1984) (a chemical test, conducted for the purpose of determining the identity of a particular substance, is within the reach of the Fourth Amendment, since, by destroying a quantity of the powder, it results in a permanent deprivation of possessory interests).

funds.[57] The Fourth Amendment protects property even where privacy or liberty is not implicated and even though no search within its meaning has taken place.[58] This Amendment also places restrictions on seizures conducted for purposes of civil forfeiture.[59]

[G22] *Mistake as to Persons or Things Seized.* "A seizure occurs even when an unintended person or thing is the object of the detention or taking, . . . but the detention or taking itself must be willful."[60]

iii. Abandonment[61]

[G23] Abandoned property is not within the reach of the Fourth Amendment. Evidentiary items found in a hotel room's wastepaper basket, after the occupant paid his bill and vacated the room, are abandoned articles.[62] If a suspect, while being pursued—but not seized—by the police, drops a container, he abandons it.[63] But "a citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer's inquiry, clearly has not abandoned that property."[64]

b. Particular Types of Searches and Seizures

i. Particular Places, Effects, or Papers

[G24] *Residential Dwellings.* "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."[65] Private residences are places in which the individual normally expects privacy free of governmental intrusion; that expectation is plainly one that society is prepared to recognize as justifiable.[66] A hotel room is not much different from a home.[67] A trailer home equally falls within the scope of the Fourth Amendment.[68]

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57 Maryland v. Macon, 472 U.S. 463, 469 (1985).

58 *See Soldal v. Cook County, Illinois*, 506 U.S. 56, 62–64 (1992), rejecting the position that the seizure and removal of a trailer home is "pure deprivation of property," not cognizable under the Fourth Amendment.

59 *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993), *citing* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965) (the exclusionary rule applies to forfeiture of property not intrinsically illegal in character but involved in the commission of a criminal offense).

When the government seizes property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself, its action must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 52 (1993).

60 Brower v. County of Inyo, 489 U.S. 593, 596 (1989), *citing* Hill v. California, 401 U.S. 797, 802–05 (1971) and Maryland v. Garrison, 480 U.S. 79, 85–89 (1987).

61 *See also* para. G44 (*garbage*).

62 Abel v. United States, 362 U.S. 217, 241 (1960).

63 Nester v. United States, 265 U.S. 57, 58 (1924); California v. Hodari D., 499 U.S. 621, 629 (1991).

64 Smith v. Ohio, 494 U.S. 541, 543–44 (1990).

65 Payton v. New York, 445 U.S. 573, 589 (1980).

66 United States v. Karo, 468 U.S. 705, 714 (1984).

67 *See* Hoffa v. United States, 385 U.S. 293, 301 (1966), *citing* United States v. Jeffers, 342 U.S. 48 (1951).

68 Soldal v. Cook County, 506 U.S. 56, 61 (1992).

[G25] "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. . . . In the home, . . . all details are intimate, because the entire area is held safe from prying government eyes."[69]

[G26] *Open Fields and Curtilage of a House.* The "open fields" doctrine was first enunciated in *Hester*[70] and was reaffirmed in *Oliver.*[71] Under this doctrine, the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment. The open fields are not "effects," within the meaning of the Fourth Amendment. "The Framers would have understood the term 'effects' to be limited to personal, rather than real, property."[72]

[G27] "The term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech. For example, . . . a thickly wooded area nonetheless may be an open field, as that term is used in construing the Fourth Amendment."[73] And the erection of fences on an open field does not create a constitutionally protected privacy interest.[74] "[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. . . . There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter, these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas. . . . [Besides,] the public and police lawfully may survey lands from the air. For these reasons, [a subjective] expectation of privacy in open fields is not an expectation that society recognizes as reasonable."[75]

[G28] Moreover, "in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. . . . The law of trespass recognizes the interest in possession and control of one's property, and for that reason permits exclusion of unwanted intruders. But it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. To the contrary, the common law of trespass furthers a range of interests that have nothing to do with privacy, and that would not be served by applying the strictures of trespass law to public officers. Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property. And the civil action of trespass serves the important function of authorizing an owner to defeat claims of prescription by asserting his own title. . . . For these reasons, the law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests."[76]

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69 Kyllo v. United States, 533 U.S. 27. 37 (2001).

70 Hester v. United States, 265 U.S. 57, 59 (1924).

71 Oliver v. United States, 466 U.S. 170, 176–77 (1984).

72 *Id.* at 177, n.7.

73 *Id.* at 180, n.11.

74 *Id.* at 182–83.

75 *Id.* at 178–79. Planting marihuana on secluded land and erecting fences and "No Trespassing" signs around the property, do not establish that expectations of privacy in an open field are legitimate in the sense required by the Fourth Amendment. *Id.* at 182–83.

76 *Id.* at 183–84, n.15.

[G29] Open fields are distinguished from the "curtilage" of a house, "the land immediately surrounding and associated with the home."[77] The curtilage is protected by the Fourth Amendment. "[T]he extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as part of the home. . . . [T]he central component of this inquiry [is] whether the area harbors 'the intimate activity associated with the sanctity of a man's home and the privacies of life.'"[78] "[C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."[79]

[G30] "Under *Oliver* and *Hester*, there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields."[80] The Fourth Amendment protection "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."[81] The fact "that the objects observed by the officers lay within an area" that the Court has assumed is protected by the Fourth Amendment does not affect this conclusion.[82]

[G31] *Business Premises—Offices.* "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."[83] But a store operator does not have any reasonable expectation of privacy "in areas of the store where the public [is] invited to enter and to transact business. . . . [Thus, a police] officer's action in entering a bookstore and examining the wares that are intentionally exposed to all who frequent the place of business" does not constitute a search.[84] Likewise, an entry into the public lobby of a motel and restaurant for the purpose of serving an administrative subpoena is not forbidden by the Fourth Amendment.[85]

[G32] Within the workplace context, the Court has recognized that employees may have a reasonable expectation of privacy against governmental intrusions.[86] Thus, a

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77 *Id.* at 180.

78 United States v. Dunn, 480 U.S. 294, 300 (1987), *discussing and quoting* Oliver v. United States, 466 U.S. 170, 180 (1984).

79 United States v. Dunn, 480 U.S. 294, 301 (1987). The area of a barn is not within the curtilage of a ranch house, for Fourth Amendment purposes, if the barn (1) is located at a substantial distance from the fence surrounding the rancher's house (50 yards) and from the house itself (60 yards), (2) stands out as a distinct and separate portion of the ranch, (3) is not used as part of the rancher's home, and (4) may be observed by those standing outside of the ranch, since the ranch's fences, being of the type used to corral livestock, do not to ensure privacy. *Id.* at 301–03.

80 *Id.* at 304.

81 California v. Ciraolo, 476 U.S. 207, 213 (1986).

82 United States v. Dunn, 480 U.S. 294, 304 (1987).

83 See v. City of Seattle, 387 U.S. 541, 543 (1967).

84 Maryland v. Macon, 472 U.S. 463, 469 (1985). Nevertheless, *the fact that a retail store invites the public to enter does not mean that "it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees." See* Lo-Ji Sales v. New York, 442 U.S. 319, 329 (1979) (emphasis added), *citing* Lewis v. United States, 385 U.S. 206, 211 (1966).

85 Donovan v. Lone Steer 464 U.S. 408, 413 (1984).

86 Oliver v. United States, 466 U.S. 170, 178, n.8 (1984) ("The Fourth Amendment's pro-

union employee who shares an office with other union employees has a privacy interest in his desk and filing cabinet in that office.[87] Public employees may also have a reasonable expectation of privacy in their place of work. "Individuals do not lose Fourth Amendment rights merely because they work for the government, instead of a private employer. The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable, when an intrusion is by a supervisor, rather than a law enforcement official. in certain situations. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation. . . . Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis."[88]

[G33] *Fire-Damaged Premises.* "[R[easonable privacy expectations may remain in fire-damaged premises."[89] "People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises."[90] "Privacy expectations will vary with the type of property, the amount of fire damage, the prior and continued use of the premises, and in some cases the owner's efforts to secure it against intruders. Some fires may be so devastating that no reasonable privacy interests remain in the ash and ruins, regardless of the owner's subjective expectations."[91]

[G34] *Prison Cells.*[92] Society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell. "A right of privacy in . . . Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." Accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. It follows from this conclusion that prison officials may conduct irregular or random "shakedown" searches of cells, in the absence of the cell occupants, and are free to seize from cells any articles that, in their view, disserve legitimate institutional interests.[93]

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tection of offices and commercial buildings in which there may be legitimate expectations of privacy is based upon societal expectations that have deep roots in the history of the Amendment").

87 Mancusi v. DeForte, 392 U.S. 364, 369 (1968).

88 O'Connor v. Ortega, 480 U.S. 709, 717–18 (1987) (plurality opinion); *id.* at 737–38 (dissenting opinion).

89 *See* Michigan v. Clifford, 464 U.S. 287, 292 (1984) (plurality opinion), *discussing* Michigan v. Tyler, 436 U.S. 499, 505 (1978).

90 Michigan v. Tyler, 436 U.S. 499, 505 (1978). Fire victims retain the protection of the Fourth Amendment, even if they are suspected of arson, for it is "impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction." *Id.* at 505–06.

91 Michigan v. Clifford, 464 U.S. 287, 292 (1984) (plurality opinion).

92 *See also* para. G137 (*pre-trial detainees*).

93 Hudson v. Palmer, 468 U.S. 517, 527–28, n.8 (1984). The Eighth Amendment stands as a protection against "calculated harassment unrelated to prison needs." *Id.* at 530.

[G35] *Automobiles.* Automobiles are "effects" and thus within the reach of the Fourth Amendment. A search of an automobile is an invasion of privacy.[94] Nevertheless, the Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. The function of a motor vehicle is transportation, and "it seldom serves as one's residence or as the repository of personal effects."[95] "The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel."[96] Motor vehicles "trave[l] public thoroughfares where both its occupants and its contents are in plain view."[97] "All States require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways."[98] Therefore, "[o]ne has a lesser expectation of privacy in a motor vehicle."[99]

[G36] "The exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a 'search.'"[100] The examination of the tire on the wheel and the taking of paint scrapings from the exterior of a vehicle left in a public parking lot infringe no expectation of privacy.[101] In addition, "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile," like the Vehicle Identification Number, which plays an important role in the pervasive governmental regulation of the automobile.[102] Moreover, like the dog sniff in *Place*,[103] a sniff by a narcotics-detection dog that simply walks around a car is not a "search,"[104] since "governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest."[105]

[G37] *Mail.* "Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guar-

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94 United State v. Ortiz, 422 U.S. 891, 896 (1975).

95 Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion).

96 S. Dakota v. Opperman, 428 U.S. 364, 368 (1976).

97 Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion).

98 *See* United States v. Chadwick, 433 U.S. 1, 12–13 (1977), *quoting* Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

99 *See* United States v. Chadwick, 433 U.S. 1, 12 (1977), *quoting* Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion).

100 New York v. Class, 475 U.S. 106, 114 (1986).

101 Cardwell v. Lewis, 417 U.S. 583, 591 (1974) (plurality opinion)

102 New York v. Class, 475 U.S. 106, 114 (1986).

103 *See* para. G42.

104 City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000).

105 Illinois v. Caballes, 543 U.S. 405, 408 (2005). In that case, the Court held that "the use of a well-trained narcotics-detection dog—one that does not expose non-contraband items that otherwise would remain hidden from public view—during a lawful traffic stop, *generally* does not implicate legitimate privacy interests," after noting that "[a]lthough respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk." *Id.* at 409.

anty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."[106] Hence, "first-class mail such as letters and sealed packages subject to letter postage—as distinguished from newspapers, magazines, pamphlets, and other printed matter—is free from inspection by postal authorities except in the manner provided by the Fourth Amendment."[107]

[G38] *Bank Records.* A depositor has no expectation of privacy and thus no protectable Fourth Amendment interest in copies of checks and deposit slips retained by his bank. "The checks are not confidential communications, but negotiable instruments to be used in commercial transactions. [The relevant records] contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."[108]

[G39] In *California Bankers*, the Court upheld federal regulations requiring the reporting of domestic financial transactions by financial institutions. The Court noted that organizations engaged in commerce do not possess "an unqualified right to conduct their affairs in secret" and may be required "to file reports dealing with particular phases of their activities," since the government has a legitimate right to satisfy itself that "corporate behavior is consistent with the law and the public interest."[109] Moreover, the information sought was "sufficiently described and limited in nature, and sufficiently related to a tenable congressional determination as to improper use" of large transactions in currency in inter-state commerce.[110] In light of these considerations, the Court rejected the Fourth Amendment challenge made by the bank plaintiffs.

[G40] *Luggage—Containers.* A person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. "By placing personal effects inside a double-locked footlocker, a person manifests an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection" of the Fourth Amendment.[111]

[G41] "[T]ravelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand. . . . When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." Therefore, a law enforcement officer's physical manipulation of

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106 *Ex parte* Jackson, 96 U.S. 727, 733 (1878) (letters and sealed packages subject to letter postage in the mail can be opened and examined only under like warrant, particularly describing the thing to be seized).

107 United States v. Van Leeuwen, 397 U.S. 249, 251 (1970).

108 United States v. Miller, 425 U.S. 435, 442 (1976). *Cf. United States v. Payner*, 447 U.S. 727, 732 (1980), involving a loan guarantee agreement in which respondent had pledged as security his funds in a foreign bank account.

109 California Bankers Ass'n v. Shultz, 416 U.S. 21, 65 (1974), *citing and quoting* United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

110 California Bankers Ass'n v. Shultz, 416 U.S. 21, 67 (1974).

111 United States v. Chadwick, 433 U.S. 1, 11 (1977).

a bus passenger's carry-on luggage comes within the scope of the Fourth Amendment's proscription against unreasonable searches.[112]

[G42] Subjecting luggage to a "sniff test" by a trained narcotics detection dog is not a "search" within the meaning of the Fourth Amendment. "A 'canine sniff' by a well-trained narcotics detection dog does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited."[113]

[G43] "No protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal. The simple act of resealing the container to enable the police to make a controlled delivery does not operate to revive or restore the lawfully invaded privacy rights. . . . [T]he rigors and contingencies inescapable in an investigation into illicit drug traffic often make 'perfect' controlled deliveries impossible to attain. Conducting such a surveillance undetected is likely to render it virtually impossible for police so perfectly to time their movements as to avoid detection and also be able to arrest the owner and reseize the container the instant he takes possession. Not infrequently, police may lose sight of the container they are trailing, as is the risk in the pursuit of a car or vessel. During such a gap in surveillance, it is possible that the container will be put to other uses—for example, the contraband may be removed or other items may be placed inside. The likelihood that this will happen depends on all the facts and circumstances, including the nature and uses of the container, the length of the break in surveillance, and the setting in which the events occur. However, the mere fact that the police may be less than 100% certain of the contents of the container is insufficient to create a protected interest in the privacy of the container. . . . The issue then becomes at what point after an interruption of control or surveillance, courts should recognize the individual's expectation of privacy in the container as a legitimate right protected by the Fourth Amendment proscription against unreasonable searches. . . . A workable, objective standard that limits the risk of intrusion on legitimate privacy interests is whether there is a substantial likelihood that the contents of the container have been changed during the gap in surveillance. Absent a substantial likelihood that the contents have been changed, there is no legitimate expectation of privacy in the contents of a container previously opened under lawful authority."[114]

[G44] *Garbage.* The search and seizure of garbage left for collection outside the curtilage of a home does not come within the scope of the Fourth Amendment. "It is common knowledge that plastic garbage bags left along a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, [an individual places is refuse] at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself [sort] through the garbage or permit others, such as the police, to do so. Accordingly, having deposited [his] garbage in an area particularly suited for public inspection, . . . for the express purpose of having

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112 Bond v. United States, 529 U.S. 334, 337–39 (2000).

113 United States v. Place, 462 U.S. 696, 707 (1983).

114 Illinois v. Andreas, 463 U.S. 765, 771–73 (1983).

strangers take it," an individual can have no reasonable expectation of privacy in the inculpatory items that he discarded.[115]

ii. Particular Acts or Methods[116]

[G45] *Frisk of Persons.* "[A] careful exploration of the outer surfaces of a person's clothing," in an attempt to find weapons, is a "search" under the Fourth Amendment.[117] If an officer "lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons."[118]

[G46] *Voice or Handwriting Exemplars.* A compelled production of "physical characteristics" that are "constantly exposed to the public" is not to be examined under the Fourth Amendment.[119] Handwriting, like speech, is repeatedly shown to the public. No person can have a reasonable expectation that others will not know the sound of his voice or the characteristics of his script. Hence, no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars.[120]

[G47] *Fingerprints—Fingernail Samples.* "Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." Nevertheless, detentions for the sole purpose of obtaining fingerprints are subject to the constraints of the Fourth Amendment.[121] Unlike the obtaining of fingerprints or voice and handwriting exemplars, the search of one's fingernails goes beyond mere "physical characteristics constantly exposed to the public" and constitutes "the type of severe, though brief, intrusion upon cherished personal security that is subject to constitutional scrutiny."[122]

[G48] *Chemical Tests.* "A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. . . . [E]ven if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. [Since] Congress has decided . . . to treat the interest in 'privately' possessing cocaine as illegitimate, . . . governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest."[123]

[G49] *Blood, Urine, or Breath Testing.* "[A] compelled intrusion into the body for blood to be analyzed for alcohol content" constitutes a search. "[T]his physical intrusion, pen-

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115 California v. Greenwood, 486 U.S. 35, 40–41 (1988).

116 *See also* paras. G36, G42 (*dog sniff*).

117 Terry v. Ohio, 392 U.S. 1, 16 (1968).

118 Minnesota v. Dickerson, 508 U.S. 366, 375 (1993). "[I]f the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context." *Id.* at 375–76.

119 United States v. Dionisio, 410 U.S. 1, 14 (1973).

120 *Id.* at 14; United States v. Mara, 410 U.S. 19, 21 (1973); United States v. Euge, 444 U.S. 707, 713, 718 (1980).

121 Davis v. Mississippi, 394 U.S. 721, 727 (1969).

122 Cupp v. Murphy, 412 U.S. 291, 295 (1973).

123 United States v. Jacobsen, 466 U.S. 109, 123 (1984). However, such a test constitutes a "seizure," to the extent that it affects one's possessory interests protected by the Fourth Amendment, since, by destroying a quantity of the powder, it converts what has been only a temporary deprivation of possessory interests into a permanent one. *Id.* at 124–25.

etrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested person's privacy interests. . . . Much the same is true of breath-testing procedures. . . . Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis, . . . implicates similar concerns about bodily integrity and, like the blood-alcohol test . . . should also be deemed a search. . . . [Procedures prescribed by governmental regulations] for collecting and testing urine samples do not entail a surgical intrusion into the body. It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about [a person,] including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests; [indeed,] there are few activities in our society more personal or private than the passing of urine." Therefore, the collection and subsequent analysis of blood, urine, or breath samples must be deemed Fourth Amendment searches.[124]

[G50] *Visual Inspection.* "[V]isual observation is no 'search' at all."[125] "[T]he mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible."[126] That the objects observed by the officers lay within an area that is presumably protected by the Fourth Amendment does not affect this conclusion. The Fourth Amendment "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."[127] And "there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields."[128]

[G51] A "cursory inspection—one that involves merely looking at what is already lawfully exposed to view, without disturbing it—is not a 'search' for Fourth Amendment purposes."[129] Hence, the mere recording of the serial numbers of stereo equipment does not constitute a search. But when a police officer, suspecting that the stereo components are stolen, moves some of them, in order to read and record their serial numbers, he "searches" for evidence plain and simple.[130]

[G52] *Electronic Surveillance, Aerial Inspections, and Sense-Enhancing Devices.* Until *Katz*, neither wiretapping nor electronic eavesdropping violated a defendant's Fourth Amendment rights, if there was no "seizure of his tangible material effects, or an actual physical invasion of his house or curtilage for the purpose of making a seizure."[131] But where eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the defendant, the Fourth Amendment was con-

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124 Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616–17 (1989).

125 Kyllo v. United States, 533 U.S. 27, 32 (2001), *citing* Dow Chem. Co. v. United States, 476 U.S. 227, 234–35, 239 (1986).

126 California v. Ciraolo, 476 U.S. 207, 213 (1986).

127 *Id.*

128 United States v. Dunn, 480 U.S. 294, 304 (1987).

129 Arizona v. Hicks, 480 U.S. 321, 328 (1987).

130 *Id.* at 324–25.

131 Olmstead v. United States, 277 U.S. 438, 466 (1928); Goldman v. United States, 316 U.S. 129, 135–36 (1942).

sidered to be violated.[132] *Katz*, however, finally swept away doctrines that electronic eavesdropping is permissible under the Fourth Amendment unless physical invasion of a constitutionally protected area produced the challenged evidence. In that case, government agents, without petitioner's consent or knowledge, attached a listening device to the outside of a public telephone booth and recorded the defendant's end of his telephone conversations. The Court overruled *Olmstead* and *Goldman* and held that the agents violated Katz's privacy, on which he justifiably relied while using the telephone in those circumstances.[133]

[G53] "[A] police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights."[134] "For constitutional purposes, no different result is required if the agent, instead of immediately reporting and transcribing his conversations with defendant, either simultaneously records them with electronic equipment which he is carrying on his person, . . . or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency."[135]

[G54] "[T]elephone subscribers . . . do not harbor any general expectation that the numbers they dial will remain secret. . . . Telephone users typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes." Thus, the state activity of installing and using a pen register is not a "search."[136]

[G55] The monitoring of an electronic device, such as a beeper, may constitute a search. In *Knotts*, law enforcement officials, with the consent of the seller, installed a beeper in a five-gallon can of chloroform and monitored the beeper after delivery of the can to the buyer in Minneapolis. Although there was partial visual surveillance as the automobile containing the can moved along the public highways, the beeper enabled the officers to locate the can in the area of a cabin near Shell Lake, Wisconsin, and it was this information that provided the basis for the issuance of a search warrant. The record did not show that the beeper was monitored while the can containing it was inside the cabin. The Court held that, since visual surveillance from public places would have sufficed to reveal the movements of the automobile and the arrival of the can containing the beeper in the area of the cabin, no Fourth Amendment violation was committed by monitoring the beeper during the trip to the cabin. "Nothing in the Fourth Amendment prohibited the police from augmenting their sensory faculties with such enhancement as science and technology afforded them in this case."[137]

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[132] Silverman v. United States, 365 U.S. 505, 509, 511 (1961). *See also* Wong Sun v. United States, 371 U.S. 471 (1963); Berger v. New York, 388 U.S. 41, 52 (1967).

[133] Katz v. United States, 389 U.S. 347, 351–53 (1967). To the extent that *Katz* departed from previous decision of the Court, it was held to be applied prospectively only. *See* Desist v. United States, 394 U.S. 244 (1969).

[134] United States v. White, 401 U.S. 745, 751 (1971) (plurality opinion of four Justices), *citing* Hoffa v. United States, 385 U.S. 293, 300–03 (1966).

[135] United States v. White, 401 U.S. 745, 751 (1971) (plurality opinion).

[136] Smith v. Maryland, 442 U.S. 735, 743, 745–46 (1979).

[137] United States v. Knotts, 460 U.S. 276, 282 (1983).

[G56] Installation of a beeper in a container of chemicals with the consent of the original owner does not constitute a search within the meaning of the Fourth Amendment, when the container is delivered to a buyer having no knowledge of the presence of the beeper. "It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." The mere transfer of a can containing an unmonitored beeper infringes no privacy interest, for it conveys no information at all. But the monitoring of a beeper falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance. The monitoring of an electronic tracking device in a private residence, a location not open to visual surveillance, constitutes a search. "The beeper tells the government agent that a particular article is actually located at a particular time in the private residence and is in the possession of the person or persons whose residence is being watched. Even if visual surveillance has revealed that the article to which the beeper is attached has entered the house, the later monitoring not only verifies the officers' observations but also establishes that the article remains on the premises."[138]

[G57] "[O]btaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into [it], constitutes a search—at least where . . . the technology in question is not in general public use."[139] In the sanctity of the home, "all details are intimate details."[140] Therefore, the use of a thermal imaging device aimed at a private home from a public street, to determine if the amount of heat emanating from it is consistent with the high-intensity lamps, typically required for indoor marijuana growth, constitutes a Fourth Amendment search.[141]

[G58] In *Ciraolo*, the Court held that a naked-eye police inspection of a fenced backyard from a plane flying at an altitude of 1,000 feet, within public navigable space, did not violate a reasonable expectation of privacy. As a general proposition, the police may see what may be observed from a public vantage point where they have a right to be. Thus, the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace. The Court concluded that, "[I]n an age where private and commercial flight in the public airways is routine, it would be unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet."[142] Similarly, in *Riley*, the Court decided that police observation of a greenhouse in a home's curtilage from a helicopter lawfully passing at an altitude of 400 feet did not violate the Fourth Amendment.[143]

[G59] *Dow Chemical* involved enhanced aerial photography of an industrial complex, from navigable airspace. The Court stressed that "the open areas of an industrial plant

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138 United States v. Karo, 468 U.S. 705, 712, 715 (1984).

139 Kyllo v. United States, 533 U.S. 27, 34 (2001).

140 *Id.* at 37.

141 *Id.* at 34–40. The four dissenters observed, *inter alia*, that heat waves enter the public domain if and when they leave a building and, hence, a subjective expectation that they would remain private is not reasonable.

142 California v. Ciraolo, 476 U.S. 207, 215 (1986). The fact that the officers were trained to recognize marijuana was considered to be irrelevant for Fourth Amendment purposes.

143 Florida v. Riley, 488 U.S. 445, 449–55 (1989).

complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the 'curtilage' of a dwelling for purposes of aerial surveillance." And although "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology," might be a "search" and constitutionally proscribed absent a warrant, the photographs there were not "so revealing of intimate details as to raise constitutional concerns," since they remained limited to an outline of the facility's buildings and equipment. "The mere fact that human vision is enhanced somewhat, at least to the degree [in that case], does not give rise to constitutional problems."[144] For example, the use of artificial means to illuminate a darkened area does not constitute a search.[145]

[G60] *Governmental Search Subsequent to a Private Search.* An invasion of one's "effects" that is occasioned by private action, without any governmental involvement, does not violate the Fourth Amendment, because of its private character. The additional invasions of one's privacy by government agents "must be tested by the degree to which they exceeded the scope of the private search." That standard was adopted by a majority of the Court in *Walter* and was reaffirmed in *Jacobsen.*[146]

[G61] In *Walter,*[147] a private party had opened a misdirected carton, found rolls of motion picture films that appeared to be contraband, and turned the carton over to the Federal Bureau of Investigation. Later, without obtaining a warrant, FBI agents obtained a projector and viewed the films. While there was no single opinion of the Court, a majority did agree on the appropriate analysis of a governmental search that follows on the heels of a private one.[148] Two Justices noted that, "[e]ven though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search, unless it has the right to make an independent search." In that case, the private party had not actually viewed the films. Prior to the government screening, one could only draw inferences about what was on the films. The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore should be characterized as a separate search, which was not supported by any exigency or by a warrant.[149] "Four additional Justices were also of the view that the legality of the governmental search must be tested by the scope of the antecedent private search."[150] Taking into account the fact that the FBI had received the film cartons after they had been opened, and after the films' labels had been exposed to the public, they concluded that the FBI's subsequent viewing of the movies on a projector did not change the nature of the search and was not an additional search subject to the warrant requirement.[151]

[G62] In *Jacobsen*, the Court explained that the foregoing standard follows from the analysis applicable when private parties reveal other kinds of private information to the

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144 Dow Chem. Co. v. United States, 476 U.S. 227, 238–39 (1986).

145 Texas v. Brown, 460 U.S. 730, 739–40 (1983). The use of a searchlight is comparable to the use of a marine glass or a field glass. *See* United States v. Lee, 274 U.S. 559, 563 (1927).

146 *See* United States v. Jacobsen, 466 U.S. 109, 115 (1984).

147 Walter v. United States, 447 U.S. 649 (1980).

148 *See* United States v. Jacobsen, 466 U.S. 109, 115 (1984), *discussing Walter.*

149 Walter v. United States, 447 U.S. 649, 657 (1980).

150 *See* United States v. Jacobsen, 466 U.S. 109, 116 (1984), *discussing* Walter v. United States, 447 U.S. 649, 663–64 (1980).

151 Walter v. United States, 447 U.S. 649, 663–64 (1980).

authorities. The Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose, and the confidence placed in a third party will not be betrayed.[152] "The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated."[153] In the specific case, the employees of a private freight carrier had notified the Drug Enforcement Administration (DEA), after observing a white powdery substance in the innermost of a series of four plastic bags that had been concealed in a tube inside a damaged package. When a DEA agent arrived, he removed the tube from the box and the plastic bags from the tube, saw the white powder, opened the bags, removed a trace of the powder, subjected it to a field chemical test, and determined it was cocaine. The DEA agent's removal of the plastic bags from the tube and his visual inspection of their contents enabled him to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and, hence, was not a "search" within the meaning of the Fourth Amendment. By contrast, the agent's field test exceeded the scope of the private search.[154]

3. Who May Invoke the Fourth Amendment Safeguards

[G63] Fourth Amendment rights are personal in nature.[155] In order to claim the protection of the Fourth Amendment, a defendant "must demonstrate that he *personally* has an expectation of privacy in the place or item searched, and that his expectation is reasonable—i.e., one which has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'"[156] The Court has rejected a so-called "target" the-

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[152] *See* United States v. Miller, 425 U.S. 435, 443 (1976).

[153] United States v. Jacobsen, 466 U.S. 109, 117 (1984).

[154] *Id.* at 115–21.

[155] The *"definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." See* Minnesota v. Carter, 525 U.S. 83, 87–88 (1998), *quoting* Rakas v. Illinois, 439 U.S. 128, 140 (1978) (emphasis added).

[156] Minnesota v. Carter, 525 U.S. 83, 88 (1998), *quoting* Rakas v. Illinois, 439 U.S. 128, 143–44, n.12 (1978).

This rule applies equally to defendants charged with crimes of possession. *See* United States v. Salvucci, 448 U.S. 83, 86–95 (1980), *overruling* Jones v. United States, 362 U.S. 257, 262-63 (1960). The *Jones* Court held that the defendant was not obligated to establish that his own Fourth Amendment rights had been violated, but only that the search and seizure of the evidence was unconstitutional. In order to prevent both the risk that self-incrimination would attach to the assertion of Fourth Amendment rights, as well as to prevent the vice of prosecutorial self-contradiction (asserting that the defendant possessed the goods for purposes of criminal liability, while simultaneously asserting that he did not possess them for the purposes of claiming the protections of the Fourth Amendment), the Court adopted the rule of "automatic standing." This rule was disavowed in *Salvucci.* The first reason was eliminated by *Simmons v. United States,* 390 U.S. 377, 389-94 (1968), wherein it was held that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial. As to the second reason given in *Jones,* the Court noted that a prosecutor, without legal contradiction, may simultaneously maintain that a defendant criminally possessed the seized goods but was not subject to a Fourth Amendment deprivation, because it must be asked not merely whether the defendant has a possessory interest in the items seized, but also whether he had an expectation of privacy in the area searched.

ory, whereby any criminal defendant at whom a search was "directed" would have the right to contest the legality of that search and object to the admission at trial of evidence obtained as a result of the search. And the position that anyone legitimately on the premises where a search occurs may challenge its legality has been expressly repudiated.[157] Accordingly, automobile passengers cannot assert the protection of the Fourth Amendment against the seizure of incriminating evidence from a vehicle where they own neither the vehicle nor the evidence.[158]

[G64] A person may not have a reasonable expectation of privacy in the contents of a container in the possession of another, even if he owns them. In *Rawlings*, the Court approved the admission of drugs seized from a woman's purse because her male companion did not prove that he had a legitimate expectation of privacy in the purse, even though he claimed ownership of the drugs. The Court emphasized that petitioner had known the woman for only a few days, had never sought or received access to her purse, nor had he had any right to exclude other persons from access to this purse.[159]

[G65] "The homeowner may object to police conduct that reveals what has gone on in his home, irrespective of whether he has any expectation of privacy in the effects that have been searched and seized."[160] "If the police make an unwarranted search of a house and seize tangible property belonging to third parties—even a transcript of a third-party conversation—the homeowner may object to its use against him, not because he had any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment."[161]

[G66] Although the text of the Amendment suggests that its protections extend only to people in *their* houses, the Court has held that, in some circumstances, a person may have a legitimate expectation of privacy in the house of someone else. For example, staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. Thus, an overnight guest in a home may claim the protection of the Fourth Amendment.[162] But one who is merely present with the consent of the householder may not. A person staying in another's home for a couple of hours, in order to carry out an illegal business (drug) transaction, without having any previous relationship with the apartment's lessee, is found in a situation similar to that of one simply permitted on the premises and has no legitimate expectation of privacy in the apartment.[163]

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157 *See* Rakas v. Illinois, 439 U.S. 128, 133–38, 141–44 (1978).

158 *Id.* at 148–49. "Participants in a criminal conspiracy may have privacy expectations or property interests, but the conspiracy itself neither adds nor detracts from them." *See* United States v. Padilla, 508 U.S. 77, 82 (1993) (*per curiam*).

159 Rawlings v. Kentucky, 448 U.S. 98, 104–106 (1980).

160 Karo, United States v., 468 U.S. 705, 732, n.7 (1984) (opinion of Stevens, J.)

161 Alderman v. United States, 394 U.S. 165, 176–77 (1969).

162 Minnesota v. Olson, 495 U.S. 91, 98 (1990). *See also Jones v. United States*, 362 U.S. 257, 259 (1960), where the defendant, seeking to exclude evidence resulting from a search of an apartment, had been given the use of the apartment by a friend, had clothing in it, had slept there "maybe a night," and at the time was the sole occupant of the place.

163 Minnesota v. Carter, 525 U.S. 83, 90–91 (1998).

C. LEGALITY OF SEARCHES AND SEIZURES

1. General Requirements

a. Warrant

i. In General

[G67] Except in certain well-defined circumstances, a search or seizure in a criminal case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. Administrative searches also generally require warrants.[164] The "essential purpose of the warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. . . . A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case."[165]

[G68] The Court has made it clear that there are exceptions to the warrant requirement. "When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."[166]

ii. Particularity

[G69] The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized."[167] The manifest purpose of this particularity requirement was to prevent general searches and seizures. "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers

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164 *See, e.g.*, Michigan v. Tyler, 436 U.S. 499, 506 (1978).

165 Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619, 621–22 (1989). "[T]he presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant." *See* Groh v. Ramirez, 540 U.S. 551, 559 (2004).

166 Illinois v. McArthur, 531 U.S. 326, 330 (2001). *See, e.g.*, Pennsylvania v. Labron, 518 U.S. 938, 940–41 (1996) (*per curiam*) (search of automobile supported by probable cause); Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (suspicionless stops at drunk driver checkpoint); United States v. Place, 462 U.S. 696, 706 (1983) (temporary seizure of luggage based on reasonable suspicion); Michigan v. Summers, 452 U.S. 692, 702–05 (1981) (temporary detention of suspect without arrest warrant to prevent flight and protect officers while executing search warrant); Terry v. Ohio, 392 U.S. 1, 27 (1968) (temporary stop and limited search for weapons based on reasonable suspicion); United States v. Santana, 427 U.S. 38, 42–43 (1976) (hot pursuit of a fleeing felon); Chimel v. California, 395 U.S. 752, 762 (1969) (protective search incident to arrest); Michigan v. Tyler, 436 U.S. 499, 509 (1978) (ongoing fire).

167 When an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." See v. City of Seattle, 387 U.S. 541, 544 (1967). *See also* United States v. Moron Salt Co., 338 U.S. 632, 652–53 (1950).

intended to prohibit."[168] A particular warrant also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."[169] The Court requires that a warrant contain "a description sufficient to enable the officers who execute it to ascertain with reasonable effort where they are to search and what they are to seize."[170]

[G70] "The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents."[171] If the warrant provides no description of the type of evidence sought, the fact that the *application* adequately described the "things to be seized" does not save the warrant from its facial invalidity, at least when the application (which has been placed under seal) does not accompany the warrant. And for good reason—the presence of a search warrant serves a high function, and "that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for his inspection."[172]

[G71] *Stanford* invalidated a search aimed at obtaining evidence that an individual had violated a sweeping and many-faceted law that, among other things, outlawed the Communist Party and created various individual criminal offenses. The search warrant authorized a search of Stanford's private home for books, records, and other materials concerning illegal Communist activities. After spending more than four hours in Stanford's house, police officers seized half of his books, which included works by Sartre, Marx, Pope John XXIII, Justice Hugo Black, Theodore Draper, and Earl Browder, as well as private documents, including a marriage certificate, insurance policies, household bills and receipts, and personal correspondence. The Court held this to be an unconstitutional general search.[173]

[G72] In *Andresen*, the Court held that the warrants at issue had not been rendered fatally "general" by the addition, in each warrant, to the exhaustive list of particularly described documents pertaining to the fraudulent sale of certain realty (Lot 13T), of the phrase "together with other fruits, instrumentalities and evidence of crime at this time unknown." In doing so, the Court read the challenged phrase as authorizing only the search for and seizure of evidence relating to "the crime of false pretenses with respect to Lot 13T."[174]

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168 Maryland v. Garrison, 480 U.S. 79, 84 (1987). The discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. *Id.* at 85.

169 United States v. Chadwick, 433 U.S. 1, 9 (1977).

170 *See* Steele v. United States, 267 U.S. 498, 503 (1925). *Cf.* Marron v. United States, 275 U.S. 192, 196 (1927) ("As to what is to be taken, nothing is to be left to the discretion of the officer executing the warrant."). As a constitutional matter, search warrants need not name the person from whom the things will be seized. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 555 (1978), *citing* United States v. Kahn, 415 U.S. 143, 155 n.15 (1974).

171 Groh v. Ramirez, 540 U.S. 551, 557 (2004).

172 *Id.* The Court did not say that the Fourth Amendment forbids a warrant from cross-referencing other documents. Indeed, as the Court noted, most courts of appeals have held that a court may construe a warrant with reference to a supporting application or affidavit, if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant. *Id.* at 557–58.

173 Stanford v. Texas, 379 U.S. 476, 480–86 (1965).

174 Andresen v. Maryland, 427 U.S. 463, 480 (1976).

[G73] The Fourth Amendment does not "countenance open-ended warrants to be completed while a search is being conducted and items seized or after the seizure has been carried out." Except for the specification of copies of two films previously purchased, the warrant at issue in *Lo-Ji Sales* left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The search began when the local justice entered the premises. The search progressed pursuant to the sweeping open-ended authorization in the warrant. It was not limited at the outset as a search for other copies of the two "sample" films; it expanded into a more extensive search because other items were found that the local justice deemed illegal. The Court found that the search warrant and what had followed the entry on petitioner's premises were repugnant to the Fourth Amendment.[175]

[G74] "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."[176]

[G75] "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found, and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside."[177]

[G76] By contrast, "a warrant to search a place cannot normally be construed to authorize a search of each individual in that place." A warrant authorizing the search of a tavern and the person of the bartender for "evidence of the offense of possession of a controlled substance" gives the police no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.[178]

iii. Issuing Officials

[G77] Criminal warrants must be issued by "neutral, disinterested magistrates."[179] In *Coolidge*, the Court voided a search warrant issued by a state Attorney General, serving as justice of peace, since the Attorney General was "the chief government enforcement agent of the State, [and] actively in charge of the investigation."[180] In *Shadwick*, the issue centered on the qualification of municipal court clerks to issue arrest warrants for breaches of ordinances. "The Court held that the clerks, although laymen, worked within the judicial branch under the supervision of judges, and were qualified to deter-

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175 Lo-Ji Sales v. New York, 442 U.S. 319, 325–26 (1979).

176 Payton v. New York, 445 U.S. 573, 602–03 (1980).

177 United States v. Ross, 456 U.S. 798, 820–21 (1982).

178 Ybarra v. Illinois, 444 U.S. 85, 92, n.4 (1979). There, the Court noted that it "need not consider situations where the warrant authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs."

179 Dalia v. United States, 441 U.S. 238, 255 (1979).

180 Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971).

mine the existence of probable cause. They were, therefore, 'neutral and detached magistrates' for purposes of the Fourth Amendment."[181] In *Connally*, the Court invalidated a system in which justices of the peace were paid for issuance, but not for non-issuance, of search warrants; an officer of the court who has a direct, personal, substantial, pecuniary interest in his decision to issue or deny the warrant cannot be deemed neutral.[182] Finally, in *Lo-Ji Sales*, the Court found that a magistrate who participates in a search, based on an invalid, general warrant issued by himself, acts as "an adjunct law enforcement officer" and, therefore, does not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application and cannot provide valid authorization for the otherwise unconstitutional search.[183]

[G78] Administrative search warrants may, but do not necessarily, have to be issued by courts.[184] The Court has suggested that they must be issued by "neutral officers."[185]

b. Probable Cause—Reasonable Suspicion

i. Generally

[G79] The Fourth Amendment prescribes that "where the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause."[186] But even a search or a seizure that may be performed without a warrant must be based, as a general matter, on "probable cause;" thus, the scope of a lawful search "is defined by the object of the search and the places in which there is probable cause to believe that it may be found."[187] However, "'probable cause' is not an irreducible requirement of a valid search or seizure. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required."[188] Thus, in a number of cases, where "special needs, beyond the normal need for law enforcement, make the probable cause requirement impracticable,"[189] the Court has upheld "the legality of searches and seizures based on suspicions that, although 'reasonable,' do not rise to the level of probable cause. . . . Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Court has] not hesitated to adopt such a standard."[190] Nonetheless, the Court has made clear that "[a] search or seizure

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[181] *See* Connally v. Georgia, 429 U.S. 245, 250 (1977) (*per curiam*), *discussing* Shadwick v. City of Tampa, 407 U.S. 345, 346 (1972).

[182] Connally v. Georgia, 429 U.S. 245, 250–51 (1977) (*per curiam*).

[183] Lo-Ji Sales v. New York, 442 U.S. 319, 326–27 (1979).

[184] Griffin v. Wisconsin, 483 U.S. 868, 877 (1987).

[185] Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978).

[186] Griffin v. Wisconsin, 483 U.S. 868, 877 (1987).

[187] United States v. Ross, 456 U.S. 798, 824 (1982).

[188] New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

[189] O'Connor v. Ortega, 480 U.S. 709, 725 (1987).

[190] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). The first, and leading, case of a minimally intrusive search held valid when based on suspicion short of probable cause is *Terry v. Ohio*, 392 U.S. 1, 30 (1968), where the Court held that a police officer who observes unusual conduct suggesting criminal activity by persons he reasonably suspects are armed and presently

is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."[191] While such suspicion is not an irreducible component of reasonableness,[192] the Court has recognized only limited circumstances in which the usual rule does not apply;[193] "where the privacy interests implicated by the search [or seizure] are minimal, and where an important governmental interest [—other than crime detection—] furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search or seizure may be reasonable despite the absence of such suspicion."[194]

[G80] Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. "They are common sense, nontechnical conceptions that deal with 'the

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dangerous may conduct a carefully limited search of the outer clothing of such persons. *See also* United States v. Hensley, 469 U.S. 221 (1985) (upholding brief stop of person described on wanted flyer while police ascertain if arrest warrant has been issued); Delaware v. Prouse, 440 U.S. 648 (1979) (invalidating discretionary stops of motorists to check licenses and registrations when not based on reasonable suspicion that the motorist is unlicensed, the automobile is unregistered, or that the vehicle or an occupant should otherwise be detained); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (upholding limited search where officers who had lawfully stopped car saw a large bulge under the driver's jacket); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (upholding brief stops by roving border patrols where officers reasonably believe car may contain illegal aliens); Adams v. Williams, 407 U.S. 143 (1972) (upholding brief stop to interrogate suspicious individual believed to be carrying narcotics and gun).

[191] Chandler v. Miller, 520 U.S. 305, 308 (1997).

[192] United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976).

[193] For example, the Court has upheld certain regimes of suspicionless searches where the program was designed to serve "*special needs*, beyond the normal need for law enforcement." *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (random drug testing of student athletes); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug tests for U.S. Customs Service employees seeking transfer or promotion to certain positions); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations). The Court has also allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited. *See, e.g.*, New York v. Burger, 482 U.S. 691, 702–04 (1987) (warrantless administrative inspection of premises of "closely regulated" business); Michigan v. Tyler, 436 U.S. 499, 507–09, 511–12 (1978) (administrative inspection of fire-damaged premises to determine cause of blaze); Camara v. Mun. Court of City and County of San Francisco, 387 U.S. 523, 534–39 (1967) (administrative inspection to ensure compliance with city housing code). The Court has also upheld brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens and at a sobriety checkpoint aimed at removing drunk drivers from the road. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451–55 (1990).

[194] Chandler v. Miller, 520 U.S. 305, 314 (1997), *quoting* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989). In *Florida v. J.L.*, 529 U.S. 266, 273–74 (2000), the Court was careful to point out that its opinion did not suggest that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and schools, cannot conduct protective searches on less than individualized suspicion or that there are not circumstances under which the danger alleged in an anonymous tip, lacking indicia of reliability, might be so great as to justify a search even without a showing of reasonable suspicion. Likewise, in *City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48 (2000), the Court noted that its opinion did not affect the validity of searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.

factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[195] As such, the standards "are not readily, or even usefully, reduced to a neat set of legal rules,"[196] and they are "incapable of precise definition or quantification into percentages."[197] The Court has described reasonable suspicion simply as "a particularized and objective basis for suspecting the person stopped of criminal activity."[198] Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.[199] "The substance of all the definitions of probable cause to arrest is a reasonable ground for belief of guilt."[200] And this means less than evidence that would justify conviction but "more than bare suspicion."[201] *Probable cause to arrest* exists where

> the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.[202]

Probable cause to search has been described as existing where

> the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found;[203] [it means] a fair probability that contraband or evidence of a crime will be found in a particular place.[204]

"[T]hese two legal principles are not 'finely-tuned standards,' comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. . . . They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed."[205]

[G81] "The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer,[206] amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second

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195 *See* Ornelas v. United States, 517 U.S. 690 (1996), *quoting* Illinois v. Gates, 462 U.S. 213, 231 (1983), *quoting in turn* Brinegar v. United States, 338 U.S. 160, 176 (1949).

196 Illinois v. Gates, 462 U.S. 213, 232 (1983).

197 *See* Maryland v. Pringle, 540 U.S. 366, 371 (2003).

198 United States v. Cortez, 449 U.S. 411, 417–18 (1981).

199 United States v. Sokolow, 490 U.S. 1, 7 (1989).

200 Brinegar v. United States, 338 U.S. 160, 175 (1949).

201 *Id.*

202 *Id.* at 175–76.

203 Ornelas v. United States, 517 U.S. 690, 696 (1996).

204 Illinois v. Gates, 462 U.S. 213, 238 (1983).

205 Ornelas v. United States, 517 U.S. 690, 696 (1996).

206 An officer's improper subjective motivations play no role in ordinary, probable cause Fourth Amendment analysis. *See* Whren v. United States, 517 U.S. 806, 813 (1996) and Arkansas v. Sullivan, 532 U.S. 769, 771–72 (2001). The standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment. *See* Whiteley v. Warden, 401 U.S. 560, 566 (1971).

is a mixed question of law and fact."[207] The assessment of probable cause or reasonable suspicion "must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person. The process does not deal with hard certainties, but with probabilities."[208] "While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a *prima facie* showing, of criminal activity, is the standard of probable cause.'"[209]

[G82] "Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause."[210] "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'"[211] "Deference to the issuing magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based."[212] Moreover, "reviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'"[213] "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."[214] "Even if the warrant application was supported by more than a 'bare bones' affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable cause determination reflected an improper analysis of the totality of the circumstances, . . . or because the form of the warrant was improper in some respect."[215]

[G83] "[P]olice officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the infor-

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[207] Ornelas v. United States, 517 U.S. 690, 696 (1996).

[208] United States v. Cortez, 449 U.S. 411, 418 (1981).

[209] Illinois v. Gates, 462 U.S. 213, 235 (1983), *quoting* Spinelli v. United States, 393 U.S. 410, 419 (1969). *See also* Hill v. California, 401 U.S. 797, 804 (1971) ("sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment").

[210] United States v. Leon, 468 U.S. 897, 914 (1984).

[211] Illinois v. Gates, 462 U.S. 213, 236 (1983), *quoting* Spinelli v. United States, 393 U.S. 410, 419 (1969).

[212] United States v. Leon, 468 U.S. 897, 914 (1984), *citing* Franks v. Delaware, 438 U.S. 154, 165 (1978).

[213] United States v. Leon, 468 U.S. 897, 914 (1984), *quoting* Illinois v. Gates, 462 U.S. 213, 239 (1983). As a general matter, determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Nevertheless, an appeals court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. *See* Ornelas v. United States, 517 U.S. 690, 699 (1996).

[214] Illinois v. Gates, 462 U.S. 213, 239 (1983). *See also* Giordenello v. United States, 357 U.S. 480, 486 (1958).

[215] United States v. Leon, 468 U.S. 897, 915 (1984).

mation requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."[216]

[G84] "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be."[217] Hence, a search warrant, issued upon probable cause, which gives the officers authority to search a tavern and the person of the bartender for drugs, gives them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.[218] By contrast, a car passenger "will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." Thus, when the quantity of drugs and cash found in a car being driven by its owner indicates the likelihood of drug dealing, there is probable cause to arrest the front seat passenger in the car.[219]

[G85] There must be "at least a minimal level of objective justification" [for having a 'reasonable suspicion.'] . . . An individual's presence in a 'high crime area,' standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. . . . But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. . . . [N]ervous, evasive behavior is another pertinent factor in determining reasonable suspicion. . . . Headlong flight is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. . . . [A]ny refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure, based on reasonable suspicion. . . . But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business;' in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning."[220]

[G86] Unlawfully seized evidence may not be the basis for probable cause. "It is axiomatic that a search incident to an arrest made without probable cause may not serve as part of its justification."[221]

[G87] The showing of "probable cause" necessary to secure a search warrant for *administrative* purposes "may vary with the object and intrusiveness of the search,"[222]

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216 Whiteley v. Warden, 401 U.S. 560, 568 (1971).

217 Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

218 *Id.* at 92.

219 Maryland v. Pringle, 540 U.S. 366, 373 (2003).

220 Illinois v. Wardlow, 528 U.S. 119, 123–25 (2000).

221 Sibron v. New York, 392 U.S. 40, 63 (1968), *citing* Johnson v. United States, 333 U.S. 10, 16–17 (1948).

222 Michigan v. Tyler, 436 U.S. 499, 506 (1978).

because, in that context, the term is used "as referring not to a quantum of evidence, but merely to a requirement of reasonableness."[223] For example, in administrative searches conducted to enforce local building, health, or fire codes, probable cause to issue a warrant to inspect exists if "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular dwelling [or establishment]. Such standards, which will vary with the program being enforced, may be based upon the passage of time, the nature of the building, . . . or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling."[224]

ii. Informant's Tip

[G88] The Court has repeatedly faced the question whether an informant's tip establishes probable cause for the issuance of a warrant. In *Aguilar*, a search warrant had issued upon an affidavit of police officers who swore only that they had "received reliable information from a credible person and do believe" that narcotics were being illegally stored on the described premises. While recognizing that the constitutional requirement of probable cause can be satisfied by hearsay information, the Court held the affidavit inadequate for two reasons. First, the application failed to set forth any of the "underlying circumstances" necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant officers did not attempt to support their claim that their informant was credible or his information reliable.[225] In *Spinelli*, police officers observed petitioner going to and from a particular apartment, which the telephone company said contained two telephones with stated numbers. The officers also were "informed by a confidential reliable informant that Spinelli was engaging in illegal gambling activities" at the apartment, and that he used two phones with numbers corresponding to those possessed by the police. The officers submitted an affidavit with this information to a magistrate and obtained a warrant to search Spinelli's apartment. The Court held that the magistrate could have made his determination of probable cause only by abdicating his constitutional function. The government's affidavit contained absolutely no information regarding the informant's reliability. In addition, the tip failed to satisfy *Aguilar*'s requirement that it detail some of the underlying circumstances from which the informant concluded that narcotics were where he claimed they were.[226]

[G89] An informant's "veracity," "reliability," and "basis of knowledge" are also relevant in the reasonable suspicion context, "although allowance must be made in applying them for the lesser showing required to meet that standard."[227] For example, in *Adams* the Court sustained an investigatory stop and frisk undertaken on the basis of a tip given in person by a known informant who had provided information in the past. The Court concluded that, while the unverified tip might have been insufficient to support an arrest or search warrant, the information carried enough "indicia of reliability" to justify reasonable suspicion.[228]

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[223] Griffin v. Wisconsin, 483 U.S. 868, 877, n.4 (1987).

[224] Camara v. Mun. Court of the City and County of San Francisco, 387 U.S. 523, 538 (1967). *See also* Marshall v. Barlow's, Inc., 436 U.S. 307, 320–21 (1978).

[225] Aguilar v. Texas, 378 U.S. 108, 114 (1964).

[226] Spinelli v. United States, 393 U.S. 410, 415–17 (1969).

[227] Alabama v. White, 496 U.S. 325, 328–29 (1990).

[228] Adams v. Williams, 407 U.S. 143, 146–47 (1972).

[G90] *Aguilar* and *Spinelli* were understood to require strict satisfaction of a "two-pronged test" whenever an affidavit supporting the issuance of a search warrant relies on an informant's tip. Under this test, the affidavit, first, should establish the "basis of knowledge" of the informant—the particular means by which he came by the information given in his report; and, second, it should provide facts establishing either the general "veracity" of the informant or the specific "reliability" of his report in the particular case. In *Gates*, the Court made clear that, although those factors that had been considered critical under *Aguilar* and *Spinelli*—an informant's "veracity," "reliability," and "basis of knowledge"—remain "highly relevant in evaluating his report," a "totality of the circumstances" approach is appropriate in determining whether an informant's tip establishes probable cause.[229]

[G91] Under the "totality of the circumstances" analysis, corroboration of details of an informant's tip by independent police work is of significant value.[230] The Court's decision in *Draper* is the classic case on the value of corroborative efforts of police officials. There, an informant named Hereford reported that Draper would arrive in Denver on a train from Chicago in one of two days, and that he would be carrying a quantity of heroin. The informant also supplied a fairly detailed physical description of Draper, and predicted that he would be wearing a light colored raincoat, brown slacks, and black shoes and would be walking "real fast." Hereford gave no indication of the basis for his information. On one of the stated dates, police officers observed a man matching this description exit a train arriving from Chicago; his attire and luggage matched Hereford's report, and he was walking rapidly. The Court explained that, by this point in his investigation, the arresting officer had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, the officer had reasonable grounds to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true.[231]

[G92] In *White*, the police received an anonymous tip asserting that a woman was carrying cocaine and predicting that she would leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel. Standing alone, the tip would not have justified an investigatory stop, based on rea-

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[229] Illinois v. Gates, 462 U.S. 213, 230 (1983). The Court noted that a deficiency in one of the *Aguilar* prongs "may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233. "If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge should not serve as an absolute bar to a finding of probable cause based on his tip. . . . Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which, if fabricated, would subject him to criminal liability—. . . rigorous scrutiny of the basis of his knowledge is unnecessary. . . . Conversely, even if [there is] some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case." *Id.* at 233–34.

[230] Illinois v. Gates, 462 U.S. 213, 241 (1983). *Anonymous tips*, particularly "when supplemented by independent police investigation, frequently contribute to the solution of otherwise 'perfect crimes.'" *Id.* at 237–238.

[231] Draper v. United States, 358 U.S. 307, 309–13 (1959).

sonable suspicion. Only after police observation showed that the informant had accurately predicted the woman's movements, the Court explained, did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine.[232]

[G93] By contrast, an anonymous tip that a person is carrying a gun is not, without more, sufficient to justify reasonable suspicion of illegal conduct and a police officer's stop and frisk of that person. In *Florida v. J.L.*, the officers' suspicion that respondent was carrying a weapon arose not from their own observations but solely from a call made from an unknown location by an unknown caller. The tip lacked sufficient indicia of reliability to provide reasonable suspicion to make a *Terry* stop: "it provided no predictive information, and therefore left the police without means to test the informant's knowledge or credibility." The Court rejected the contentions of Florida that the tip was reliable, because it accurately described J.L.'s visible attributes, noting that the reasonable suspicion at issue in the specific case required that a tip "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."[233]

c. Reasonableness

[G94] The touchstone of the Fourth Amendment is reasonableness.[234] The Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity.[235] The Court also evaluates the search or seizure "under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[236] The balancing of competing interests has been described as the key principle of the Fourth Amendment.[237] Because one of the factors to be taken into account is the extent of the intrusion, it is plain that reasonableness depends on not only *when* a search or a seizure is conducted but also *how* it is carried out,[238] including its duration;[239] a search, as actually conducted, must be "reasonably related in *scope* to the circumstances which justified the interference in the first place."[240] Reasonableness "is measured in objective

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[232] Alabama v. White, 496 U.S. 325, 328–32 (1990).

[233] Florida v. J.L., 529 U.S. 266, 271–72 (2000). The Court also declined to adopt the argument that the standard *Terry* analysis should be modified to license a "firearm exception," under which a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. The facts of this case did not require the Court to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great—e.g., a report of a person carrying a bomb—as to justify a search even without a showing of reliability and reasonable suspicion. *Id.* at 272–74.

[234] *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106, 108–09 (1977) (*per curiam*); Florida v. Jimeno, 500 U.S. 248, 250 (1991).

[235] Tennessee v. Garner, 471 U.S. 1, 13 (1985).

[236] *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 300 (1999).

[237] Michigan v. Summers, 452 U.S. 692, 700, n. 12 (1981).

[238] Tennessee v. Garner, 471 U.S. 1, 8 (1985).

[239] Muehler v. Mena, 544 U.S. 93, 101 (2005), *citing* Illinois v. Caballes, 543 U.S. 405 (2005) (a lawful seizure can become unlawful if it is prolonged beyond the time reasonably required to complete that mission).

[240] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (emphasis added).

terms by examining the totality of the circumstances. In applying this test, [the Court has] consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."[241]

[G95] Nevertheless, in light of the Court's decisions, certain generalizations may be made. For example, in most cases, the Court strikes the balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. The Court has recognized exceptions to this rule, when *exigent circumstances*[242] or *special needs*,[243] beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable.[244] But even in such cases, searches and seizures are ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.[245] And where probable cause has existed, the only cases in which the Court found it necessary actually to perform the "balancing" analysis involved searches or seizures "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests."[246]

[G96] In fashioning "reasonableness" standards, the Court is mindful of three principles: first, the standard "should be workable for application by rank-and-file, trained police officers;"[247] second, it should be reasonable;[248] and third, the standard "should be objective, not dependent on the belief of individual police officers."[249] For example, the Court has announced that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile . . . [and] may also examine the contents of any containers found within the passenger compartment."[250]

[G97] The Court has stated that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."[251] "It is obvious that the logic of such elaborate 'less-restrictive-alternative'

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241 Ohio v. Robinette, 519 U.S. 33, 39 (1996).

242 "Exigent circumstances" involve *"specially pressing or urgent"* needs for official action. *See* Illinois v. McArthur, 531 U.S. 326, 331 (2001) (emphasis added). For example, a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant. *See* Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (warrantless entry of house by police in hot pursuit of armed robber). A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable." *See* Michigan v. Tyler, 436 U.S. 499, 509 (1978). And a warrantless blood test for alcohol may be "reasonable" where the delay would have led to loss of evidence. *See* Schmerber v. California, 384 U.S. 757, 770–71 (1966).

243 Merely symbolic needs are not "special." *See* Chandler v. Miller, 520 U.S. 305, 321–22 (1997) (a state's requirement that candidates for state office pass a drug test cannot be justified by the state's need to display its commitment to the struggle against drug abuse).

244 Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

245 City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

246 Whren v. United States, 517 U.S. 806, 818 (1996).

247 *See* Illinois v. Andreas, 463 U.S. 765, 772 (1983), *citing* New York v. Belton, 453 U.S. 454, 458–60 (1981) and United States v. Ross, 456 U.S. 798, 821 (1982).

248 *See* Illinois v. Andreas, 463 U.S. 765, 773 (1983).

249 *Id.* at 773, *citing* Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

250 *See* New York v. Belton, 453 U.S. 454, 460 (1981).

251 Illinois v. Lafayette, 462 U.S. 640, 647 (1983). *See also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995).

arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers, . . . because judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the Government might have been accomplished."[252]

2. Particular Types of Searches and Seizures

a. Particular Places, Effects, or Persons

i. Private Dwellings

[G98] It is axiomatic that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[253] And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest.[254] Therefore, searches and seizures inside a home without a warrant are "presumptively unreasonable."[255] "[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless entries, searches, or seizures in the home context."[256] Indeed, the Court has recognized only a few such emergency conditions, where "there is compelling need for official action and no time to secure a warrant ."[257]

[G99] Warrantless arrests in the home are generally prohibited by the Fourth Amendment; the police may not make a warrantless and non-consensual entry into a suspect's home in order to conduct a routine felony arrest.[258] The Court's "hesitation

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[252] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 629, n.9 (1989).

[253] United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).

[254] Johnson v. United States, 333 U.S. 10, 13–14 (1948).

[255] Coolidge v. New Hampshire, 403 U.S. 443, 474–75 (1971).

[256] Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984).

[257] Michigan v. Tyler, 436 U.S. 499, 509 (1978). *See* United States v. Santana, 427 U.S. 38, 42–43 (1976) (hot pursuit of a fleeing felon); Maryland v. Buie, 494 U.S. 325, 334–336 (1990) (protective search incident to arrest); Michigan v. Clifford, 464 U.S. 287, 293, 299 (1984) (ongoing fire); Mincey v. Arizona, 437 U.S. 385, 392 (1978) (person in need of immediate aid and searches of a homicide scene for possible other victims or a killer on the premises); Illinois v. McArthur, 531 U.S. 326 (2001) (brief seizure of the premises, supported by probable cause and designed to prevent the loss of evidence, while obtaining a search warrant).

When "the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, a government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials." *See* Lewis v. United States, 385 U.S. 206, 211 (1966).

[258] *See* Payton v. New York, 445 U.S. 573, 583–90 (1980). An arrest warrant alone will suffice to enter a suspect's own residence to effect his arrest. *Id.* at 602–03. But forcible entry into a third party's premises to execute an arrest warrant is unconstitutional, if the entry is without a search warrant and in the absence of consent or exigent circumstances. *See* Steagald v. United States, 451 U.S. 204, 211–16 (1981). Absent a search warrant or consent, the police may not serve capiases at the areas of a private clinic that are not open to the public. *See* Pembauer v. Cincinnati, 475 U.S. 469, 472, 484 (1986).

in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor."[259] A warrantless, night-time entry into an individual's home to arrest him for a non-jailable traffic offense cannot be upheld simply because evidence of the driver's blood alcohol level might have dissipated while the police obtained a warrant.[260]

ii. Commercial Premises—Offices

[G100] In the absence of consent or exigent circumstances, official entry into "the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."[261] Nevertheless, "[a]n expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home."[262] The Court has emphasized that, unlike a homeowner's interest in his dwelling, the interest of the owner of commercial property is not one in being free from any administrative inspections.[263]

[G101] One's office is constitutionally protected against warrantless governmental intrusions. Hence, a union employee who shares an office with other union employees has a privacy interest in the office sufficient to challenge successfully the warrantless search of that office.[264] However, in the context of public employment, where the government has a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner, "special needs, beyond the normal need for law enforcement" make the warrant and probable cause requirement impracticable, for legitimate work-related, non-investigatory intrusions as well as investigations of work-related misconduct.[265]

iii. Fire-Damaged Premises

[G102] "If reasonable privacy interests remain in the fire-damaged property, the warrant requirement applies, and any official entry must be made pursuant to a warrant in the absence of consent or exigent circumstances."[266] "A burning building clearly pres-

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[259] Welsh v. Wisconsin, 466 U.S. 740, 750 (1984).

[260] *Id.* at 754.

[261] See v. City of Seattle, 387 U.S. 541, 545 (1967). Moreover, the fact that a retail store invites the public to enter does not mean that it consents "to wholesale searches and seizures that do not conform to Fourth Amendment guarantees." *See* Lo-Ji Sales v. New York, 442 U.S. 319, 329 (1979).

[262] New York v. Burger, 482 U.S. 691, 700 (1987).

[263] Donovan v. Dewey, 452 U.S. 594, 598–99 (1981). *See also* para. G183.

[264] Mancusi v. DeForte, 392 U.S. 364, 369–72 (1968).

[265] O'Connor v. Ortega, 480 U.S. 709, 724–26 (1987) (plurality opinion of four Justices); *id.* at 732 (concurring opinion of Justice Scalia). The plurality held that public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable. Ordinarily, a search of an employee's office by a supervisor will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct or that the search is necessary for a non-investigatory, work-related purpose, such as to retrieve a needed file. *Id.* at 725–26.

[266] Michigan v. Clifford, 464 U.S. 287, 292–93 (1984) (plurality opinion of four members of the Court).

ents an exigency of sufficient proportions to render a warrantless entry 'reasonable.' . . . [But] [f]ire officials are charged not only with extinguishing fires, but also with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished."[267]

[G103] "Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches."[268] "To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant, on the other. . . . The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might all be relevant factors."[269]

[G104] Evidence of arson discovered in the course of such investigations is admissible at trial.[270] Nevertheless, "if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime."[271]

[G105] In *Tyler*, the Court upheld a warrantless post-fire search of a furniture store, despite the absence of exigent circumstances, on the ground that it was a continuation of a valid search begun immediately after the fire. The investigation was begun as the last flames were being doused but could not be completed because of smoke and darkness. The search was resumed promptly after the smoke cleared and daylight dawned.

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[267] Michigan v. Tyler, 436 U.S. 499, 509–10 (1978). "The circumstances of particular fires and the role of firemen and investigating officials will vary widely. A fire in a single-family dwelling that clearly is extinguished at some identifiable time presents fewer complexities than those likely to attend a fire that spreads through a large apartment complex or that engulfs numerous buildings. In the latter situations, it may be necessary for officials—pursuing their duty both to extinguish the fire and to ascertain its origin—to remain on the scene for an extended period of time repeatedly entering or re-entering the building or buildings, or portions thereof. In determining what constitutes a 'reasonable time to investigate,' appropriate recognition must be given to the exigencies that confront officials serving under these conditions, as well as to individuals' reasonable expectations of privacy." *Id.* at 510, n.6.

[268] Michigan v. Tyler, 436 U.S. 499, 511 (1978).

[269] *Id.* at 507. *See also* Michigan v. Clifford, 464 U.S. 287, 293–94 (1984) (plurality opinion).

[270] "The 'plain view' doctrine must be applied in light of the special circumstances that frequently accompany fire damage. In searching solely to ascertain the cause, firemen customarily must remove rubble or search other areas where the cause of fires is likely to be found. An object that comes into view during such a search may be preserved without a warrant." *See* Michigan v. Clifford, 464 U.S. 287, 295, n.6 (1984) (plurality opinion).

[271] Michigan v. Tyler, 436 U.S. 499, 512 (1978).

Because the post-fire search was interrupted for reasons that were evident, the Court held that the early morning search was "no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence."[272]

[G106] The case in *Clifford* was distinguishable for several reasons. First, the challenged search was not a continuation of an earlier search. Second, between the time the firefighters had extinguished the blaze and left the scene and the arson investigators first arrived to begin their investigation, the Cliffords had taken steps to secure the privacy interests that remained in their residence against further intrusion, by having a work crew board up the house. Third, the privacy interests in the residence—particularly after the Cliffords had acted—were significantly greater than those in the fire-damaged furniture store. Thus, a four-Justice plurality concluded that the post-fire search at issue should have been conducted pursuant to a warrant, consent, or the identification of some new exigency.[273]

iv. Murder Scenes

[G107] The Court has rejected the contention that there is a "murder scene exception" to the Warrant Clause of the Fourth Amendment. Although police may make warrantless entries on premises where "they reasonably believe that a person within is in need of immediate aid," and "may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises," a general "murder scene exception" would be inconsistent with the Fourth and Fourteenth Amendments.[274] Hence, the warrantless search of the suspected murderer's apartment is not constitutionally permissible simply because a homicide has recently occurred there.[275]

v. Public Places

[G108] The Court's Fourth Amendment jurisprudence "has consistently accorded law enforcement officials greater latitude in exercising their duties in public places,"[276] such as streets, parks, and restaurants.[277] It is one thing to seize without a warrant persons or property found in an open area, and it is quite another thing to effect a warrantless seizure "in private premises to which access is not otherwise available for the seizing officer."[278] For example, although a warrant presumptively is required for a felony arrest in a suspect's home, the Fourth Amendment permits the warrantless arrest of an individual in a public place upon probable cause.[279] A person standing in the doorway of a house, where he is "exposed to public view, speech, hearing, and touch," is "in a pub-

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[272] *Id.* at 511.

[273] Michigan v. Clifford, 464 U.S. 287, 296–97 (1984). Justice Stevens agreed that the search of respondents' home was unreasonable, holding that a non-exigent, forceful, warrantless entry cannot be reasonable unless the investigator has made some effort to give the owner sufficient notice to be present while the investigation of the cause of fire is made. *Id.* at 303–04.

[274] Mincey v. Arizona, 437 U.S. 385, 392, 395 (1978). *See also* Thompson v. Louisiana, 469 U.S. 17, 21 (1984) (*per curiam*); Flippo v. West Virginia, 528 U.S. 11, 14 (1999).

[275] Mincey v. Arizona, 437 U.S. 385, 395 (1978).

[276] Florida v. White, 526 U.S. 559, 655 (1999).

[277] *See, e.g.*, Donovan v. Lone Steer, 464 U.S. 408, 413–16 (1984) (an entry into the public lobby of a motel and restaurant for the purpose of serving an administrative subpoena is not the sort of governmental act that is forbidden by the Fourth Amendment).

[278] *See* G. M. Leasing Co. v. United States, 429 U.S. 338, 354 (1977).

[279] United States v. Watson, 423 U.S. 411, 416–24 (1976).

lic place" and hence subject to arrest without a warrant permitting entry of the home.[280] The Court has stressed that "[t]he congregation of a large number of persons in a private home does not transform it into a public place open to the police."[281]

[G109] It is also well settled that objects, such as weapons or contraband, found in a public place may be seized by the police without a warrant. "The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity."[282] Federal agents do not violate the Fourth Amendment by failing to secure a warrant prior to seizing automobiles in partial satisfaction of income tax assessments, if the seizure of the automobiles takes place on public streets, parking lots, or other open places.[283]

vi. Border Searches

[G110] "[T]he expectation of privacy [is] less at the border than in the interior."[284] Moreover, consistently with the longstanding power of the sovereign to protect itself "by stopping and examining persons and property crossing into th[e] country, . . . the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is . . . struck much more favorably to the Government at the border."[285] Hence, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant."[286] "Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion, even if the stop is based largely on ethnicity."[287] "[T]he Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank."[288] Moreover, "boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever" for inspection of their documents.[289]

[G111] Incoming international letter-class mail may be opened without a warrant on less than probable cause. The rationale of the "border search" exception "suggests no

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[280] United States v. Santana, 427 U.S. 38, 42 (1976).

[281] Recznik v. City of Lorain, 393 U.S. 166, 168–69 (1968).

[282] Payton v. New York, 445 U.S. 573, 586–87 (1980).

[283] G. M. Leasing Corp. v. United States, 429 U.S. 338, 351 (1977). *See also* Florida v. White, 526 U.S. 559, 563–66 (1999) (the Fourth Amendment does not require the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband).

[284] United States v. Montoya de Hernandez, 473 U.S. 531, 539 (1985).

[285] *Id.* at 538, 540.

[286] *Id.* at 538.

[287] *Id.* at 538, *citing* United States v. Martinez-Fuerte, 428 U.S. 543, 562–63 (1976). In *City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48 (2000), which involved drug checkpoints, the Court noted that its opinion did not affect the validity of border searches.

[288] United States v. Flores-Montano, 541 U.S. 149, 155 (2004). As the Court noted, a gas tank search involves a brief procedure that can be reversed without damaging the safety or operation of the vehicle. If damage to a vehicle were to occur, the motorist might be entitled to recovery. While the interference with a motorist's possessory interest is not insignificant when the government removes, disassembles, and reassembles his gas tank, it nevertheless is justified by the government's paramount interest in protecting the border. In addition, delays of one to two hours at international borders are to be expected.

[289] United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985), *citing* United States v. Villamonte-Marquez, 462 U.S. 579 (1983). *See, in extenso*, para. G128.

distinction in constitutional doctrine stemming from the mode of transportation across the borders."[290] Hence, the Fourth Amendment is not transgressed by a federal statute that authorizes customs officials to inspect incoming international mail when they have a "reasonable cause to suspect" that the mail contains illegally imported merchandise.[291]

[G112] In *Montoya de Hernandez*, the Court held that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and his trip, reasonably suspect that the traveler is smuggling contraband in his alimentary canal. . . . [T]his type of smuggling gives no external signs, and inspectors will rarely possess probable cause to arrest or search, yet governmental interests in stopping smuggling at the border are high indeed. Under this standard, officials at the border must have a particularized and objective basis for suspecting the particular person of alimentary canal smuggling."[292]

[G113] Routine border searches may, in certain circumstances, "take place not only at the border itself, but at its functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a non-stop flight from Mexico City would clearly be the functional equivalent of a border search. But the search of [one's] automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border," is not a border search or the functional equivalent thereof.[293]

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[290] United States v. Ramsey, 431 U.S. 606, 621 (1977).

[291] *Id.* at 621–23. Moreover, since applicable postal regulations flatly prohibit, under all circumstances, the reading of correspondence absent a search warrant, the opening of international mail in search of customs violations, does not impermissibly chill the exercise of free speech. *Id.* at 623–24.

[292] United States v. Montoya de Hernandez, 473 U.S. 531, 541–42 (1985). In that case, respondent arrived at Los Angeles International Airport shortly after midnight, on a direct ten-hour flight from Bogota, Colombia. A Customs Inspector reviewed her documents and noticed from her passport that she had made at least eight recent trips to either Miami or Los Angeles. Respondent revealed that she spoke no English and had no family or friends in the United States. She explained in Spanish that she had come to the United States to purchase goods for her husband's store in Bogota, which was known as a "source city" for narcotics. She admitted that she had no appointments with merchandise vendors and no hotel reservations, and she could not recall how her airline ticket had been purchased. Moreover, she had no shoes other than the high-heeled pair she was wearing. The inspectors requested a female customs inspector to take respondent to a private area and conduct a patdown and strip search. During the search, the female inspector felt respondent's abdomen area and noticed a firm fullness, as if respondent were wearing a girdle. The search revealed no contraband, but the inspector noticed that respondent was wearing two pairs of elastic underpants with a paper towel lining the crotch area. The Court found that these facts and their rational inferences clearly supported a reasonable suspicion that respondent was a "balloon swallower." *Id.* at 533–34, 542. *See also* para. G149, regarding the duration of respondent's detention.

The Court suggested no view on what level of suspicion, if any, is required for non-routine border searches such as strip, body cavity, or involuntary x-ray searches. *See id.* at 541, n.4.

[293] Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973).

vii. Automobiles—Motorists

[G114] *The Automobile Exception to the Warrant Requirement.* The automobile exception to the Fourth Amendment's warrant requirement requires only that there be probable cause to conduct a search. This exception was first set forth by the Court in *Carroll*. "There, the Court recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of the automobile justifies a lesser degree of protection of those interests."[294] The Court rested this exception on a long-recognized distinction between stationary structures and vehicles: "the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[295] "More recent cases provide a further justification: the individual's reduced privacy expectation in an automobile owing to its pervasive regulation."[296] "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle, without more."[297] This rule may also apply to motor homes: "[w]hen a vehicle is being used on the highways or is capable of such use and is found stationary in a place not regularly used for residential purposes—temporary or otherwise—the two justifications for the vehicle exception come into play."[298]

[G115] "The scope of a warrantless search of an automobile is . . . not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. . . . [For example,] [p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab."[299] Hence, the police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.[300]

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[294] *See* California v. Carney, 471 U.S. 386, 390 (1985), *discussing* Carroll v. United States, 267 U.S. 132 (1925).

[295] Carroll v. United States, 267 U.S. 132, 153 (1925).

[296] Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (*per curiam*), *citing* California v. Carney, 471 U.S. 386, 391–92 (1985). *See also* para. G35.

[297] Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (*per curiam*). The automobile exception does not require a separate finding of exigency in addition to a finding of probable cause. *See* Maryland v. Dyson, 527 U.S. 465, 466 (1999) (*per curiam*).

[298] California v. Carney, 471 U.S. 386, 392–393 (1985) (respondent's vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle).

[299] United States v. Ross, 456 U.S. 798, 824 (1982), *overruling* Robbins v. California, 453 U.S. 420 (1981).

[300] California v. Acevedo, 500 U.S. 565, 580 (1991), *overruling* Arkansas v. Sanders, 442 U.S. 753, 764–65 (1979). In *Sanders*, the police had probable cause to believe a suitcase contained marijuana. They watched as the defendant placed the suitcase in the trunk of a taxi and was driven away. The police pursued the taxi for several blocks, stopped it, found the suitcase in the trunk, and searched it. Although the Court had applied the *Carroll* doctrine to searches of integral parts of the automobile itself (indeed, in *Carroll*, contraband whiskey was in the

This rule applies "to all containers within a car, without qualification as to ownership. . . . [P]olice officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search. . . . [And] a package may be searched, whether or not its owner is present as a passenger or otherwise, because it may contain the contraband that the officer has reason to believe is in the car."[301]

[G116] When police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody,[302] and even though a prior search has already been made.[303] "There is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure."[304] The Court has rejected the position that warrantless searches of containers must invariably be conducted "immediately" as part of the vehicle inspection or "soon thereafter."[305] It is clear that "the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant."[306]

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upholstery of the seats), it did not extend the doctrine to the warrantless search of personal luggage "merely because it was located in an automobile lawfully stopped by the police." *Id.* at 765. The *Sanders* majority "stressed the heightened privacy expectation in personal luggage, and concluded that the presence of luggage in an automobile did not diminish the owner's expectation of privacy in his personal items." *See* California v. Acevedo, 500 U.S. 565, 572 (1991), *discussing Sanders, supra*, at 764–65. In *Acevedo, supra*, at 580, the Court eliminated the "line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile," noting that the protections of the Fourth Amendment must not turn on such coincidences.

[301] Wyoming v. Houghton, 526 U.S. 295, 301, 307 (1999). The Court observed, *inter alia*, that, in contrast to the passenger's reduced privacy expectations, the governmental interest in effective law enforcement would be appreciably impaired without the ability to search the passenger's belongings, since (1) an automobile's ready mobility creates the risk that evidence or contraband will be permanently lost while a warrant is obtained; (2) a passenger may have an interest in concealing evidence of wrongdoing in a common enterprise with the driver; and (3) a criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car. *Id.* at 304–05.

[302] Chambers v. Maroney, 399 U.S. 42, 52 (1970); Texas v. White, 423 U.S. 67, 68 (1975) (*per curiam*). The police exercise a form of custody or control over a car disabled as a result of an accident, when, for reasons of traffic safety, they have such a car towed to a private garage. *See* Cady v. Dombrowski, 413 U.S. 433, 442–43 (1973).

[303] Michigan v. Thomas, 458 U.S. 259, 261 (1982) (*per curiam*) (prior inventory search); Florida v. Meyers, 466 U.S. 380, 382 (1984) (prior search for criminal evidence).

[304] United States v. Johns, 469 U.S. 478, 484 (1985).

[305] United States v. Johns, 469 U.S. 478, 484 (1985) (a warrantless search of the packages found in a truck was not unreasonable merely because it occurred three days after the packages were placed in a DEA warehouse). *See also* Cooper v. California, 386 U.S. 58, 61–62 (1967) (upholding a warrantless search that took place seven days after the seizure of the automobile, pending forfeiture proceedings).

[306] Michigan v. Thomas, 458 U.S. 259, 261 (1982) (*per curiam*).

[G117] *Stops for Traffic Violations.* Detention of a motorist is reasonable where probable cause exists to believe that a traffic violation has occurred.[307] On these occasions, "licenses and registration papers are subject to inspection, and drivers without them will be ascertained."[308] Moreover, the Fourth Amendment does not forbid a warrantless arrest for a minor traffic offense, such as a misdemeanor seatbelt violation punishable only by a fine.[309]

[G118] In case of a routine traffic stop, the police cannot conduct a full field-type search; there is no "search incident to citation" exception to the Fourth Amendment's probable cause requirement.[310] Nevertheless, "officers have other, independent bases to search for weapons and protect themselves from danger."[311] For example, they may order out of a vehicle both the driver and any passengers;[312] "perform a 'pat-down' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous;"[313] conduct a "pat-down" of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon;[314] and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest.[315]

[G119] *Checkpoint Stops.* The reasonableness of checkpoint stops turns on factors, such as the checkpoint's purpose, location, and method of operation.[316] The Court has upheld brief, suspicionless seizures at a fixed checkpoint designed to intercept illegal aliens[317] and at a sobriety checkpoint aimed at removing drunk drivers from the road.[318] The Court has also suggested that a similar roadblock to verify drivers' licenses and registrations would be permissible to serve a highway safety interest.[319] While the Court has not limited "the purposes that may justify a checkpoint program to any rigid set of categories," it has declined to approve a checkpoint "program whose *primary* purpose is ultimately indistinguishable from the general interest in crime control. . . . When law enforcement authorities pursue primarily general crime control purposes at checkpoints, stops can only be justified by some quantum of individualized suspicion or by an emergency. . . . For example, . . . the Fourth Amendment would . . . permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route."[320]

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[307] Whren v. United States, 517 U.S. 806, 809–16 (1996) (the temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective).

[308] Delaware v. Prouse, 440 U.S. 648, 659 (1979).

[309] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

[310] Knowles v. Iowa, 525 U.S. 113, 117–18 (1998).

[311] *Id.* at 117.

[312] Pennsylvania v. Mimms, 434 U.S. 106, 108–11 (1977) (*per curiam*); Maryland v. Wilson, 519 U.S. 408, 412–15 (1997). *See, in extenso*, paras. G206–G207.

[313] Knowles v. Iowa, 525 U.S. 113, 118 (1998), *citing* Terry v. Ohio, 392 U.S. 1 (1968).

[314] Michigan v. Long, 463 U.S. 1032, 1049 (1983). *See, in extenso*, para. G155.

[315] New York v. Belton, 453 U.S. 454, 460 (1981). *See also* paras. G162–G163.

[316] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976). Operation of a fixed checkpoint need not be authorized in advance by a judicial warrant. *Id.* at 566.

[317] United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[318] Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990).

[319] Delaware v. Prouse, 440 U.S. 648, 663 (1979).

[320] City of Indianapolis v. Edmond, 531 U.S. 32, 44, 47 (2000).

[G120] In *Martinez-Fuerte*, the Court entertained Fourth Amendment challenges to stops at two permanent immigration checkpoints located on major U.S. highways less than 100 miles from the Mexican border. This practice involved slowing all oncoming traffic "to a virtual, if not a complete, halt," at a highway roadblock. Most motorists were allowed to resume their progress without any oral inquiry or close visual examination. In a relatively small number of cases, the Border Patrol agents concluded that further inquiry was in order and directed these cars to a secondary inspection area where their occupants were asked about their citizenship and immigration status. The Court emphasized that the checkpoints were located near the border and served a border control function made necessary by the difficulty of guarding the border's entire length. It also stressed the impracticality of the particularized study of a given car to discern whether it was transporting illegal aliens. While the need to make immigration checkpoint stops was great, the consequent intrusion on Fourth Amendment interests was relatively modest, mainly because the generating of concern or even freight on the part of lawful traveler was quite limited. The potential interference with legitimate traffic was minimal. Motorists using these highways were not taken by surprise, as they knew, or could obtain knowledge of, the location of the checkpoints. The motorist could see that other vehicles were being stopped and could also observe visible signs of the officers' authority. Furthermore, checkpoint operations both appeared to involve, and actually involved, a limited discretionary enforcement activity. "The regularized manner in which these established checkpoints [we]re operated [wa]s visible evidence, reassuring to law-abiding motorists, that the stops [we]re duly authorized and believed to serve the public interest." And since field officers might stop only those cars passing the checkpoint, there was little room for abusive or harassing stops of individuals. Consequently, the Court found that the balance tipped in favor of the government's interests in policing the nation's borders.[321]

[G121] In *Sitz*, the Court evaluated the constitutionality of a state highway sobriety checkpoint program. The *Sitz* checkpoint involved brief suspicionless stops of motorists so that police officers could detect signs of intoxication and remove impaired drivers from the road. Motorists who exhibited signs of intoxication were diverted for a license and registration check and, if warranted, further sobriety tests. This checkpoint program was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. Conversely, the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—was slight. As to the "subjective intrusion" and the potential for generating fear and surprise, the Court explained that the "fear and surprise" to be considered were "not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law abiding motorists by the nature of the stop." The checkpoints at issue were selected pursuant to state guidelines, and uniformed police officers stopped every approaching vehicle. Hence, the intrusion resulting from the brief stop at the sobriety

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[321] United States v. Martinez-Fuerte, 428 U.S. 543, 556–62 (1976). The Court also found it permissible to refer motorists selectively to a secondary inspection area for limited inquiry. Even if such referrals were made largely on the basis of apparent Mexican ancestry, the Court perceived no constitutional violation, as the intrusion was sufficiently minimal that no particularized reason was necessary to justify it, and the Border Patrol officers should have wide discretion in selecting the motorists to be diverted for the brief questioning involved. *Id.* at 563–64.

checkpoint was, for constitutional purposes, indistinguishable from the checkpoint stops upheld in *Martinez-Fuerte*. In balancing "the State's interest in preventing drunken driving, the extent to which the program [could] reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who [we]re briefly stopped," the Court concluded that the program was consistent with the Fourth Amendment.[322]

[G122] In *Edmond*, the Court upset a drug checkpoint program of the city of Indianapolis. Pursuant to relevant police directives, at least one officer approached the vehicle, advised the driver that he or she was being stopped briefly at a drug checkpoint, and asked the driver to produce a license and registration. The officer also looked for signs of impairment and conducted an open-view examination of the vehicle from the outside. A narcotics-detection dog walked around the outside of each stopped vehicle. The Court noted that what principally distinguished this checkpoint program from those it had previously approved was its primary purpose. The programs approved in *Martinez-Fuerte* and *Sitz* were designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. By contrast, the primary purpose of the Indianapolis narcotics checkpoint program was to "detect evidence of ordinary criminal wrongdoing" on the part of the occupants of the stopped vehicles.[323] For that reason, the program was found unconstitutional. The Court stressed that "[w]ithout drawing the line at roadblocks designed *primarily* to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."[324] And if the program could be justified by its lawful secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations, authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check; that is why the Court should determine the primary purpose of the checkpoint program.[325]

[G123] The checkpoint stop at issue in *Lidster* differed significantly from that in *Edmond*. The stop's primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a hit-and-run accident occurring about one week earlier at the same location and time of night—a crime in all likelihood committed by others. This special law enforcement concern could justify highway stops without individualized suspicion; the relevant public concern was grave and was advanced by the challenged stop to a significant degree. Moreover, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line—a very few minutes at most. Contact with the police lasted only a few seconds. Police contact consisted simply of a request for information and the distribution of a flyer. Viewed subjectively, the contact provided little reason for anxiety or alarm; the police stopped all vehicles systematically, and there was no allegation that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops. In upholding the constitutional-

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[322] Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451–55 (1990).

[323] City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000). The purpose inquiry in this context "is to be conducted only at the programmatic level, and is not an invitation to probe the minds of individual officers acting at the scene." *Id.* at 48.

[324] *Id.* at 42 (emphasis added).

[325] *Id.* at 46.

ity of the challenged stop, the Court also noted that "an *Edmond*-type rule is [not] needed to prevent an unreasonable proliferation of police checkpoints," since "[p]ractical considerations—namely, limited police resources and community hostility to traffic tie-ups—seem likely to inhibit any such proliferation," and "the Fourth Amendment's normal insistence that the stop be reasonable in context will still provide an important legal limitation on police use of this kind of information-seeking checkpoint."[326]

[G124] *Discretionary Stops.* The Court has disapproved random, roving patrol stops of vehicles, relying "on the more intrusive nature of random patrols as compared with fixed-checkpoint stops, . . . and on the ever-present danger of arbitrariness and abuse posed by the completely discretionary nature of random roving patrol stops."[327]

[G125] In *Brignoni-Ponce*, the Court addressed the limits on police officers' power to stop vehicles and question the occupants about their citizenship and immigration status, without searching either vehicles or occupants. The stop was made by Border Patrol officers on a roving patrol. In weighing the public interest in preventing the illegal entry of aliens at the Mexican border against the interference with individual liberty that results when an officer stops an automobile and briefly questions its occupants, the Court held that such stops were permitted only if the police had a reasonable suspicion that the vehicle contained illegal aliens. Random roving patrol stops could not be tolerated, because they "would subject the residents of . . . [border] areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers," who would have the authority "to stop motorists at random for questioning, day or night, anywhere within 100 miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they had violated any law."[328] Hence, except at the border and its functional equivalents, "officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that criminal activity may be afoot.[329]

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[326] Illinois v. Lidster, 540 U.S. 419, 426 (2004).

[327] United States v. Villamonte-Marquez, 462 U.S. 579, 604 (1983) (opinion of Brennan, J.).

[328] United States v. Brignoni-Ponce, 422 U.S. 873, 882–83 (1975). "Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. . . . They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. . . . Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. . . . The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. . . . [Mexican appearance] is a relevant factor, but, standing alone, . . . [it] would justify neither a reasonable belief . . . [that they the car's occupants are aliens,] nor a reasonable belief that the car conceal[s] other aliens who [a]re illegally in the country." *Id.* at 884–87.

[329] *Id.* at 884. *Cf.* United States v. Arvizu, 534 U.S. 266, 273 (2002). In the latter case, respondent was stopped by Border Patrol Agent Stoddard while driving on an unpaved road in a remote area of Southeastern Arizona. A consent search of his vehicle revealed more than 100 pounds of marijuana. Considering the totality of the circumstances and giving due weight to the factual inferences drawn by the law enforcement officer, the Court held that Stoddard had

[G126] In *Prouse*, the Court invalidated a discretionary, suspicionless stop for a spot check of a motorist's driver's license and vehicle registration. The officer's conduct in that case was unconstitutional primarily on account of his exercise of standardless and unconstrained discretion. Moreover, the Court observed that no empirical evidence indicated that such stops would be an effective means of promoting roadway safety and said that it seemed common sense that the percentage of all drivers on the road, who were driving without a license was very small, and that the number of licensed drivers who would be stopped in order to find one unlicensed operator would indeed be large. The Court concluded that "[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions, but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials."[330] However, it suggested that questioning of all oncoming traffic at roadblock-type stops would be a lawful means of serving the state interest in highway safety.[331]

[G127] *Random Searches.* A search, even of an automobile, is a substantial invasion of privacy. The Court has rejected the contention that the government's strong interest in controlling immigration and the practical difficulties of policing the Mexican border combine to justify dispensing with both warrant and probable cause for vehicle searches near the border or its functional equivalents. In *Almeida-Sanchez*, the question was whether a roving patrol unit constitutionally could search a vehicle for illegal aliens simply because it was in the general vicinity of the border. The Court recognized the government's strong interest in controlling immigration and the practical difficulties of policing the Mexican border, but it held that searches by roving patrols impinged so significantly on Fourth Amendment privacy interests that a search could be conducted without consent only if there was probable cause to believe that a car contained illegal aliens, at least in the absence of a judicial warrant authorizing random searches by roving patrols in a given area.[332] In *Ortiz*, the Court held that the same limitations apply to

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reasonable suspicion to believe that Arvizu was engaged in illegal activity. It was reasonable for Stoddard to infer from his observations, his registration check, and his experience as a Border Patrol agent that respondent had set out from a border area notorious for alien and narcotics smuggling along a little-traveled route used by smugglers to avoid a specific highway checkpoint. Stoddard's knowledge further supported a common sense inference that respondent intended to pass through the area at a time when officers would be leaving their backroads patrols to change shifts. The likelihood that respondent and his family were on a picnic outing was diminished by the fact that the minivan had turned away from the known recreational areas. The knees of the two children sitting in the very back seat were unusually high, which suggested the existence of concealed cargo in the passenger compartment. Finally, Stoddard's assessment of respondent's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes, were entitled to some weight. While each of these factors alone was susceptible to innocent explanation, taken together, the same factors sufficed to form a particularized and objective basis for Stoddard to stop the vehicle.

330 Delaware v. Prouse, 440 U.S. 648, 661 (1979).

331 *Id.* at 663.

332 Almeida-Sanchez v. United States, 413 U.S. 266, 269–72, n.3, 283–285, 288 (1973). "Although standards for probable cause in the context of this case are relatively unstructured, there are a number of relevant factors which would merit consideration: they include (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and

similar vehicle searches conducted at a permanent checkpoint. The severity of the intrusion and the selective discretion necessarily exercised by police in the field require that that discretion be limited by a requirement of probable cause.[333]

viii. Vessels

[G128] The Fourth Amendment is not offended when customs officials, acting pursuant to a statute authorizing them to board any vessel at any time and at any place in the United States to examine the vessel's manifest and other documents, board, without any suspicion of wrongdoing, for inspection of documents a vessel that is located in waters providing ready access to the open sea. In reaching that conclusion, the Court considered several factors. In 1790, the First Congress clearly authorized the suspicionless boarding of vessels, reflecting its view that such boardings are not contrary to the Fourth Amendment. Second, while random stops of vehicles, without any articulable suspicion of unlawful conduct away from the borders, are not permissible under the Fourth Amendment, and whereas vehicles stops at fixed checkpoints or at roadblocks may be, there are important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares. "[N]o reasonable claim can be made that permanent checkpoints would be practical on waters where vessels can move in any direction at any time, and need not follow established 'avenues,' as automobiles must do. [W]hile permanent checkpoints could be established at various ports, . . . vessels having ready access to the open sea need never come to harbor. Should the captain want to avoid the authorities at port, he could carry on his activity by anchoring at some obscure location on the shoreline, or . . . [he] could transfer his cargo from one vessel to another. . . . [Moreover,] the system of prescribed outward markings used by States for vehicle registration is also significantly different from the system of external markings on vessels, and the extent and type of documentation required by federal law is a good deal more variable and more complex than are the state vehicle registration laws. . . . These documentation laws serve the public interest in many obvious ways. . . . They are the linchpin for regulation of participation in certain trades, such as fishing, salvaging, towing, and dredging, as well as areas in which trade is sanctioned, and for enforcement of various environmental laws. The documentation laws play a vital role in the collection of customs duties and tonnage duties. They allow for regulation of imports and exports assisting, for example, Government officials in the prevention of entry into th[e] country of controlled substances, illegal aliens, prohibited medicines, adulterated foods, dangerous chemicals, prohibited agricultural products, diseased or prohibited animals, and illegal weapons and explosives. . . . [Finally,] [w]hile the need to make document checks is great, the resultant intrusion on Fourth Amendment interests is quite limited, . . . [since] it involves only a brief detention where officials come on board, visit public areas of the vessel, and inspect documents."[334]

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the extent of their use; and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area. . . . Experience with an initial search or series of searches would be highly relevant in considering applications for renewal of a warrant." *Id.* at 283–84, n.3 (concurring opinion of Justice Powell).

333 United States v. Ortiz, 422 U.S. 891, 895–97 (1975).

334 United States v. Villamonte-Marquez, 462 U.S. 579, 585, 589–93 (1983).

ix. Seizure of Materials Presumptively Protected by the First Amendment

[G129] "[W]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved. . . . It is the risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials that motivates this rule."[335] "Prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of 'reasonableness;'"[336] yet, no "higher" probable cause standard is required.[337]

[G130] Pre-trial seizures of allegedly obscene materials may only be undertaken pursuant to "a procedure designed to focus searchingly on the question of obscenity."[338] Such warrantless seizures cannot be justified as incident to arrest.[339] A warrant for the seizure of allegedly obscene books cannot be issued on the conclusory opinion of a police officer that the books sought to be seized are obscene, without any inquiry by the issuing magistrate into the factual basis for the officer's conclusions.[340] And "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."[341]

[G131] Most importantly, the Court has noted that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding." Therefore, until there has been a judicial determination of the obscenity issue in an adversary proceeding, exhibition of a film cannot be restrained by seizing all the available copies of it.[342] The same is also true for books or any other expressive materials. "While a single copy of a book may be seized and retained for evidentiary purposes based on a finding

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[335] Fort Wayne Books v. Indiana, 489 U.S. 46, 63–64 (1989).

[336] Roaden v. Kentucky, 413 U.S. 496, 504 (1973).

[337] New York v. P. J. Video, 475 U.S. 868, 875 (1986) ("an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally").

[338] A Quantity of Books v. Kansas, 378 U.S. 205, 210 (1964). *See also* para. I25.

[339] Roaden v. Kentucky, 413 U.S. 496, 506 (1973).

[340] Marcus v. Search Warrant, 367 U.S. 717, 731–32 (1961); Lee Art Theatre v. Virginia, 392 U.S. 636, 637 (1968).

[341] Stanford v. Texas, 379 U.S. 476, 485 (1965). There the Court invalidated a warrant authorizing the search of a private home for all books, records, and other materials relating to the Communist Party, on the ground that, whether or not the warrant would have been sufficient in other contexts, "it authorized the searchers to rummage among and make judgments about books and papers, and was the functional equivalent of a general warrant." *See* Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978).

[342] Heller v. New York, 413 U.S. 483, 492–93 (1973). On a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding.

of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing."[343]

[G132] The Fourth Amendment does not forbid warrants where the press is involved. The courts must "apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search; . . . no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant . . . should afford sufficient protection against" interference with the press's ability to gather, analyze, and disseminate news.[344]

x. Searches and Seizures in the Public School Context

[G133] The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. "In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the State, not merely as surrogates for the parents of students, and they cannot claim the parents' immunity from the Fourth Amendment's strictures."[345]

[G134] Schoolchildren have legitimate expectations of privacy. "They may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items by bringing them onto school grounds."[346] But "[a] student's privacy interest is limited in the public school environment, where the State is responsible for maintaining discipline, health and safety."[347] "[T]he preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. . . . [Striking] the balance between schoolchildren's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place . . . requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. . . . [Moreover,] the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception;' . . . second, one must determine whether the search as actually conducted 'was reasonably related in scope to the cir-

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343 Fort Wayne Books v. Indiana, 489 U.S. 46, 63 (1989).

344 Zurcher v. Stanford Daily, 436 U.S. 547, 563–65 (1978).

345 New Jersey v. T.L.O., 469 U.S. 325, 336–37 (1985).

346 *Id.* at 339.

347 Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 830 (2002).

cumstances which justified the interference in the first place.' . . . Under ordinary circumstances, a search of a student by a teacher or other school officialwill be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[348]

[G135] Random, suspicionless drug testing of students who participate in inter-scholastic sports is constitutional. First, the subjects of such a regulation have a limited expectation of privacy, mainly because of the school's custodial responsibility and authority. The requirements that public schoolchildren submit to physical examinations and be vaccinated indicate that they have a lesser privacy expectation with regard to medical examinations and procedures than the general population. Student athletes have even less of a legitimate privacy expectation, for an element of communal undress is inherent in athletic participation, and athletes are subject to pre-season physical exams and rules regulating their conduct. Second, the privacy interests compromised by the process of obtaining the urine sample are negligible, at least when the conditions of production of the sample are nearly identical to those typically encountered in public restrooms that schoolchildren use daily, the tests look only for standard drugs, not medical conditions, and the results are disclosed only to a limited class of school personnel who have a need to know, and they are not turned over to law enforcement authorities or used for any internal disciplinary function. Third, the importance of the governmental concern in preventing drug use by schoolchildren cannot be doubted. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. And, of course, the effects of a drug-infested school are visited not just upon the users but upon the entire student body and faculty, as the educational process is disrupted. The health and safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and non-athletes alike. The need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy; indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use. Taking into account all the factors considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—the Court has found that drug testing of students who participate in extracurricular activities is reasonable.[349]

xi. Patients at Public Hospitals

[G136] The Court has held that, "[w]hile state hospital employees . . . may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obli-

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[348] New Jersey v. T.L.O., 469 U.S. 325, 339–42 (1985). The Court expressed no opinion on the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies. *Id.* at 341, n.7.

[349] Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 830–38 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–64 (1995).

gation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require."[350]

xii. Pre-Trial Detainees

[G137] Assuming that a pre-trial detainee retains a diminished expectation of privacy after commitment to a custodial facility, the requirement that pre-trial detainees remain outside their rooms during inspections by custodial officials does not violate the Fourth Amendment, but simply facilitates the safe and effective performance of the searches, and thus does not render such searches "unreasonable."[351] Similarly, assuming that pre-trial detainees retain some Fourth Amendment rights upon commitment to a corrections facility, the practice of visual body cavity searches of inmates, following contact visits with persons from outside the institution, does not violate that Amendment. Balancing the significant and legitimate security interests of the institution against the inmates' privacy interests, such searches can be conducted without probable cause and are not unreasonable.[352]

xiii. Probationers

[G138] In *Griffin*, the Court upheld a search of a probationer conducted pursuant to a Wisconsin regulation permitting "any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are reasonable grounds to believe the presence of contraband." The Court held that a state's operation of its probation system presents a "special need" for the exercise of supervision to assure that probation restrictions are in fact observed. That special need makes the warrant requirement impracticable and justifies replacement of the probable cause standard with a "reasonable grounds" standard. Because it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law, the Court thought it enough if the information supporting the search indicated only the "likelihood" of facts justifying the search.[353] Likewise, the warrantless search of a probationer's apartment, supported by

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[350] Ferguson v. City of Charleston, 532 U.S. 67 (2001). *See also* para. G175.

[351] Bell v. Wolfish, 441 U.S. 520, 557 (1979); Block v. Rutherford, 468 U.S. 576, 590–91 (1984). Moreover, such a room search rule does not violate the Due Process Clause. *See* Bell v. Wolfish, 441 U.S. 520, 560–61 (1979).

[352] Bell v. Wolfish, 441 U.S. 520, 558–60 (1979).

[353] Griffin v. Wisconsin, 483 U.S. 868, 873–80 (1987). "A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate, rather than the probation officer, as the judge of how close a supervision the probationer requires. Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct, . . . and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create. . . . [T]he probation regime would also be unduly disrupted by a requirement of probable cause. . . . [This requirement] would reduce the deterrent effect of the supervisory arrangement. . . . [I]t is both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree of demonstrable reliability of particular items of supporting data, and upon the same degree of certainty of violation, as is required in other contexts. In some cases—especially those involving drugs or illegal weapons—the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society. The agency, moreover, must be able to proceed on the basis of its entire experience with the probationer, and to assess probabilities in the light of its knowledge of his life, character, and circumstances." *Id.* at 876, 878–79.

reasonable suspicion and authorized by a probation condition, satisfies the Fourth Amendment.[354]

b. Particular Acts, Methods, or Forms

i. Arrests

[G139] Arrests may constitutionally be made only on probable cause.[355] But the police may arrest a suspect without a warrant. In *Watson*, the Court held that the warrantless felony arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment.[356] And in *Atwater*, the Court admitted that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense committed in the officer's presence, such as a misdemeanor seatbelt violation punishable only by a fine.[357]

[G140] In *Gerstein*, the Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pre-trial detention following a warrantless arrest and that this determination may be made by a judicial officer without an adversary hearing. In reaching this conclusion, the Court attempted to reconcile important competing interests. "On the one hand, States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause. . . . On the other hand, prolonged detention based on incorrect or unfounded suspicion may unjustly 'imperil [a] suspect's job, interrupt his source of income, and impair his family relationships.' . . . The Court, thus, established a 'practical compromise' between the rights of individuals and the realities of law enforcement."[358]

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[354] Unites States v. Knights, 534 U.S. 112 (2001). The Court did not decide whether respondent's acceptance of the search condition constituted consent to a complete waiver of his Fourth Amendment rights, because the search was reasonable under the Court's general Fourth Amendment "totality of the circumstances" approach. In reaching that conclusion, the Court considered, *inter alia*, that Knights's reasonable expectation of privacy had been significantly diminished as a result of the search condition of his probation. *Id.* at 118–20.

[355] Dunaway v. New York, 442 U.S. 200, 208, 213–14 (1979); Hayes v. Florida, 470 U.S. 811, 815 (1985).

[356] United States v. Watson, 423 U.S. 411, 414–24 (1976). The Court relied on (1) the well-settled common law rule that a warrantless arrest in a public place is valid if the arresting officer had probable cause to believe the suspect is a felon; (2) the clear consensus among the states adhering to that well-settled common law rule; and (3) the expression of the judgment of Congress that such an arrest is "reasonable."

[357] Atwater v. City of Lago Vista, 532 U.S. 318 (2001). There, the five-member majority rejected petitioner's request to mint a new rule of constitutional law forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time, and the government can show no compelling need for immediate detention. In doing so, the majority noted, *inter alia*, that the Court has traditionally recognized that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Id.* at 347.

[358] *See* County of Riverside v. McLaughlin, 500 U.S. 44, 52–53 (1991), *discussing and quoting* Gerstein v. Pugh, 420 U.S. 103, 112–13 (1975).

[G141] Taking into account the foregoing competing interests, the Court decided in *McLaughlin* that a jurisdiction providing judicial determinations of probable cause within 48 hours of arrest would, as a general matter, comply with the promptness requirement of *Gerstein*. But this is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. "Such a hearing may nonetheless violate *Gerstein*, if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill-will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities."[359] "Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a *bona fide* emergency or other extraordinary circumstance. The fact that, in a particular case, it may take longer than 48 hours to consolidate pre-trial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible but in no event later than 48 hours after arrest."[360]

[G142] In *Payton*, the Court proclaimed for the first time a rigid warrant requirement for all non-exigent home arrest entries, stressing that a home arrest "involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home."[361] A warrantless, night-time entry into a person's home to arrest him for a non-jailable traffic offense clearly contravenes the Fourth Amendment.[362]

[G143] "[I]t is not 'unreasonable' under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety—as well as the integrity of the arrest—is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested." Hence, once an officer has placed an individual under lawful arrest, the officer is authorized to accompany the arrestee to his room, for the purpose of obtaining identification.[363]

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[359] County of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991).

[360] *Id.* at 57.

[361] Payton v. New York, 445 U.S. 573, 588–89 (1980). At the same time, the Court recognized that, "[i]f there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Id.* at 602–03.

[362] Welsh v. Wisconsin, 466 U.S. 740, 748–54 (1984).

[363] Washington v. Chrisman, 455 U.S. 1, 7 (1982). Consequently, the officer may lawfully seize any contraband discovered in "plain view" in the arrestee's room.

ii. Investigatory Stops and Frisks

[G144] *Brief Stops of Persons.* "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, . . . it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the *status quo* momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."[364] This was recognized in *Terry v. Ohio*, which held that, where a police officer has a reasonable suspicion supported by articulable facts that criminal activity may be "*afoot*"—imminent or ongoing—the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions.[365] Similarly, "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a *completed felony*, then a *Terry* stop may be made to investigate that suspicion; . . . if a ["wanted flyer"] has been issued on the basis of articulable facts supporting a reasonable suspicion that the person wanted has committed an offense, then reliance on that flyer . . . justifies a stop to check identification, . . . to pose questions, . . . or to detain the person briefly while attempting to obtain further information."[366]

[G145] "Stop and identify" statutes vary from state to state, but all permit an officer to ask or require a suspect to disclose his identity. In *Brown v. Texas*, the Court invalidated a conviction for violating a Texas stop and identify statute on Fourth Amendment grounds. The Court ruled that the initial stop was not based on specific, objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity. Absent that factual basis for detaining the defendant, the Court held, the risk of arbitrary and abusive police practices was too great and the stop was impermissible.[367] Four terms later, the Court invalidated a stop and identify statute on vagueness grounds. The California law in *Kolender* required a suspect to give an officer "credible and reliable" identification when asked to identify himself. The Court held that the statute was void because it provided no standard for determining what a suspect must do to comply with it, resulting in "virtually unrestrained power to arrest and charge persons with a violation."[368] *Hiibel* made clear that the state may require a suspect to disclose his name in the course of a *Terry* stop, and that a suspect can be arrested and prosecuted for failure to identify himself, if the request for identification was "reasonably related in scope to the circumstances" justifying the stop.[369]

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[364] Adams v. Williams, 407 U.S. 143, 145–46 (1972), *citing* Terry v. Ohio, 392 U.S. 1, 21–23 (1968). *Cf.* Michigan v. Summers, 452 U.S. 692, 704–05 (1981) ("If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home.").

[365] Terry v. Ohio, 392 U.S. 1, 30 (1968).

[366] United States v. Hensley, 469 U.S. 221, 230, 232 (1985). The Court expressed no view on whether *Terry* stops to investigate all past crimes, however serious, are permitted.

[367] Brown v. Texas, 443 U.S. 47, 51–52 (1979).

[368] Kolender v. Lawson, 461 U.S. 352, 360 (1983).

[369] Hiibel v. Sixth Judicial Dist. Court of Nevada, 542 U.S. 177, 188 (2004). The Court noted, *inter alia*, that "Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for

[G146] Because of the public interest in suppressing illegal drug transactions and other serious crimes, a temporary detention for questioning in the case of an airport search may be justified without a showing of "probable cause" if "there is articulable suspicion that a person has committed or is about to commit a crime."[370] In *Sokolow*, respondent was stopped by Drug Enforcement Administration (DEA) agents upon his arrival at Honolulu International Airport. The agents found 1,063 grams of cocaine in his carry-on luggage. When respondent was stopped, the agents knew, *inter alia*, that he had traveled under an assumed name, paid for an airline ticket in cash with a number of small bills, traveled from Miami, a source city for illicit drugs, stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours, and appeared nervous during his trip. These factors, taken together, justified the suspicion that Sokolow was a "drug courier."[371] In *Reid*, four facts, encoded in a "drug courier profile," were alleged in support of the DEA's detention of a suspect at the Atlanta Airport. First, Reid had arrived from Fort Lauderdale, Florida, a source city for cocaine. Second, he arrived in the early morning, when law enforcement activity is diminished. Third, he and his companion appeared to have no luggage other than their shoulder bags. And fourth, he and his companion appeared to be trying to conceal the fact that they were traveling together. This collection of facts, the Court held, was inadequate to support a finding of reasonable suspicion. All but the last of these facts "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." The sole fact that suggested criminal activity was that Reid preceded another person and occasionally looked backward at him as they proceeded through the concourse. This observation did not, of itself, provide a reasonable basis for suspecting wrongdoing, for inferring criminal activity from such evidence reflected no more than "an inchoate and unparticularized suspicion or 'hunch.'"[372]

[G147] In *Dunaway*, the Court refused to extend *Terry* to authorize investigative interrogations at police stations on less than probable cause, even though proper warnings under *Miranda* had been given.[373] Detention at the police station for investigative purposes, whether for interrogation or fingerprinting, is "in important respects indistinguishable from a traditional arrest."[374] Hence, in the absence of probable cause or a warrant, it cannot be squared with the Fourth Amendment.[375]

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another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases . . . where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Id.* at 186. The Court concluded that the request for identification at issue in this case was reasonably related in scope to the circumstances justifying the stop.

The Court noted a similar limitation in *Hayes*, where it suggested that *Terry* may permit an officer to determine a suspect's identity by compelling the suspect to submit to *fingerprinting* only if there is "a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime." *See* Hayes v. Florida, 470 U.S. 811, 817 (1985).

370 Florida v. Rodriguez, 469 U.S. 1, 5 (1984) (*per curiam*).

371 United States v. Sokolow, 490 U.S. 1, 8–9 (1989).

372 Reid v. Georgia, 448 U.S. 438, 440–41 (1980) (*per curiam*).

373 Dunaway v. New York, 442 U.S. 200, 213–16 (1979).

374 *Id.* at 212.

375 Hayes v. Florida, 470 U.S. 811, 815–16 (1985). *See also* para. G156.

[G148] *Brief Detentions of Property.* "Given the fact that seizures of property can vary in intrusiveness, some brief detentions of property may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only reasonable, articulable suspicion that the property contains contraband or evidence of criminal activity. [For instance,] when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope."[376] And postal officers may seize a "suspicious" package and detain it briefly, until they secure a search warrant.[377] Similarly, if the police have probable cause to believe that a home contains contraband, which is evidence of a crime, they may temporarily keep the resident from entering his home unaccompanied by an officer, so as to prevent the loss of evidence, while they diligently obtain a warrant in a reasonable period of time.[378]

[G149] *Time Limits.* "[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion."[379] However, the Court has rejected "hard-and-fast" time limits; "authorities must be allowed 'to graduate their response to the demands of any particular situation.'"[380] "In assessing whether a detention is too long in duration to be justified as an investigative stop, [the Court] consider[s] it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. . . . A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. . . . A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But the fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable. . . . The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."[381]

[G150] In *Sharpe*, the Court rejected the contention that a 20-minute stop is unreasonable when the police have acted diligently, and a suspect's actions contribute to the added delay about which he complains. There, a DEA agent, while patrolling a highway in an area under surveillance for suspected drug trafficking, noticed an apparently overloaded pickup truck with an attached camper traveling in tandem with a Pontiac. Respondent Savage was driving the truck, and respondent Sharpe was driving the Pontiac. When they attempted to stop the vehicles, the Pontiac pulled over to the side of the road, but the truck continued on, pursued by a state Highway Patrol officer. The DEA agent was unable to contact the state officer to see if he had stopped the truck, so he radioed the local police for help. In the meantime, the state officer had stopped the

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376 United States v. Place, 462 U.S. 696, 706 (1983).

377 *See* United States v. Van Leeuwen, 397 U.S. 249, 251–53 (1970).

378 Illinois v. McArthur, 531 U.S. 326, 334, 337 (2001).

379 United States v. Place, 462 U.S. 696, 709 (1983).

380 United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985), *quoting* United States v. Place, 462 U.S. 696, 709, n.10 (1983).

381 United States v. Sharpe, 470 U.S. 675, 686–87 (1985).

truck, questioned Savage, and told him that he would be held until the DEA agent arrived. The agent, who had left the local police with the Pontiac, arrived at the scene approximately 15 minutes after the truck had been stopped. After confirming his suspicion that the truck was overloaded and upon smelling marihuana, the agent opened the rear of the camper without Savage's permission and observed a number of bales of marihuana. The agent then placed Savage under arrest and, returning to the Pontiac, also arrested Sharpe. Under these circumstances, the Court held that there had been no delay unnecessary to the legitimate investigation of the law enforcement officers; except for Savage's maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place.[382]

[G151] In *McArthur*, police officers, with probable cause to believe that respondent had hidden marijuana in his home, prevented him from entering the home unaccompanied by an officer for about two hours, while they obtained a search warrant. In upholding the seizure of the premises, the Court noted, *inter alia*, that the two-hour period was "no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant."[383]

[G152] "[A]limentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief *Terry*-type stops. It presents few, if any, external signs; a quick frisk will not do, nor will even a strip search."[384] In *Montoya de Hernandez*, the inspectors had available, as an alternative to simply awaiting respondent's bowel movement, an x-ray. They offered her the alternative of submitting herself to that procedure. But when she refused that alternative, the customs inspectors were left with only two practical alternatives: detain her for such time as necessary to confirm their suspicions, a detention that would last much longer than the typical *Terry* stop, or turn her loose into the interior carrying the reasonably suspected contraband drugs. The inspectors, in this case, followed the former procedure. They no doubt expected that respondent, having recently disembarked from a ten-hour direct flight with a full and stiff abdomen, would produce a bowel movement without extended delay. But her visible efforts to resist the call of nature, which were "heroic," disappointed this expectation and, in turn, caused her great discomfort. Although respondent's detention was long, and, indeed, humiliating, both its length and its discomfort resulted solely from the method by which she had chosen to smuggle illicit drugs into the country. Considering that the police are not to be charged "with delays in investigatory detention attributable to the suspect's evasive actions," and that the challenged detention had occurred at the international border, where the Fourth Amendment balance of interests leans heavily to the government, the Court concluded that the 16-hour detention, in that case, was not unreasonably long.[385]

[G153] "The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage. Moreover, he is not subjected to the coercive atmosphere of a custodial confinement or to the public indignity of being personally detained. Nevertheless, such a seizure can effectively restrain the person, since he is subjected to the possible disruption of his travel plans

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382 *Id.* at 677–79, 687–88.

383 Illinois v. McArthur, 531 U.S. 326, 332 (2001).

384 United States v. Montoya de Hernandez, 473 U.S. 531, 543 (1985).

385 *Id.* at 543–44.

in order to remain with his luggage or to arrange for its return. . . . At least when the authorities do not make it absolutely clear how they plan to reunite the suspect and his possessions at some future time and place, seizure of the object is tantamount to seizure of the person. This is because that person must either remain on the scene or else seemingly surrender his effects permanently to the police. . . . Therefore, when the police seize luggage from the suspect's custody, . . . the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause."[386] Under this standard, the Court found in *Place* that the 90-minute detention of respondent's luggage, suspected of containing narcotics, was sufficient to render the seizure unreasonable.[387]

[G154] *Protective Frisks and Searches. Terry* further held that, "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a patdown search to determine whether the person is in fact carrying a weapon.[388]

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[386] United States v. Place, 462 U.S. 696, 708–09, n.8 (1983).

[387] *Id.* at 709–10. Moreover, in assessing the effect of the length of the detention, the Court noted that the police knew of respondent's arrival time for several hours beforehand; hence, the police could have arranged for a trained narcotics dog in advance and thus avoided the necessity of holding respondent's luggage for 90 minutes. Furthermore, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion.

In *Van Leeuwen*, the defendant had voluntarily relinquished two packages of coins to the postal authorities. Several facts aroused the suspicion of the postal officials, who detained the packages, without searching them, for about 29 hours while certain lines of inquiry were pursued. The information obtained during this time was sufficient to give the authorities probable cause to believe that the packages contained counterfeit coins. After obtaining a warrant, the authorities opened the packages, found counterfeit coins therein, resealed the packages, and sent them on their way. Expressly limiting its holding to the facts of the case, the Court concluded that the 29-hour detention of the packages on reasonable suspicion that they contained contraband did not violate the Fourth Amendment. *See* United States v. Van Leeuwen, 397 U.S. 249, 251–53 (1970). This was not a difficult case, because the defendant was unable to show that the invasion intruded upon either a privacy interest in the contents of the packages or a possessory interest in the packages themselves. *See* United States v. Place, 462 U.S. 696, 705, n.6 (1983).

[388] Terry v. Ohio, 392 U.S. 1, 24 (1968). There, a Cleveland detective, in a neighborhood that he had been patrolling for many years, observed two strangers on a street corner. He saw them proceed alternately back and forth along an identical route, pausing to stare in the same store window, which they did for a total of about 24 times. Each completion of the route was followed by a conference between the two on a corner, at one of which they were joined by a third man (Katz) who left swiftly. Suspecting the two men of "casing a job, a stick-up," the officer followed them and saw them rejoin the third man a couple of blocks away in front of a store. The officer approached the three, identified himself as a policeman, and asked their names. The men "mumbled something," whereupon the officer spun petitioner around, patted down his outside clothing, and found a pistol in his overcoat pocket. Terry was convicted of carrying concealed weapons. The Court found that the officer had performed a legitimate function of investigating suspicious conduct, and that the officer's protective seizure of petitioner and the limited search that he had made were reasonable, both at their inception and as conducted. Consequently, the Court upheld the conviction.

"The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."[389] "Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.' . . . If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed."[390] However, tactile discoveries of other contraband may be made in the course of a *Terry* search. "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity *immediately apparent*, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure is justified by the same practical considerations that inhere in the plain view context."[391]

[G155] Although *Terry* involved the stop and subsequent patdown search for weapons of a person suspected of criminal activity, it did not restrict the preventive search to the person of the detained suspect. "[P]rotection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger. . . . [R]oadside encounters between police and suspects are especially hazardous, and danger may arise from the possible presence of weapons in the area surrounding a suspect. [Thus,] . . . the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons. . . . If, while conducting a legitimate *Terry* search of an automobile's interior, the officer . . . [discovers] contraband other than weapons," he may seize them, under the "plain view" doctrine.[392]

iii. Fingerprinting

[G156] Detentions for the sole purpose of obtaining fingerprints are subject to the constraints of the Fourth Amendment; hence, fingerprints obtained during the brief

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[389] Adams v. Williams, 407 U.S. 143, 146 (1972).

[390] Sibron v. New York, 392 U.S. 40, 65–66 (1968).

[391] Minnesota v. Dickerson, 508 U.S. 366, 375–76 (1993) (emphasis added). There, the officer never thought that the lump that he felt in respondent's jacket was a weapon, but he did not immediately recognize it as cocaine. Rather, he determined that it was contraband only after he squeezed, slid, and otherwise manipulated the pocket's contents. As the Court held, while *Terry* entitled the officer to place his hands on respondent's jacket and to feel the lump in the pocket, his continued exploration of the pocket, after he concluded that it contained no weapon, was unrelated to the sole justification for the search under *Terry*. Because this further search was constitutionally invalid, the seizure of the cocaine that followed was likewise unconstitutional. *Id.* at 377–79.

[392] Michigan v. Long, 463 U.S. 1032, 1049–50 (1983). In that case, police approached a man who had driven his car into a ditch and who appeared to be under the influence of some intoxicant. As the man moved to re-enter the car from the roadside, police spotted a knife on the floorboard. The officers stopped the man, subjected him to a patdown search, and then inspected the interior of the vehicle for other weapons. During the search of the passenger compartment, the police discovered an open pouch containing marijuana and seized it. The Court upheld the validity of the search and seizure under *Terry* and the "plain view" doctrine.

detention of persons seized in a police dragnet procedure, without probable cause, are inadmissible in evidence. "It is arguable, however, that, because of the unique nature of the fingerprinting process, detentions for obtaining fingerprints might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause. . . . Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions, and is not subject to such abuses as the improper line-up. Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context."[393]

iv. Hot Pursuit[394]

[G157] "The Fourth Amendment does not require police officers to delay in the course of an investigation, if to do so might result in destruction of evidence or would gravely endanger their lives or the lives of others." In *Hayden*, the Court recognized the right of police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons.[395]

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[393] Davis v. Mississipi, 394 U.S. 721, 727–28 (1969). The Court had no occasion, in this case, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. For it was clear that no attempt had been made there to employ procedures that might comply with the requirements of the Fourth Amendment: the detention at police headquarters of petitioner and other young African-Americans had not been authorized by a judicial officer; petitioner had been unnecessarily required to undergo two fingerprinting sessions, and he had also been subjected to interrogation. *See also Hayes v. Florida*, 470 U.S. 811, 817 (1985), where the Court stated that "there is . . . support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch. . . . Of course, neither reasonable suspicion nor probable cause would suffice to permit the officers to make a warrantless entry into a person's house for the purpose of obtaining fingerprint identification. . . . We also do not abandon the suggestion . . . that, under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting."

[394] "Hot pursuit" means some sort of a chase, but it need not be an extended hue and cry "in and about the public streets." *See* United States v. Santana, 427 U.S. 38, 43 (1976).

[395] Warden v. Hayden, 387 U.S. 294, 298–99 (1967). *Warden* was based upon the "exigencies of the situation" and did not use the term "hot pursuit" or even involve a "hot pursuit" in the sense that that term would normally be understood. That phrase first appears in *Johnson v. United States*, 333 U.S. 10, 16 n.7 (1948), where it was recognized that some element of a chase will usually be involved in a "hot pursuit" case.

[G158] *Santana* was suspected of having in her possession marked money used to make a heroin "buy" arranged by an undercover agent. Police officers went to Santana's house, where she was standing in the doorway, holding a paper bag, but, as the officers approached, she retreated into the vestibule of her house, where they caught her. By retreating into a private place, the Court held, Santana could not "defeat an arrest that ha[d] been set in motion in a public place." Since there was a need to act quickly to prevent destruction of evidence, there was a true "hot pursuit," and thus a warrantless entry to make the arrest was justified.[396]

[G159] In *Welsh*, the Court found that petitioner's warrantless arrest in the privacy of his own bedroom for a non-jailable traffic offense could not be justified on the basis of the "hot pursuit" doctrine, because there was no immediate or continuous pursuit of the petitioner from the scene of a crime. Nor could the arrest be justified as necessary to preserve evidence of petitioner's blood alcohol level, given the fact that the state had chosen to classify the offense for driving while intoxicated as a non-criminal, civil forfeiture offense for which no imprisonment was possible.[397]

v. Search Incident to Lawful Arrest

[G160] Under *Chimel*, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to gain possession of a weapon or destructible evidence must be governed by a like rule."[398] Therefore, the police cannot conduct a full-blown search of a suspect's house simply because the police had arrested him at home. However, drawers within the arrestee's reach can be searched because of the danger their contents might pose to the police.[399]

[G161] Moreover, as an incident to a valid arrest, the officers can, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, . . . there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. . . . [S]uch a protective sweep, . . . if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises."[400]

[G162] "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of

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396 United States v. Santana, 427 U.S. 38, 43 (1976).

397 Welsh v. Wisconsin, 466 U.S. 740, 753–54 (1984).

398 Chimel v. California, 395 U.S. 752, 762–63 (1969).

399 *Id.* at 763.

400 Maryland v. Buie, 494 U.S. 325, 334–36 (1990).

each step in the search."[401] "The potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved."[402] The Court has rejected the suggestion that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search incident to a lawful arrest. . . . The authority to search incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would, in fact, be found upon the person of the suspect [or in the area within his immediate control]. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."[403]

[G163] "[A]rticles inside the relatively narrow compass of the passenger compartment of an automobile are . . . generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.' . . . Accordingly, . . . when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. . . . [T]he police may also examine the contents of any open or closed containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach."[404] These rules are not limited to situations where the officer makes contact with the occupant while the occupant is inside the vehicle, but they also apply "when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle."[405]

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[401] United States v. Robinson, 414 U.S. 218, 235 (1973).

[402] United States v. Chadwick, 433 U.S. 1, 14–15 (1977).

[403] United States v. Robinson, 414 U.S. 218, 235 (1973). *See also* New York v. Belton, 453 U.S. 454, 459, 461 (1981). It is of no constitutional significance that police regulations do not establish the conditions under which a full-scale body search of an arrestee should be conducted, nor is it relevant that the arresting officer had no subjective fear of the arrestee or suspicion that he was armed. *See* Gustafson v. Florida, 414 U.S. 260, 264–66 (1973).

[404] New York v. Belton, 453 U.S. 454, 460 (1981).

[405] Thornton v. United States, 541 U.S. 615, 617 (2004). As the Court noted, "the span of the area generally within the arrestee's immediate control is [not] determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he was in the car. . . . In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and evidence destruction as one who is inside." *Id.* at 620–21. The Court rejected a "contact initiation" rule, under which officers, who decide that it may be safer and more effective to conceal their presence until a suspect has left his car, "would be unable to search the passenger compartment in the event of a custodial arrest, potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction. The Fourth Amendment does not require such a gamble. . . . *Belton* allows police to search a car's passenger compartment incident to a lawful arrest of both 'occupants and 'recent occupants.' . . . [W]hile an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car when the officer first initiated contact with him. [Although] not all contraband in the passenger compartment is likely to be accessible to a 'recent occupant, . . . the need for a clear rule, readily understood by police and

[G164] Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.[406] Warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest, if the "search is remote in time or place from the arrest."[407] However, "once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant, even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration."[408] In the same context, the Court has held that "it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures."[409]

[G165] A reasoning that justifies an arrest by a search, and at the same time the search by the arrest, cannot be sustained;[410] "an incident search may not precede an arrest and serve as part of its justification."[411] However, where the police clearly have probable cause to place an individual under arrest, but his "formal arrest follow[s] quickly on the heels of the search of [his] person, . . . it is [not] particularly important that the search precede[s] the arrest, rather than *vice versa*."[412] Similarly a suspect of murder, detained upon probable cause at the station house, without being formally arrested, can be subjected to the "very limited search necessary to preserve the highly evanescent evidence that [may be] found under his fingernails," which he has taken immediate steps to destroy.[413]

vi. The "Plain View" Doctrine

[G166] Under the "plain view" doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant."[414]

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not depending on differing estimates of what items were or were not within an arrestee's reach at any particular moment, justifies the sort of generalization which *Belton* enunciated." *Id.* at 621–23.

406 Preston v. United States, 376 U.S. 364, 367 (1964).

407 United States v. Chadwick, 433 U.S. 1, 15 (1977). There, the Court held that a search conducted more than an hour after federal agents had gained exclusive control of a container and long after the suspects had been in custody could not be viewed as incidental to the arrest.

408 United States v. Edwards, 415 U.S. 800, 807–08 (1974).

409 Illinois v. Lafayette, 462 U.S. 640, 648 (1983).

410 Johnson v. United States, 333 U.S. 10, 16–17 (1948).

411 Smith v. Ohio, 494 U.S. 541, 543 (1990) (*per curiam*), *quoting* Sibron v. New York, 392 U.S. 40, 63 (1968).

412 Rawlings v. Kentucky, 448 U.S. 98, 111 (1980).

413 Cupp v. Murphy, 412 U.S. 291, 296 (1973).

414 Minnesota v. Dickerson, 508 U.S. 366, 375 (1993), *citing* Horton v. California, 496 U.S. 128, 136–37 (1990). The doctrine can legitimate action beyond that scope of the primary search or seizure. *See* Arizona v. Hicks, 480 U.S. 321, 325–26 (1987). Moreover, it applies even if the discovery of the evidence was not inadvertent. *See* Horton v. California, *supra*, at 136–41.

If, however, the police lack probable cause to believe that an object in plain view is contraband, without conducting some further search of the object, the plain view doctrine cannot justify its seizure or search.[415]

[G167] The rationale of this doctrine is that, "if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy, and thus no 'search' within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point."[416] "The warrantless seizure of contraband that presents itself in this manner is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable, and would do little to promote the objectives of the Fourth Amendment."[417]

[G168] "The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context."[418]

vii. Technological Surveillance

[G169] Electronic surveillance that constitutes Fourth Amendment "search" is subject to the usual requirement of advance authorization by a magistrate, upon a showing of probable cause.[419] The warrant authorizing a wiretap must, *inter alia*, specify the offenses that justify the intrusion, describe "with particularity" the communications or conversations sought to be seized and order the termination of the eavesdrop once the conversation sought is seized.[420] By contrast, a bugging order need not include a specific authorization to enter, covertly, the premises described in the order.[421]

[G170] The Fourth Amendment equally requires prior judicial approval for domestic security surveillances. Nevertheless, this type of search "may involve different policy and practical considerations from the surveillance of 'ordinary crime.' The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify. . . . Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime."[422]

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415 Arizona v. Hicks, 480 U.S. 321, 326–28 (1987).

416 Minnesota v. Dickerson, 508 U.S. 366, 375 (1993), *citing* Illinois v. Andreas, 463 U.S. 765, 771 (1983).

417 Minnesota v. Dickerson, 508 U.S. 366, 375 (1993), *citing* Arizona v. Hicks, 480 U.S. 321, 326–27 (1987) and Coolidge v. New Hampshire, 403 U.S. 443, 467–70 (1971).

418 Minnesota v. Dickerson, 508 U.S. 366, 375–76 (1993).

419 Katz v. United States, 389 U.S. 347, 358 (1967).

420 Berger v. New York, 388 U.S. 41, 56, 59–60 (1967).

421 Dalia v. United States, 441 U.S. 238, 254–59 (1979).

422 United States v. United States Dist. Court for the E. Dist. of Michigan, 407 U.S. 297, 321–22 (1972).

viii. Drug and Alcohol Testing

[G171] In *Schmerber*, the Court held that a state could direct that a blood sample be withdrawn from a motorist suspected of driving while intoxicated. Schmerber was hospitalized following an accident involving an automobile that he had apparently been driving. A police officer, who smelled liquor on petitioner's breath and noticed other symptoms of drunkenness at the accident scene and at the hospital, placed him under arrest. At the officer's direction, a physician took a blood sample from petitioner despite his refusal to consent thereto. A report of the chemical analysis of the blood indicated intoxication. The Court found that the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to petitioner's arrest, considering that the percentage of alcohol in the blood begins to diminish shortly after drinking stops and, therefore, the officer might reasonably have believed that the delay necessary to obtain a warrant threatened the destruction of evidence. Moreover, the test chosen to measure Schmerber's blood alcohol level was a reasonable one. The intrusion occasioned by a blood test is not significant, since such tests "are a commonplace in these days of periodic physical examinations, and experience with them teaches that the quantity of blood extracted is minimal, and that, for most people, the procedure involves virtually no risk, trauma, or pain." And the test was performed in a reasonable manner, as the motorist's blood was taken by a physician in a hospital environment according to accepted medical practices.[423]

[G172] "The possession of unlawful drugs is a criminal offense that the Government may punish, but it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influence of those substances."[424] *Skinner* concerned Federal Railroad Administration (FRA) regulations that required blood and urine tests of rail employees involved in train accidents; the regulations also authorized railroads to administer breath and urine tests to employees who violated certain safety rules. The FRA adopted the drug testing program in response to evidence of drug and alcohol abuse by some railroad employees, the obvious safety hazards posed by such abuse, and the documented link between drug- and alcohol-impaired employees and the incidence of train accidents. Recognizing that the urine analysis tests, most conspicuously, raised evident privacy concerns, the Court noted two off-setting considerations. First, the regulations reduced the intrusiveness of the collection process: the sample was collected in a medical environment, by personnel unrelated to the railroad employer, without the direct observation of a monitor. Second, and more important, railway employees, by reason of their participation in an industry that is regulated pervasively to ensure safety, had diminished expectations of privacy. Surpassing safety interests, the Court concluded, warranted the FRA testing program. The drug tests could deter illegal drug use by railroad employees, workers positioned to cause great human loss before any signs of impairment become noticeable to supervisors. The program also helped railroads to obtain invaluable information about the causes of major train accidents. Testing without a showing of individualized suspicion was essential, the Court explained, if these vital interests were to be served. Employees could not forecast the timing of an accident or a safety violation, events that would trigger testing. The employee's inability to avoid detection simply by staying drug-free at a prescribed test time significantly enhanced the deterrent effect of the program. Furthermore, imposing an individualized suspicion

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423 Schmerber v. California, 384 U.S. 757, 770–72 (1966).

424 Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 633 (1989).

requirement for a drug test in the chaotic aftermath of a train accident would seriously impede an employer's ability to discern the cause of the accident; indeed, waiting until suspect individuals could be identified likely would result in the loss or deterioration of the evidence furnished by the tests.[425]

[G173] In *Von Raab*, the Court sustained a U.S. Customs Service program that made drug tests a condition of promotion or transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm. The regime was developed for an agency with an almost unique mission, as the "first line of defense" against the smuggling of illicit drugs into the United States. "Work directly involving drug interdiction and posts that require the employee to carry a firearm pose grave safety threats to employees who hold those positions, and also expose them to large amounts of illegal narcotics and to persons engaged in crime; illicit drug users in such high-risk positions might be unsympathetic to the Service's mission, tempted by bribes, or even threatened with blackmail."[426] Furthermore, "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force."[427] Thus, the government has a compelling interest in assuring that employees placed in these positions would not include drug users. Individualized suspicion would not work in this setting, because it is "not feasible to subject these employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments."[428] And while the Service's regime was not prompted by a demonstrated drug abuse problem, the need to prevent its occurrence furnished an ample justification for reasonable searches calculated to advance the government's goal.[429] The Court also held that employees who sought promotions to positions where they would handle sensitive information could be required to submit to a urine test under the Service's screening program, especially if the positions covered under this category required background investigations, medical examinations, or other intrusions that might be expected to diminish their expectations of privacy in respect of a urinalysis test.[430]

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[425] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 618–34 (1989). The Court rejected the court of appeal's conclusion that the regulations were unreasonable, because the tests in question could not measure current impairment. Even if urine test results disclosed nothing more specific than the recent use of controlled substances, this information would provide the basis for a further investigation, and might allow the FRA to reach an informed judgment as to how the particular accident occurred. More importantly, the regulations were designed not only to discern impairment, but to deter it. *Id.* at 631–32.

[426] *See* Chandler v. Miller, 520 U.S. 305, 316 (1997), *referring to* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668–71 (1989).

[427] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 670–71 (1989).

[428] *Id.* at 674.

[429] *Id.* at 674–75. The Court rejected the argument that the Service's testing program was ineffective because employees might attempt to deceive the test by a brief abstention before the test date. First, "addicts may be unable to abstain even for a limited period of time, or may be unaware of the 'fade-away effect' of certain drugs. . . . More importantly, a particular employee's pattern of elimination for a given drug cannot be predicted with perfect accuracy, and, in any event, this information is not likely to be known or available to the employee." *Id.* at 676.

[430] *Id.* at 677. The Service's program also required tests for individuals promoted or transferred to positions in which they would handle "classified" material. However, the Court did not rule on this aspect of the program, because the record did not clarify whether the category

[G174] In *Chandler*, the Court upset Georgia's requirement that candidates for state office pass a drug test. The state's defense of the statute rested primarily on the incompatibility of unlawful drug use with holding high state office. However, Georgia's testing prescription, the record showed, responded to "no concrete danger," was supported by no evidence of a particular problem, and targeted a group not involved in "high-risk, safety-sensitive tasks." The Court stressed that "[a] demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, . . . would shore up an assertion of special need for a suspicionless general search program. Proof of unlawful drug use may help to clarify—and to substantiate—the precise hazards posed by such use."[431] Moreover, candidates for public office "are subject to relentless scrutiny—by their peers, the public, and the press. Their day-to-day conduct attracts attention notably beyond the norm in ordinary work environments." From this aspect, there was a critical difference between *Von Raab* and Georgia's candidate drug testing program. In addition, Georgia's certification requirement was not well designed to identify candidates who violated anti-drug laws, and it was not a credible means to deter illicit drug users from seeking state office. The test date was selected by the candidate, and, thus, all but the prohibitively addicted could abstain for a pre-test period sufficient to avoid detection. And the Court was offered no reason why ordinary law enforcement methods would not suffice to apprehend those unable so to abstain, should they appear in the limelight of a public stage.[432]

[G175] *Ferguson* concerned a city policy, developed by representatives of the municipal hospital, police, and local officials, which set forth procedures for identifying and testing pregnant patients suspected of drug use; required that a chain of custody be followed when obtaining and testing patients' urine samples, presumably to make sure that the results could be used in subsequent criminal proceedings; provided for education and treatment referral for patients testing positive; contained police procedures and criteria for arresting patients who tested positive; and prescribed prosecutions for drug offenses and/or child neglect, depending on the stage of the defendant's pregnancy. The document codifying the policy incorporated the police's operational guidelines and devoted its attention to the chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests. Moreover, throughout the development and application of the policy, the city prosecutors and police were extensively involved in the day-to-day administration of the policy. Thus, the Court found it clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers. "While the ultimate goal of the program [might] well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. . . . Given the primary purpose of the . . . program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply [did] not fit within the closely guarded category of 'special needs'" that may justify the absence of a warrant or individualized suspicion.[433]

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defined by the regulation encompassed only those Customs employees likely to gain access to sensitive information. *Id.* at 678.

[431] Chandler v. Miller, 520 U.S. 305, 319 (1997).

[432] *Id.* at 319–22.

[433] Ferguson v. City of Charleston, 532 U.S. 67, 82–84 (2001).

[G176] Finally, the Court has sustained drug tests for school students participating in interscholastic sports.[434]

ix. Administrative Inspections[435]

[G177] Government inspectors cannot generally make warrantless non-consensual entries into premises not open to the public. In *Camara* and *See*, the Court held that a warrant was required to effect an unconsented administrative entry into and inspection of private dwellings or commercial premises to ascertain health or safety conditions. To protect the privacy interests of building owners from the unbridled discretion of municipal inspectors, the Court held that administrative searches had to be conducted pursuant to an "area" warrant. The Court emphasized that the practical effect of the then-existing warrantless search procedures had been "to leave the occupant subject to the discretion of the official in the field," since "when [an] inspector demand[ed] entry, the occupant ha[d] no way of knowing whether enforcement of the municipal code involved require[d] inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself [wa]s acting under proper authorization."[436] However, in light of the important public interest in abating public health hazards, the relatively limited invasion of privacy inhering in administrative searches, and the essentially non-criminal focus of the inspection, probable cause to issue this kind of warrant does not sound, in terms of suspicion of criminal activity, but in terms of reasonable legislative or administrative standards governing the decision to search a particular building.[437]

[G178] Nevertheless, "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment. This warrantless inspection, . . . even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made, . . . [such as the government interest in improving the health and safety conditions in the country's underground and surface mines.] Second, the warrantless inspections must be 'necessary to further the regulatory scheme;' . . . For example, [the Court has] recognized that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purposes of the Mine Safety and Health Act—to detect and thus to deter safety and health violations. . . . Finally, 'the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.' . . . In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search

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[434] Bd. of Educ. of Indep. Sch. Dist. No 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002). *See, in extenso*, para. G135.

[435] *See also* para. G127, regarding the inspection of a vessel's manifest and other documents, and paras. G102 *et seq.*, regarding inspections of fire-damaged buildings. An administrative inspection is the inspection of premises conducted by authorities responsible for enforcing a pervasive regulatory scheme. *See* Whren v. United States, 517 U.S. 806, 811, n.2 (1996).

[436] Camara v. Mun. Court of the City & County of San Francisco, 387 U.S. 523, 532 (1967).

[437] *Id.* at 535–40; See v. City of Seattle, 387 U.S. 541 (1967). *Camara overruled* Frank v. Maryland, 359 U.S. 360 (1959).

is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. . . . To perform this first function, the statute must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.' . . . [And] in defining how a statute limits the discretion of the inspectors, [the Court has] observed that it must be 'carefully limited in time, place, and scope.'"[438]

[G179] Furthermore, it has been made clear that a state can address a major social problem both by way of an administrative scheme and through penal sanctions. In *Burger*, the Court relied on the "plain administrative purposes" of the scheme to reject the contention that the statute was in fact "designed to gather evidence to enable convictions under the penal laws." The discovery of evidence of other violations would have been merely incidental to the purposes of the administrative search. And there was no constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct administrative inspections. "So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself."[439]

[G180] In *Colonnade Catering*, the Court recognized the reasonableness of a statutory authorization to inspect the premises of a caterer dealing in alcoholic beverages, noting that Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand.[440]

[G181] *Biswell* sustained the authority to conduct warrantless searches of firearm dealers under the Gun Control Act of 1968. Federal regulation of the inter-state traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic is undeniably an "urgent federal interest." When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to "effective inspection." Moreover, "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible."[441]

[G182] In *Barlow's, Inc.*, the Court declared unconstitutional the provisions of the Occupational Safety and Health Act of 1970, which authorized inspectors to enter an employer's premises without a warrant to conduct inspections of work areas. That statute imposed health and safety standards on all businesses engaged in or affecting inter-state commerce that had employees, and it authorized representatives of the Secretary of Labor to conduct inspections to ensure compliance with the Act. However, the Act failed "to tailor the scope and frequency of such administrative inspections to the particular health and safety concerns posed by the numerous and varied businesses regulated by the statute. Instead, the Act flatly authorize[d] administrative inspections of 'any fac-

438 New York v. Burger, 482 U.S. 691, 702–03 (1987).

439 *Id.* at 715–17.

440 Colonnade Catering Corp. v. United States, 397 U.S. 72, 76–77 (1970).

441 United States v. Biswell, 406 U.S. 311, 315–17 (1972).

tory, plant, establishment, construction site, or other area, workplace, or environment where work was performed by an employee of an employer,' and empowered inspectors conducting such searches to investigate 'any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.' . . . Similarly, the Act [did] not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search. The statute instead simply provide[d] that such searches should be performed 'at reasonable times, and within reasonable limits and in a reasonable manner.' In assessing this regulatory scheme, th[e] Court found that the provisions authorizing administrative searches 'devolve[d] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search.' . . . Accordingly, [the Court] concluded that a warrant was constitutionally required to assure a non-consenting owner, who might have little real expectation that his business would be subject to inspection, that the contemplated search was 'authorized by statute, and . . . pursuant to an administrative plan containing specific neutral criteria.' However, [the Court] expressly limited its holding to the inspection provisions of the Occupational Safety and Health Act, noting that the 'reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute and that some statutes apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply.'"[442]

[G183] Indeed, in *Dewey*, the Court held that warrantless, unannounced inspections of underground and surface mines, pursuant to Federal Mine Safety and Health Act of 1977, did not violate the Fourth Amendment. First, there is a substantial federal interest in improving the health and safety conditions in the country's underground and surface mines. Second, a warrant requirement clearly might impede the specific enforcement needs of the Act at issue. This Act mandated inspection of all mines, defined the frequency of inspection (at least twice annually for surface mines, four times annually for underground mines, and irregular six-, ten-, or 16-day intervals for mines that generated explosive gases), mandated follow-up inspections where violations had been found, and immediate inspection upon notification by a miner or miner's representative that a dangerous condition existed, required compliance with elaborate standards set forth in the Act, and required individual notification to mine operators of all standards proposed pursuant to the Act. Under these circumstances, the Court found it difficult to see what additional protection a warrant requirement would provide. The Act itself clearly notified the operator that inspections would be performed on a regular basis. Moreover, the Act and the regulations issued pursuant to it informed the operator of what health and safety standards should be met in order to be in compliance with the statute. The discretion of government officials to determine what facilities to search and what violations to search for was thus directly curtailed by the regulatory scheme. Finally, the Act provided a specific mechanism for accommodating any special privacy concerns that a specific mine operator might have. The Act prohibited forcible entries, and it instead required the Secretary of Labor, when refused entry onto a mining facility, to file a civil action in federal court to obtain

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[442] See Donovan v. Dewey, 452 U.S. 594, 601–02 (1981), *discussing* Marshall v. Barlow's, Inc., 436 U.S. 307, 321–23 (1978).

an injunction against future refusals. This proceeding provided an adequate forum for the mine owner to show that a specific search was outside the federal regulatory authority or to seek from the district court an order accommodating any unusual privacy interests that the mine owner might have.[443]

[G184] *Burger* concerned a New York statute authorizing police officers to carry out warrantless administrative inspections of vehicle dismantling businesses, which are part of the junk industry, as well as part of the auto industry. In light of the state regulatory framework governing vehicle dismantlers and the history of regulation of related industries, the Court found that an operator of a junkyard engaging in vehicle dismantling had a reduced expectation of privacy in this "closely regulated" business. The state had a substantial interest in regulating the vehicle dismantling and automobile junkyard industry, because motor vehicle theft had increased in the state and because the problem of theft was associated with this industry. Besides, regulation of the vehicle dismantling industry reasonably served the state's substantial interest in eradicating automobile theft. And a warrant requirement would interfere with the statute's purpose of deterring automobile theft accomplished by identifying vehicles and parts as stolen and shutting down the market in such items. "Because stolen cars and parts often pass quickly through an automobile junkyard, 'frequent' and 'unannounced' inspections are necessary in order to detect them."[444] Moreover, the statute informed the operator of a vehicle dismantling business that inspections would be made on a regular basis. Thus, "the vehicle dismantler [knew] that the inspections to which he [wa]s subject [did] not constitute discretionary acts by a government official, but were conducted pursuant to statute, . . . [which also] notifie[d] the operator as to who [wa]s authorized to conduct an inspection, . . . se[t] forth the scope of the inspection and, accordingly, place[d] the operator on notice as to how to comply with the statute."[445] Under the statute, inspecting officers were allowed to conduct an inspection only during the regular and usual business hours. And the permissible scope of these searches was narrowly defined: the inspectors could examine the records, as well as any vehicles or parts of vehicles that were subject to the record-keeping requirements of the statute and that were on the premises. Finally, the statute did not violate the Fourth Amendment on the ground that it was designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property. The Court noted that the statute was designed to contribute to the regulatory goals of ensuring that vehicle dismantlers were legitimate businesspersons, and that stolen vehicles and vehicle parts passing through automobile junkyards could be identified. Nor was the administrative scheme unconstitutional simply because, in the course of enforcing it, an inspecting officer might discover evidence of crimes, besides violations of the scheme itself. In addition, there was no constitutional significance in the fact that police officers, rather than "administrative" agents, were permitted to conduct the administrative inspection. Moreover, taking into account that many states do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency, the Court declined to impose upon the states the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents rather than police officers.[446]

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443 Donovan v. Dewey, 452 U.S. 594, 602–04 (1981).

444 New York v. Burger, 482 U.S. 691, 710 (1987).

445 *Id.* at 711.

446 *Id.* at 711–18.

x. Caseworkers' Home Visits

[G185] *Wyman v. James* presented the issue whether respondent, a beneficiary of the program for Aid to Families with Dependent Children, could refuse a periodic home visit by a caseworker without risking the termination of benefits. The emphasis of the program was upon "assistance and rehabilitation" and upon "maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection." Even assuming that the home visit had some of the characteristics of a traditional search,[447] the Court found that the visit was not unreasonable, under the Fourth Amendment, because, *inter alia*, it served the paramount needs of the dependent child; enabled the state to determine that state funds were being properly used; and provided essential information not obtainable through secondary sources. And the fact that respondent had received advance notice that she would be visited by a welfare caseworker minimized the intrusion on privacy occasioned by the visit.[448]

xi. Inventory Searches

[G186] The policies behind the warrant requirement, and the related concept of probable cause, are not implicated in an inventory search.[449] When vehicles are impounded, police routinely follow caretaking procedures by securing and inventorying the cars' contents. These procedures have been sustained as reasonable under the Fourth Amendment, since they serve three distinct needs: "the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger."[450] Evidence found during such inventory searches may be lawfully seized, under the "plain view" doctrine.

[G187] Similarly, at the station house, "it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. . . . [Such a procedure] not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person. Arrested persons have also been known to injure themselves—or others—with belts, knives, drugs, or other items on their person while being detained. Dangerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent-looking articles taken from the arrestee's possession. The bare recital of these mundane realities justifies reasonable measures by police to limit these risks either while the items are in police possession or at the time they are returned to the arrestee upon his release. Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure. It is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independently of a particular officer's subjective concerns. . . . Finally, inspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity. . . . [Hence,] every consideration of orderly police administration benefiting both police and the public points toward the appropriate-

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447 *See* para. G9.

448 Wyman v. James, 400 U.S. 309, 318–24 (1971).

449 Colorado v. Bertine, 479 U.S. 367, 371 (1987).

450 S. Dakota v. Opperman, 428 U.S. 364, 369 (1976) (inventory search of the glove compartment in an abandoned automobile, impounded by the police).

ness" of an inventory search of the shoulder bag in the possession of an individual being taken into custody.[451]

[G188] "[]The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render [an inventory] search unreasonable." In *Cady*, the police had a car towed to a garage, because it constituted a hazard on the highway. In upholding the inventory search of the trunk of the car, the Court rejected the contention that the public could equally well have been protected by the posting of a police guard over the automobile.[452]

[G189] There is no merit to the contention that the search of an impounded van is unconstitutional, because departmental regulations give the police discretion to choose between impounding the van and parking and locking it in a public parking place. The exercise of police discretion is not prohibited "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity."[453]

[G190] Police, before inventorying a container, are not required to weigh the strength of the individual's privacy interest in the container against the possibility that the container might serve as a repository for dangerous or valuable items.[454] "[S]tandardized criteria, . . . or established routine, . . . must regulate the opening of containers found during inventory searches. . . . [This view] is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime. . . . But in forbidding uncanalized discretion to police officers conducting inventory searches, there is no reason to insist that they be conducted in a totally mechanical "all or nothing" fashion. . . . A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment."[455]

xii. Consent Searches[456]

[G191] The Court has long approved consensual searches "because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so."[457] It is well settled that "one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to con-

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451 Illinois v. Lafayette, 462 U.S. 640, 646–47 (1983).
452 Cady v. Dombrowski, 413 U.S. 433, 447 (1973).
453 Colorado v. Bertine, 479 U.S. 367, 375 (1987).
454 *Id.* at 374–75.
455 Florida v. Wells, 495 U.S. 1, 4 (1990).
456 *See also* para. G227 (*consent as "fruit of the poisonous tree"*).
457 Florida v. Jimeno, 500 U.S. 248, 250–51 (1991).

sent."[458] "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."[459] "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."[460] The Fourth and Fourteenth Amendments require that "a consent not be coerced, by explicit or implicit means, by implied threat or covert force."[461] "'Consent' that is the product of official intimidation or harassment is not consent at all."[462]

[G192] "[T]he question whether a consent to a search was in fact, 'voluntary' or was the product of duress or coercion, is a question of fact to be determined from the totality of all the circumstances."[463] In this context, "account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. . . . While knowledge of the right to refuse consent is one factor to be taken into consideration, the government need not establish such knowledge as the *sine qua non* of an effective consent."[464] The Court has specifically rejected the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.[465]

[G193] In *Davis*, federal agents, enforcing wartime gasoline rationing regulations, arrested a filling station operator and asked to see his rationing coupons. He eventually unlocked a room where the agents discovered the coupons that formed the basis for his conviction. "The public character of the property, the fact that the demand was made during business hours at the place of business where the coupons were required to be kept, the existence of the right to inspect, the nature of the request, the fact that the initial refusal to turn the coupons over was soon followed by acquiescence in the demand—these circumstances all support[ed] the conclusion" that the consent given was not the result of coercion.[466]

[G194] A Drug Enforcement Administration agent asked *Mendenhall* if she would accompany him to the airport DEA office, and Mendenhall did so. Once in the office, Mendenhall was asked to consent to a search of her person and her handbag and was advised of her right to decline. In a private room, following further assurance from Mendenhall that she consented to the search, a policewoman began the search of

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[458] Schneckcloth v. Bustamonte, 412 U.S. 218, 219 (1973), *citing* Davis v. United States, 328 U.S. 582, 593–94 (1946) and Zap v. United States, 328 U.S. 624, 630 (1946). The issue of consensual encounters between police and citizens is discussed in paras. G19 *et seq.*

[459] Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

[460] Bumper v. N. Carolina, 391 U.S. 543, 548 (1968).

[461] Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

[462] Florida v. Bostick, 501 U.S. 429, 438 (1991).

[463] Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). The fact of custody alone is not enough in itself to demonstrate a coerced consent to search. *See* United States v. Watson, 423 U.S. 411, 424 (1976).

[464] Schneckloth v. Bustamonte, 412 U.S. 218, 229, 227 (1973).

[465] *See* Ohio v. Robinette, 519 U.S. 33, 39–40 (1996) (the Fourth Amendment does not require that a lawfully seized individual be advised that he is "free to go," before his consent to search may be deemed voluntary); United States v. Drayton, 536 U.S. 194, 206–08 (2002) (a bus passenger need not be informed of his right to withhold permission to search).

[466] Davis v. United States, 328 U.S. 582, 593–94 (1946).

Mendenhall's person by requesting that Mendenhall disrobe. As she began to undress, Mendenhall removed two concealed packages that appeared to contain heroin and handed them to the policewoman. Mendenhall's consent was found valid. First, Mendenhall, who was 22 years old and had an 11th-grade education, was plainly capable of a knowing consent. Second, she was twice expressly told that she was free to decline to consent to the search and only thereafter explicitly consented to it. Moreover, her statement, made when she was told that the search would require the removal of her clothing, that "she had a plane to catch," could be viewed as simply an expression of concern that the search be conducted quickly. She had twice unequivocally indicated her consent to the search, and when assured by the police officer that there would be no problem if nothing were turned up by the search, she began to undress without further comment. And since her presence in the DEA office was voluntary, the fact that she was there was little or no evidence that she was in any way coerced.[467]

[G195] However, there is no valid consent, in case of "mere submission to a claim of lawful authority."[468] In *Bumper*, a 66-year-old African-American widow, who lived in a house located in a rural area at the end of an isolated mile-long dirt road, allowed four Caucasian law enforcement officials to search her home after they asserted they had a warrant to search the house. The Court held the alleged consent to be invalid, noting that, "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces, in effect, that the occupant has no right to resist the search."[469] Similarly, a person working at an "adult" bookstore, who is placed under arrest and is aware of the presumed authority of the warrant to search the store, cannot be deemed as complying freely and voluntarily with official requests.[470]

[G196] Even when officers have no basis for suspecting a particular individual, they may request consent to search luggage, provided they "do not convey a message that compliance with their requests is required."[471] A police officer, seeking permission to search the luggage of bus passengers, conveys no such message when he does not brandish a weapon or make any intimidating movements, speaks to bus passengers one by one and in a polite, quiet voice, and leaves the aisle free, so passengers can exit from the bus.[472]

[G197] The touchstone of the Fourth Amendment is reasonableness. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[473] In *Jimeno*, respondent granted a police officer permission to search his car and did not place any explicit limitation on the scope of the search. The officer had informed respondent that he believed respondent was carrying narcotics, and that he would be looking for narcotics in the car. The Court faced the question whether it was reasonable for the officer to consider a sus-

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467 United States v. Mendenhall, 446 U.S. 544, 558–59 (1980).

468 Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion).

469 Bumper v. N. Carolina, 391 U.S. 543, 550 (1968).

470 Lo-Ji Sales v. New York, 442 U.S. 319, 329 (1979).

471 Florida v. Bostick, 501 U.S. 429, 435 (1991).

472 United States v. Drayton, 536 U.S. 194, 204–06 (2002). There, the Court also observed that "where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts." *Id.* at 206.

473 Florida v. Jimeno, 500 U.S. 248, 251 (1991).

pect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car. The Court held that it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car that might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container. The authorization to search in this case, therefore, extended beyond the surfaces of the car's interior to the paper bag lying on the car's floor. Conversely, it is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk.[474]

[G198] "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show, by a preponderance of the evidence, that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[475] "Common authority is, of course, not to be implied from the mere property interest a third party has in the property."[476] A landlord cannot validly consent to the search of a house he had rented to another.[477] "The authority which justifies the third-party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes."[478]

[G199] In *Stoner*, the Court held that the police had improperly entered the defendant's hotel room based on the consent of a hotel clerk, since there was nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room. The Court noted that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'"[479]

[G200] In *Frazier*, the Court dismissed the contention that the consent of the petitioner's cousin to the search of a duffel bag, which was being used jointly by both men and had been left in the cousin's home, would not justify the seizure of petitioner's clothing found inside; joint use of the bag rendered the cousin's authority to consent to its search clear. Indeed, the Court was unwilling to engage in the "metaphysical subtleties" raised by Frazier's claim that his cousin only had permission to use one com-

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[474] *Id.* at 250–52 (1991). The Court also stressed that there is no basis for adding to the Fourth Amendment's basic test of objective reasonableness a requirement that, if police wish to search closed containers within a car, they must separately request permission to search each container.

[475] United States v. Matlock, 415 U.S. 164, 171 (1974). *See also id.* at 177, n.14.

[476] *Id.* at 171, n.7.

[477] Chapman v. United States, 365 U.S. 610, 616–17 (1961). The search was held violative of the tenant's Fourth Amendment rights, even though the owner of the house had actual authority to enter the house for some purposes, such as to "view waste." The Court pointed out that the officers' purpose in entering was not to view waste, but to search for distilling equipment, and concluded that to uphold such a search without a warrant would "leave tenants' homes secure only in the discretion of their landlords."

[478] United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (joint occupancy of a bedroom by a man and a woman representing themselves as husband and wife).

[479] Stoner v. California, 376 U.S. 483, 488 (1964).

partment within the bag. By allowing the cousin the use of the bag, and by leaving it in his house, Frazier was held to have assumed the risk that his cousin would allow someone else to look inside.[480]

[G201] "[I]n order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable."[481] "[S]ufficient probability, not certainty, is the touchstone of reasonableness" under this Amendment.[482] There is "no reason to depart from this general rule with respect to facts bearing upon the authority to consent to a search. . . . Even when a person's invitation to enter premises is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable man would doubt its truth and not act upon it without further inquiry. As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises? . . . If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid."[483]

3. Effecting a Search or Seizure

a. Executing a Warrant

[G202] Warrants need not "include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search or seizure authorized by warrant—subject, of course, to the general Fourth Amendment protection 'against unreasonable searches and seizures.'"[484]

[G203] But "the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion."[485] "[T]he purposes justifying a police search strictly limit the permissible extent of the search."[486] "If the scope of the search exceeds that permitted by the terms of a validly issued warrant, the subsequent seizure is unconstitutional,"[487] provided that the "plain view" doctrine does not come into play.

[G204] "[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."[488] And a warrant to search for contraband, founded on probable cause, implies the limited authority "to detain the occupants of the premises

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480 Frazier v. Cupp, 394 U.S. 731, 740 (1969).
481 Illinois v. Rodriguez, 497 U.S. 177, 185 (1990).
482 *Id.* at 185, *quoting* Hill v. California, 401 U.S. 797, 804 (1971).
483 *Id.* at 186, 188–89.
484 Dalia v. United States, 441 U.S. 238, 257 (1979).
485 Wilson v. Layne, 526 U.S. 603, 611 (1999).
486 Maryland v. Garrison, 480 U.S. 79, 87 (1987).
487 Horton v. California, 496 U.S. 128, 140 (1990).
488 Payton v. New York, 445 U.S. 573, 602–03 (1980).

while a proper search is conducted;" "preventing flight in the event that incriminating evidence is found," "minimizing the risk of harm" both to the officers and the occupants, and "orderly completion of the search" are law enforcement interests important enough to justify such a temporary detention.[489] By contrast, a search warrant for a tavern and its bartender does not permit body searches of all the bar's patrons.[490]

b. Traffic Stops

[G205] The Fourth Amendment does not preclude enforcement of minor traffic laws by plainclothes police in unmarked vehicles. "The making of a traffic stop out of uniform does not remotely qualify as an extreme practice, unusually harmful to an individual's privacy interests, and so is governed by the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact."[491]

[G206] "Keeping the driver of a vehicle in the car during a routine traffic stop is probably the typical police practice. . . . Nonetheless, out of a concern for the safety of the police, the Court has held that officers may, consistent with the Fourth Amendment, exercise their discretion to require a driver who commits a traffic violation to exit the vehicle."[492] In so holding, the Court noted that, since the driver's car has already been validly stopped for a traffic infraction, the additional intrusion of asking him to step outside his car is "*de minimis*." Moreover, the Court observed that the danger to the officer of standing by the driver's door and in the path of oncoming traffic might also be "appreciable."[493]

[G207] "[T]he same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver, or a passenger. . . . [Indeed, the] danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. . . . On the personal liberty side of the balance between the public interest and the individual's right to personal security, the case for passengers is stronger than that for the driver, in the sense that there is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain passengers. But, as a practical matter, passengers are already stopped by virtue of the stop of the vehicle, so that the additional intrusion upon them is minimal. . . . [Hence,] an officer making a traffic stop may order passengers to get out of the car pending completion of the stop."[494]

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[489] Michigan v. Summers, 452 U.S. 692, 705, 702–03 (1981). "Inherent in *Summers*' authorization to detain is the authority to use reasonable force to effectuate the detention." *See Muehler v. Mena*, 544 U.S. 93, 98–99 (2005), where the Court held that the police officers' use of force in the form of handcuffs to effectuate Mena's detention, as well as the detention of the three other occupants, was reasonable because the governmental interest in minimizing the risk of harm to both officers and occupants, which is at its maximum when, as in this case, a warrant authorizes a search for weapons and a wanted gang member resides on the premises, outweighed such a marginal intrusion.

[490] Ybarra v. Illinois, 444 U.S. 85, 90–92 (1979).

[491] Whren v. United States, 517 U.S. 806, 818 (1996).

[492] New York v. Class, 475 U.S. 106 (1986), *citing* Pennsylvania v. Mimms, 434 U.S. 106, 108–11 (1977) (*per curiam*).

[493] Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (*per curiam*).

[494] Maryland v. Wilson, 519 U.S. 408, 413–15 (1997).

c. Use of Excessive Force

[G208] All claims that law enforcement officials have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other seizure of a free citizen are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a "substantive due process" standard.[495] "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims."[496]

[G209] "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing 'of the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake. . . . [T]he right to make a seizure necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. . . . Because 'the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[497] "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene. . . . Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable. in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." Hence, a test that requires consideration of whether the individual officers acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm," is incompatible with a proper Fourth Amendment analysis.[498]

[G210] *Rochin*, a hypothetical drug dealer, swallowed two capsules at the time of his arrest. After an unsuccessful struggle to extract them by force, the arresting officers took petitioner to a hospital, where an emetic was forced into his stomach against his will. He vomited two capsules that were found to contain morphine. These were admitted in evidence over his objection, and he was convicted in a state court of violating a state law forbidding possession of morphine. The Court reversed the conviction, noting that

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[495] The Due Process Clause protects a pre-trial detainee from the use of excessive force that amounts to punishment. *See* Bell v. Wolfish, 441 U.S. 520, 535–39 (1979).

[496] Graham v. Connor, 490 U.S. 386, 395 (1989).

[497] *Id.* at 396.

[498] *Id.* at 396–97.

the Constitution does not "legalize force so brutal and so offensive to human dignity in securing evidence" as revealed by the record of that case.[499]

[G211] With regard to deadly force, it is unreasonable for an officer to "seize an unarmed, nondangerous suspect by shooting him dead." But "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."[500] For example, it is not reasonable for an officer to believe that a young, slight, and unarmed suspect of burglary poses any threat. Nor does the fact that an unarmed suspect has broken into a dwelling at night automatically mean he is dangerous.[501]

d. High-Speed Automobile Chases—Roadblocks

[G212] A police pursuit in attempting to seize a person does not amount to a "seizure" within the meaning of the Fourth Amendment.[502] However, it may be conducted in a manner harmful to the individual and offensive to substantive due process. "A police officer deciding whether to give chase must balance, on one hand, the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders."[503] "In such a case, where unforeseen circumstances may demand an officer's instant judgment, "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience necessary for a due process violation."[504]

[G213] "A roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur." Thus, a roadblock involves a "seizure;" it makes no difference whether a roadblock is designed to give the oncoming driver the option of a voluntary stop (e.g., one at the end of a long straightaway) or is designed precisely to produce a collision (e.g., one located just around a bend).[505] This is not to say that the precise character of the roadblock is irrelevant to its "reasonableness." Hence, a roadblock may be unreasonable if it is set up in such manner as to be likely to kill the oncoming driver. By contrast, if the suspect has the opportunity to stop voluntarily at the roadblock, but negligently or intentionally drives into it, then, because of lack of proximate causality, the police are not liable for his death.[506]

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499 Rochin v. California, 342 U.S. 165, 174 (1952).

500 Tennessee v. Garner, 471 U.S. 1, 11–12 (1985).

501 *Id.* at 20–22.

502 *See* para. G10.

503 County of Sacramento v. Lewis, 523 U.S. 833, 853 (1998).

504 *Id.* at 836. Hence, "high-speed chases with no intent to harm suspects physically or to worsen their legal plight, do not give rise" to substantive due process liability." *Id.* at 854.

505 Brower v. County of Inyo, 489 U.S. 593, 598 (1989).

506 *Id.* at 599.

e. Compelled Surgical Intrusion

[G214] A compelled surgical intrusion into an individual's body for evidence implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable." "The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure to obtain evidence for fairly determining guilt or innocence. . . . A crucial factor in analyzing the magnitude of [such an intrusion] is the extent to which the procedure may threaten the safety or health of the individual. . . . Another factor is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity."[507]

[G215] In *Schmerber*, the Court held that a state may, over the suspect's protest, have a physician extract blood from a person suspected of drunken driving. The Court emphasized that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any [intrusion beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a *clear indication* that, in fact, such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear."[508] As explained later, the words in *Schmerber* "were used to indicate the necessity for *particularized suspicion* that the evidence sought might be found within the body of the individual, rather than as enunciating still a third Fourth Amendment threshold between 'reasonable suspicion' and 'probable cause.'"[509]

[G216] In *Winston v. Lee*, the Court concluded that it would be "unreasonable" to search for evidence by means of surgical removal of a bullet from a murder suspect. In reaching that conclusion, the Court took into account that (1) "the medical risks of the operation, although not extremely severe, [we]re a subject of considerable dispute;" (2) the intrusion on respondent's privacy interests entailed by the operation could only be characterized as "severe," since surgery without the patient's consent, performed under a general anesthetic to search for evidence of a crime, "involves a virtually total divestment of the patient's ordinary control over surgical probing beneath his skin;" and (iii) the fact that the state had available substantial evidence that respondent was the murderer restricted the need for the state to compel respondent to undergo the contemplated surgery.[510]

f. Entry—The "Knock and Announce" Requirement

[G217] Absent a warrant or exigent circumstances, police cannot enter a home to make an arrest. Nevertheless, "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."[511] But, absent exigent circumstances or

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507 Winston v. Lee, 470 U.S. 753, 760–61 (1985) (emphasis added).

508 Schmerber v. California, 384 U.S. 757, 769–70 (1966). *See, in extenso,* para. G171.

509 *See* United States v. Montoya de Hernandez, 473 U.S. 531, 540 (1985) (emphasis added).

510 Winston v. Lee, 470 U.S. 753, 765–66 (1985).

511 Payton v. New York, 445 U.S. 573, 603 (1980).

consent, the police cannot search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant directing entry.[512]

[G218] As the Court held in *Wilson v. Arkansas*, the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling[513] must "knock on the door and announce their identity and purpose before attempting forcible entry."[514] Nevertheless, countervailing law enforcement interests—including, e.g., the threat of physical harm to police, the fact that an officer is pursuing a recently escaped arrestee, and the existence of reason to believe that evidence would likely be destroyed if advance notice were given—may establish the reasonableness of an unannounced entry.[515] Under *Richards*, a "no-knock" entry is justified when the police "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime, by, for example, allowing the destruction of evidence. This standard—as opposed to a probable cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of warrants and the individual privacy interests affected by no-knock entries."[516] The same criteria bear on how much time police officers have to wait after knocking and before making a forcible entry.[517] "Whether such a 'reasonable suspicion' exists does not depend on whether police must destroy property in order to enter. . . . [However,] [e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression."[518]

g. Presence of Third Parties—Media Ride-Alongs

[G219] The Fourth Amendment requires that "police actions in execution of a warrant be related to the objectives of the authorized intrusion."[519] The presence of reporters, who do not engage in the execution of the warrant or assist the police in their task, is not related to the objective of the authorized search or seizure. Publicizing the government's efforts to combat crime, facilitating accurate reporting on law enforcement activities, minimizing police abuses, and protecting suspects and the officers cannot justify media ride-alongs. Therefore, "it is a violation of the Fourth Amendment for

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[512] Steagald v. United States, 451 U.S. 204, 211–22 (1981).

[513] Intrusion into a dwelling includes opening a closed but unlocked door. *See* Sabbath v. United States, 391 U.S. 585, 590 (1968).

[514] Richards v. Wisconsin, 520 U.S. 385, 387 (1997), *discussing* Wilson v. Arkansas, 514 U.S. 927 (1995).

[515] Wilson v. Arkansas, 514 U.S. 927, 934, 936 (1995). The Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. *See* Dalia v. United States, 441 U.S. 238, 248 (1979).

[516] Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (the Fourth Amendment does not permit a blanket exception to the "knock and announce" requirement for felony drug investigations).

[517] United States v. Banks, 540 U.S. 31, 36–37 (2003). There the Court found that, after 15 to 20 seconds without a response, the officers could fairly have suspected that Banks (suspected of selling cocaine at home) would flush away the cocaine if they remained reticent. *Id.* at 38–40.

[518] United States v. Ramirez, 523 U.S. 65, 71 (1998).

[519] Wilson v. Layne, 526 U.S. 603, 611 (1999).

police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home is not in aid of the execution of the warrant."[520] For example, where the police enter a home under the authority of a warrant to search for stolen property, the presence of third parties for the purpose of identifying the stolen property would be permissible.[521]

h. Reasonable Mistakes

[G220] The Court has recognized "the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants."[522] "But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability;"[523] "simple 'good faith on the part of the . . . officer is not enough.'"[524]

[G221] In *Garrison*, a warrant supported by probable cause with respect to one apartment was erroneously issued for an entire floor that was divided (though not clearly) into two apartments. The Court observed that the validity of the search of respondent's apartment, pursuant to a warrant authorizing the search of the entire floor, depended on "whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable." The Court held that it was, since the objective facts available to the officers at the time suggested no distinction between the suspect's apartment and the third-floor premises, and the officers' conduct was consistent with "a reasonable effort to ascertain and identify the place intended to be searched."[525]

[G222] In *Hill*, the Court considered the validity of the arrest of a man named Miller based on the mistaken belief that he was Hill. The police had probable cause to arrest Hill, and they believed, in good faith, that Miller was Hill, since Miller was found in Hill's apartment and matched Hill's description. Although subjective good-faith belief would not, in itself, justify either the arrest or the subsequent search, "the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time."[526]

D. REMEDIES FOR FOURTH AMENDMENT VIOLATIONS

1. The Exclusionary Rule

[G223] The exclusionary rule is "a judicially created means of effectuating the rights secured by the Fourth Amendment."[527] Prior to the Court's decisions in *Weeks*[528] and

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[520] *Id.* at 614. In that case, the Court had no occasion to decide whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives. *Id.* at 614, n.2.

[521] *Id.* at 611–12.

[522] Maryland v. Garrison, 480 U.S. 79, 87 (1987).

[523] Illinois v. Rodriguez, 497 U.S. 177, 186 (1990), *quoting* Brinegar v. United States, 338 U.S. 160, 176 (1949).

[524] United States v. Leon, 468 U.S. 897, 915 (1984), *quoting* Beck v. Ohio, 379 U.S. 89, 97 (1964).

[525] Maryland v. Garrison, 480 U.S. 79, 88 (1987).

[526] Hill v. California, 401 U.S. 797, 804 (1971).

[527] Stone v. Powell, 428 U.S. 465, 482 (1976). *See also* United States v. Calandra, 414 U.S. 338, 348 (1974).

[528] Weeks v. United States, 232 U.S. 383 (1914). The roots of the *Weeks* decision lay in an

Gouled,[529] there existed no barrier to the introduction in criminal trials of evidence obtained in violation of the Amendment.[530] In *Weeks*, the Court held that the defendant could petition before trial for the return of property secured through an illegal search or seizure conducted by federal authorities. In *Gouled*, the Court held broadly that such evidence could not be introduced in a federal prosecution. Thirty-five years after *Weeks*, the Court held in *Wolf*[531] that the right to be free from arbitrary intrusion by the police that is protected by the Fourth Amendment is implicit in the concept of ordered liberty and, as such, enforceable against the states through the Fourteenth Amendment Due Process Clause. The Court concluded, however, that the *Weeks* exclusionary rule would not be imposed upon the states as "an essential ingredient" of that right. The full force of *Wolf* was eroded in subsequent decisions,[532] and, a little more than a decade later, the exclusionary rule was held applicable to the states in *Mapp*.[533]

[G224] The government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution; rather, a Fourth Amendment violation is "fully accomplished" by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can cure the invasion of the defendant's rights that he has already suffered.[534] The exclusionary rule is, instead, a judicially created means of deterring police misconduct that violates Fourth Amendment rights;[535] judicial officers, court employees, and legislators are not the focus of the rule.[536] As such, the rule does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons,"[537] but it applies only in contexts "where its reme-

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early decision, *Boyd v. United States*, 116 U.S. 616 (1886), where the Court held that the compulsory production of a person's private books and papers for introduction against him at trial violated the Fourth and Fifth Amendments.

529 Gouled v. United States, 255 U.S. 298 (1921).

530 *See* Adams v. New York, 192 U.S. 585 (1904).

531 Wolf v. Colorado, 338 U.S. 25, 27–29 (1949).

532 *See* Rea v. United States, 350 U.S. 214 (1956); Elkins v. United States, 364 U.S. 206 (1960).

533 Mapp v. Ohio, 367 U.S. 643 (1961).

534 United States v. Leon, 468 U.S. 897, 906 (1984).

535 United States v. Calandra, 414 U.S. 338, 348 (1974).

536 *See*, respectively, United States v. Leon, 468 U.S. 897, 916 (1984); Arizona v. Evans, 514 U.S., 1, 14–16 (1995); Illinois v. Krull, 480 U.S. 340, 350 (1987). In *Leon*, the Court determined that there was no sound reason to apply the exclusionary rule as a means of deterring misconduct on the part of judicial officers who are responsible for issuing warrants. This conclusion was based on three factors. First, the exclusionary rule was historically designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there was no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment, or that lawlessness among these actors requires the application of the extreme sanction of exclusion. Third, and of greatest importance, there was no basis for believing that exclusion of evidence seized pursuant to a warrant would have a significant deterrent effect on the issuing judge or magistrate. For similar reasons, the *Evans* Court held that the exclusionary rule does not require suppression of evidence seized in violation of the Fourth Amendment, where the erroneous information resulted from clerical errors of court employees. Moreover, as the Court recognized in *Krull*, the application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions, as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant.

537 Stone v. Powell, 428 U.S. 465, 486 (1976).

dial objectives are thought most efficaciously served."[538] Moreover, "because the rule is prudential, rather than constitutionally mandated, [the Court has] held it to be applicable only where its deterrence benefits outweigh its 'substantial social costs.'"[539] Indeed, "[b]ecause the exclusionary rule precludes consideration of reliable, probative evidence, . . . it undeniably detracts from the truthfinding process, and allows many who would otherwise be incarcerated to escape the consequences of their actions."[540]

[G225] Recognizing these costs, the Court has repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials. In *Calandra*, the Court held that the exclusionary rule does not apply to grand jury proceedings; in so doing, it "emphasized that such proceedings play a special role in the law enforcement process, and that the traditionally flexible, nonadversarial nature of those proceedings would be jeopardized by application of the rule."[541] Likewise, in *Janis*, the Court held that the exclusionary rule did not bar the introduction of unconstitutionally obtained evidence in a civil tax proceeding, "because the costs of excluding relevant and reliable evidence would outweigh the marginal deterrence benefits, which would be minimal because the use of the exclusionary rule in criminal trials already deterred illegal searches."[542] In *Lopez-Mendoza*, the Court refused to extend the exclusionary rule to civil deportation proceedings, "citing the high social costs of allowing an immigrant to remain illegally in this country and noting the incompatibility of the rule with the civil administrative nature of those proceedings."[543] Finally in *Scott*, the Court decided that the exclusionary rule is inapplicable to parole revocation hearings, since it would provide only minimal deterrence benefits in this context and would be incompatible with the traditionally flexible, non-adversarial character of these procedures.[544]

[G226] In addition, the Court has significantly limited the application of the exclusionary rule even in the context of criminal trials. First, there is a "good faith" exception to that rule. The Court has held that the rule does not apply when the police officer reasonably relied on a statute later held unconstitutional,[545] on a search warrant that was later deemed invalid,[546] or on erroneous information provided by court employ-

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[538] United States v. Calandra, 414 U.S. 338, 348 (1974).

[539] Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998), *citing* United States v. Leon, 468 U.S. 897, 907 (1984).

[540] Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998).

[541] Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998), *discussing* United States v. Calandra, 414 U.S. 338, 343–46, 349–50 (1974).

[542] Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998), *discussing* United States v. Janis, 428 U.S. 433, 448, 454 (1976).

[543] Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998), *discussing* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

[544] Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 365–68 (1998).

[545] Illinois v. Krull, 480 U.S. 340, 349–50 (1987) ("[u]nless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law").

[546] United States v. Leon, 468 U.S. 897, 920–22 (1984). *See also* Massachusetts v. Sheppard, 468 U.S. 981 (1984). Suppression remains an appropriate remedy "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," or "if the issuing magistrate wholly abandoned his detached and neutral judicial role." *Id.* at 923. "Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id.* at 923.

ees.[547] The exclusionary rule is equally inapplicable when the illegally obtained evidence is used to impeach a defendant's testimony.[548] The Court also has decided that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial."[549]

[G227] "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, . . . but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'"[550] "The question to be resolved when it is claimed that evidence subsequently obtained is 'tainted' or is 'fruit of a prior illegality is whether the challenged evidence was 'come at by exploitation of the [initial] illegality, or instead by means *sufficiently distinguishable* to be purged of the primary taint.'"[551] Hence, evidence is not to be excluded "if police had an 'independent source' for discovery of the evidence."[552] For example, in *Segura*, agents unlawfully entered the defendant's apartment and remained there until a search warrant was obtained. The evidence found for the first time during the execution of the search warrant was held admissible, because the information on which the warrant was secured came "from sources wholly unconnected with the entry, and was known to the agents well before the initial entry."[553] But "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant," the independent source doctrine should not apply.[554]

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[547] Arizona v. Evans, 514 U.S., 1, 14–16 (1995). The policies underlying the exclusionary rule do not require retroactive application of a new Fourth Amendment rule announced by the Court where the agents were acting in reliance upon a federal statute supported by longstanding administrative regulations and continuous judicial approval. *See* Unites States v. Peltier, 422 U.S. 531, 535–42 (1975).

[548] Walder v. United States, 347 U.S. 62, 65 (1954); United States v. Havens, 446 U.S. 620, 626 (1980) ("when defendants testify, they must testify truthfully, and a false testimony may not be permitted to go unchallenged").

[549] Stone v. Powell, 428 U.S. 465, 494 (1976). "In this context, the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force." *Id.* at 494–95. "Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded. . . . [I]n the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration." *Id.* at 491, n.31.

[550] Segura v. United States, 468 U.S. 796, 804 (1984), *citing* Nardone v. United States, 308 U.S. 338, 341 (1939). If a person is being illegally detained when he consents to the search of his luggage, such consent is tainted by the illegal detention, and hence is ineffective to justify the search. *See* Florida v. Royer, 460 U.S. 491, 501–09 (1983).

[551] Segura v. United States, 468 U.S. 796, 804–05 (1984), *quoting* Wong Sun v. United States, 371 U.S. 471, 488 (1963) (emphasis added).

[552] Segura v. United States, 468 U.S. 796, 805 (1984).

[553] *Id.* at 814.

[554] Murray v. United States, 487 U.S. 533, 542 (1988). In *Nix v. Williams*, 467 U.S. 431, 443 (1984), the Court adopted the *"inevitable discovery"* doctrine, which is "an extrapolation from

[G228] A confession "obtained by exploitation of an illegal arrest" may not be used against a criminal defendant.[555] Suppression of such a confession, even though voluntary under the Fifth Amendment, is required, "unless that confession is 'an act of free will [sufficient] to purge the primary taint of the unlawful detention.'"[556] "Demonstrating such purgation is a function of circumstantial evidence, with the burden of persuasion on the state. . . . Relevant considerations include observance of *Miranda*, 'the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particularly the purpose and flagrancy of the official misconduct.'"[557] However, "*Miranda* warnings, alone and *per se*, cannot always . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession."[558]

2. Bivens *Actions*[559]

[G229] *Bivens* allows a plaintiff to seek money damages from federal agents who have violated his Fourth Amendment rights.[560] "But government officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known.'"[561] "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations. *Meyer* made clear that the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity, . . . are indemnified by the employing agency or entity, . . . or are acting pursuant to the agency's policy. . . . *Meyer* also made clear that the threat of suit against a federal agency is not the kind of deterrence contemplated by *Bivens*."[562]

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the 'independent source' doctrine: since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." *See* Murray, *supra*, at 539.

555 Brown v. Illinois, 422 U.S. 590, 603 (1975).

556 Kaupp v. Texas, 538 U.S. 626, 632 (2003) (*per curiam*), *quoting* Wong Sun v. United States, 371 U.S. 471, 486 (1963).

557 Kaupp v. Texas, 538 U.S. 626, 633 (2003) (*per curiam*), *quoting* Brown v. Illinois, 422 U.S. 590, 603–04 (1975).

558 Kaupp v. Texas, 538 U.S. 626, 633 (2003) (*per curiam*), *quoting* Brown v. Illinois, 422 U.S. 590, 603 (1975). *"[T]he controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." See* United States v. Matlock, 415 U.S. 164, 178, n.14 (1974) (emphasis added), *citing* Lego v. Twomey, 404 U.S. 477, 488–89 (1972).

559 *See, in extenso*, paras. B90 *et seq.*

560 Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971). *Bivens* actions constitute a judicially fashioned remedy, based on federal law.

561 Wilson v. Layne, 526 U.S. 603, 609 (1999), *quoting* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

562 Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001), *discussing* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 473–74, 484–86 (1994).

CHAPTER 8

FREEDOMS OF CONSCIENCE, THOUGHT, AND BELIEF—RELIGIOUS FREEDOM

A. FREEDOMS OF CONSCIENCE, THOUGHT, AND BELIEF

1. In General

[H1] The Court has "identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment."[1] This Amendment "gives freedom of mind the same security as freedom of conscience."[2] The right of freedom of speech and press includes the freedoms "of inquiry [and] thought; . . . [w]ithout those peripheral freedoms, the specific righ[t] would be less secure."[3] Furthermore, the freedom of thought and speech is "the matrix, the indispensable condition, of nearly every other form of freedom."[4] Thus, freedom of conscience and thought, which includes freedom of religious belief, is "basic in a society of free men."[5]

[H2] "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that, in a free society, one's beliefs should be shaped by his mind and his conscience, rather than coerced by the State."[6] "[T]he assertion that the State has the right to control the moral content of a person's thoughts . . . is wholly inconsistent with the philosophy of the First Amendment."[7] "If there is any fixed star in the constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[8]

[H3] However, the Court's cases "do not, at their farthest reach, support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."[9] "While the freedom of belief and thought is

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1 Wallace v. Jaffree, 472 U.S. 38, 50 (1985).

2 Thomas v. Collins, 323 U.S. 516, 531 (1945).

3 Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965).

4 Palko v. Connecticut, 302 U.S. 319, 327 (1937).

5 United States v. Ballard, 322 U.S. 78, 86 (1944). General statutory expressions should not be so construed as to circumscribe liberty of conscience and political thought. *See* Schneiderman v. United States, 320 U.S. 118, 132 (1943) (involving a naturalization Act).

6 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977).

7 Stanley v. Georgia, 394 U.S. 557, 565–66, 568 (1969) (the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime). "*Stanley*'s emphasis was on the freedom of thought and mind in the privacy of the home." *See* United States v. 12 200-Ft. Reels of Super 8mm. Film No. 72, 413 U.S. 123, 128 (1973).

8 W. Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

9 *See* Gillette v. United States, 401 U.S. 437, 461 (1971) (military conscription laws).

absolute, the freedom of individual conduct is not."[10] "The absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the scope of that protection, since to do so might leave government powerless to vindicate compelling state interests."[11]

[H4] "[B]eliefs are personal, and not a matter of mere association. . . . [I]n adhering to a political party or other organization, . . . [an individual does] not subscribe unqualifiedly to all of its platforms or asserted principles."[12] "Thus, mere Party membership, even with knowledge of the Party's unlawful goals, . . . may [not] warrant a finding of moral unfitness justifying disbarment."[13]

2. Compelled Expression of Objectionable Ideas

[H5] One is free "to express himself in accordance with the dictates of his own conscience."[14] "[T]he freedom of thought protected by the First Amendment against state action includes the right to refrain from speaking. . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. . . . [When] a state measure . . . forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable, . . . the State invades the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control."[15] Thus, in *Barnette*, the Court struck down a state statute that required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. In doing so, the Court stressed that "a ceremony so touching matters of opinion and political attitude may not be imposed upon the individual by official authority under powers committed to any political organization under the Constitution."[16] In *Wooley*, the Court invalidated a statute requiring the official slogan "Live Free or Die" to be displayed on all license plates to protect the individual interest in "freedom of mind."[17] Similarly, *Abood* held that a pub-

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[10] *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); Bowen v. Roy, 476 U.S. 693, 699 (1986).

[11] McDaniel v. Paty, 435 U.S. 618, 627, n.7 (1978).

[12] Schneiderman v. United States, 320 U.S. 118, 136 (1943).

[13] Keyishian v. Bd. of Regents of Univ. of New York, 385 U.S. 589, 607 (1967), *citing* Schware v. Bd. of Bar Exam'rs of New Mexico, 353 U.S. 232. 243–46 (1957).

[14] Wallace v. Jaffree, 472 U.S. 38, 49 (1985).

[15] Wooley v. Maynard, 430 U.S. 705, 714–15 (1977).

[16] W. Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 636 (1943), *overruling* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940). The Court rejected the argument that compulsory flag salute is a permissible means for the attainment of national unity, which is the basis of national security, noting, *inter alia*, that "to believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds." *Id.* at 641.

A fortiori, the Constitution "prohibits the imposition of punishment for urging and advising that, on religious grounds, citizens refrain from saluting the flag." *See* Taylor v. Mississippi, 319 U.S. 583, 589 (1943).

[17] Wooley v. Maynard, 430 U.S. 705, 714–17 (1977). In reaching that conclusion, the Court found that the state's countervailing interests were not sufficiently compelling to justify requiring appellees to display the state motto on their license plates. The two interests advanced by the state were that display of the motto (1) facilitated the identification of passenger vehi-

lic school teacher cannot be required to contribute to the support of an ideological cause he may oppose as a condition of holding his job.[18]

3. Compulsory Disclosure of Beliefs

[H6] Compelled disclosure of political beliefs, in itself, can seriously infringe on the rights guaranteed by the First Amendment. "The right to privacy in one's political associations and beliefs will yield only to a subordinating interest of the State that is compelling, . . . and then only if there is a substantial relation between the information sought and an overriding and compelling state interest."[19]

[H7] *Nixon v. Administrator of General Services* involved the Presidential Recordings and Materials Preservation Act of 1974, which created a centralized custodian for the preservation and orderly processing of Nixon's historical materials (an estimated 42 million pages of documents and 880 tape recordings) and mandated protection of the former President's right against infringement by the processing itself or, ultimately, by public access to the materials retained. The Act aimed to guarantee the availability of evidence for use at criminal trials and to preserve monuments and records of historical value to national heritage. Nixon claimed, *inter alia*, that the Act invaded the private formulation of his political thought. The Court stressed that "a compelling public need that cannot be met in a less restrictive way" overrides a person's interests in privacy of association and belief guaranteed by the First Amendment, "particularly when the free functioning of . . . national institutions is involved." Accordingly, Nixon's allegation was rejected, because (1) it was clearly outweighed by the important governmental interests promoted by the Act, (2) no less restrictive way than archival screening had been suggested as a means for identification of materials to be returned to Nixon, and (3) the Act protected Nixon from improper public disclosures of his Presidential materials and guaranteed him full judicial review before any public access was permitted.[20]

[H8] A number of cases involved the refusal of states to admit applicants to practice law, because they declined to answer questions relating to their beliefs about government and their affiliations with organizations suspected of advocating the overthrow of government by force. These cases were relics of a turbulent period known as the "McCarthy era," which drew its name from Senator Joseph McCarthy, who had stirred up anti-Communist feelings and fears by his "investigations" in the early 1950s. The Court's opinions in this constitutional field are characterized by sharp conflicts and close divisions.[21] In *Baird*, the Court held by a five-to-four vote that a person could not

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cles, and (2) promoted appreciation of history, individualism, and state pride. The Court noted that, in any case, there were less drastic means for achieving the first end, and that the second interest could not outweigh an individual's First Amendment right to avoid becoming the courier for such message.

18 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).

19 Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91–92 (1983).

20 Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 467 (1977).

21 In *Konigsberg v. State Bar of California*, 353 U.S. 252, 258–74 (1957) (*Konigsberg I*), the Court was "concerned solely with the question whether the balance between the favorable and unfavorable evidence as to Konigsberg's qualifications had been struck in accordance with the requirements of due process. It was there held, first, that Konigsberg had made out a *prima facie* case of good character and of non-advocacy of violent overthrow, and, second, that the other evidence in the record could not, even with the aid of all reasonable inferences flowing there-

be kept out of the state bar for refusing to answer whether he had ever been a member of the Communist Party or any organization that advocated overthrow of the U.S. government by force or violence. This question was treated as an inquiry into political beliefs. A four-member plurality noted that "[w]hen a State seeks to inquire about an individual's beliefs and associations, a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." The plurality recognized that the state had a legitimate interest in determining whether petitioner had the qualities of character and the professional competence requisite to the practice of law. But, there, petitioner had already supplied the Bar Committee with extensive personal and professional information to assist its determination. In reversing the denial of petitioner's admission to the bar, the plurality concluded that, "whatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."[22] Another member of the Court, in his concurring opinion, also emphasized that "the First and Fourteenth Amendments bar a State from acting against any person merely because of his beliefs."[23]

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from, cast such doubts upon petitioner's *prima facie* case as to justify any finding other than that these two California qualification requirements had been satisfied. In assessing the significance of Konigsberg's refusal to answer questions as to Communist Party membership, the Court dealt only with the fact that this refusal could not provide any reasonable indication of a character not meeting these two standards for admission." *See* Konigsberg v. State Bar of California, 366 U.S. 36, 42 (1961), *discussing Konigsberg I. See also* Schware v. Bd. of Bar Exam'rs of New Mexico, 353 U.S. 232, 243–46 (1957). However, in *Konigsberg v. State Bar of California*, 366 U.S. 36, 44–56 (1961) (*Konigsberg II*), the Court found it not constitutionally impermissible for a state "to adopt a rule that an applicant will not be admitted to the practice of law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications. . . . [Moreover, the Court] held that the State's interest in enforcing such a rule, as applied to refusals to answer questions about membership in the Communist Party, outweigh[ed] any deterrent effect upon freedom of speech and association." *See In re* Anastaplo, 366 U.S. 82, 88–89 (1961), *discussing Konigsberg II.*

[22] Baird v. State Bar of Arizona, 401 U.S. 1, 6–7 (1971). The four dissenters noted, *inter alia*, that (1) "a belief, firm enough to be carried over into advocacy, in the use of illegal means" to change the form of the state or federal government is an important consideration in determining the fitness of applicants for membership in a profession "in whose hands so largely lies the safekeeping of the country's legal and political institutions;" (2) the question at issue was not unreasonable or irrelevant to the state's legitimate interest in determining whether the applicant had the "qualities of character" requisite for the practice of law. *Id.* at 12–13, 21–22.

[23] *Id.* at 9–10. In addition, Justice Stewart observed that "mere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities," since "[s]uch membership can be quite different from knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals." *See also* para. H4.

See also Law Students Research Council v. Wadmond, 401 U.S. 154, 161–63 (1971). In that case the Court faced a state rule directing the Bar Committees on Character and Fitness not to certify an applicant for admission "unless he believed in the form of the government of the United States and was loyal to such government." The state authorities interpreted the statute in the following way: (1) the rule placed upon applicants no burden of proof; (2) "the form of the government of the United States" and the "government" referred solely to the Constitution; and (3) "belief" and "loyalty" meant no more than willingness to take the oath to support the federal and state Constitutions and ability to do so in good faith. Accepting this construction, the Court found no constitutional invalidity in the rule. There was no showing of an intent to

[H9] Nevertheless, "it cannot be thought that, as a general principle of law, a citizen has a privilege to answer fraudulently a question that the Government should not have asked. [The] legal system provides methods for challenging the Government's right to ask questions, but lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."[24]

4. Freedom of Thought in Schools

[H10] "The vigilant protection of [the freedom of thought] is nowhere more vital than in the community of American schools. . . . '[I]n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the [First and Fourteenth Amendments,] inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice.'"[25] Academic freedom "is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[26]

5. Exclusion from a Profession or Public Employment on the Basis of Political Beliefs or Association

[H11] The First Amendment "prohibits a State from excluding a person from a profession solely because . . . he holds certain beliefs."[27] As a matter of principle, public employees cannot be fired on the basis of their political beliefs. In *Elrod* the Court held that a newly elected Democratic Sheriff had violated the constitutional rights of certain non-civil-service employees by discharging them, because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders. Noting that, in order to retain their jobs, the Sheriff's employees were required to pledge their allegiance to the Democratic Party, work for or contribute to the party's candidates, or obtain a Democratic sponsor, a three-member plurality "concluded that the inevitable tendency of such a system was to coerce employees into compromising their true beliefs. That conclusion . . . brought the practice within the rule of . . . *Barnette*, condemning the use of governmental power to prescribe what the citizenry must accept as orthodox opinion."[28]

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penalize political beliefs, and the rule performed only the function of ascertaining that an applicant was not one who swore to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath.

[24] Bryson v. United States, 396 U.S. 64, 72 (1969), *relying on* Dennis v. United States, 384 U.S. 855, 867 (1966).

[25] Shelton v. Tucker, 364 U.S. 479, 487 (1960) (statute compelling teachers to disclose their associational ties), *quoting* Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (concurring opinion of Justice Frankfurter).

[26] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[27] Ibanez v. Florida Dep't of Bus. and Prof'l Regulation, 512 U.S. 136, 144 (1994), *quoting* Baird v. State Bar of Arizona, 401 U.S. 1, 6 (1971) (plurality opinion).

[28] *See* Branti v. Finkel, 445 U.S. 507, 513–14 (1980), *discussing* Elrod v. Burns, 427 U.S.

[H12] In *Branti*, the Court emphasized that, "unless the government can demonstrate an overriding interest . . . of vital importance, . . . requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment."[29] Accordingly, it decided that the First Amendment prohibits a newly appointed public defender, who is a Democrat, from discharging assistant public defenders, because they do not have the support of the Democratic Party. The Court rejected an attempt to distinguish the case from *Elrod*, deciding that it was immaterial whether the public defender had attempted to coerce employees to change political parties or had only dismissed them on the basis of their private political beliefs. It explained that conditioning continued public employment on an employee's having obtained support from a particular political party violates the First Amendment because of "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." In sum, the Court said, "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance;" to prevail, public employees need show only that they were discharged, because they were not affiliated with or sponsored by the Democratic Party.[30] *Branti* also refined the exception created by *Elrod* for certain employees. In *Elrod*, the majority suggested that policy-making and confidential employees probably could be dismissed on the basis of their political views.[31] In *Branti*, the Court said that a state demonstrates a compelling interest in infringing First Amendment rights only when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved."[32]

[H13] In *Rutan*, the Court extended *Elrod* and *Branti* to public employment promotion, transfer, recall, and hiring decisions based on political beliefs and affiliation. *Rutan* provided that the government can justify patronage employment practices only if it proves that such patronage is "narrowly tailored to further vital governmental interests. . . . A government's interest in securing effective employees can be met by discharging, demoting or transferring staff members whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views."[33]

[H14] *O'Hare* held that the protections of *Elrod* and *Branti* are also applicable to an independent contractor, who, in retaliation for refusing to comply with demands for political support, has a government contract terminated or is removed from an official list of contractors authorized to perform public services. As the Court pointed out, "[g]overnment officials may terminate at-will relationships, unmodified by any legal con-

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347, 355–59 (1976). The *Elrod* plurality also stated that the practice had the effect of imposing an unconstitutional condition on the receipt of a public benefit and therefore came within the rule of cases like *Perry* (*see* para. B68). Another two Justices, agreed that, under *Perry*, "a nonpolicymaking, nonconfidential government employee [cannot] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.* at 375.

29 Branti v. Finkel, 445 U.S. 507, 515–16 (1980).

30 *Id.* at 516–17.

31 Elrod v. Burns, 427 U.S. 347, 367, 375 (1976).

32 Branti v. Finkel, 445 U.S. 507, 518 (1980).

33 Rutan v. Republican Party of Illinois, 497 U.S. 62, 74 (1990).

straints, without cause; but it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views."[34]

6. Oaths of Office

[H15] The Court has "made clear that neither federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments, respectively, as . . . those relating to political beliefs."[35] Article VI, Clause 3, of the Constitution, explicitly prohibits any religious test as a qualification for any office or public trust in the United States.

[H16] Article VI, Clause 3, also provides that all state and federal officers "shall be bound by oath or affirmation, to support this Constitution." Obviously, the Framers of the Constitution thought that the exaction of an affirmation of loyalty to the Constitution was worth the price of whatever deprivation of individual freedom of conscience was involved.[36] Hence, the Constitution permits an oath that requires an individual assuming public responsibilities to affirm that he will endeavor to perform his public duties lawfully, pursuant to "constitutional processes of government," and that he will not use illegal and constitutionally unprotected force to change the constitutional system.[37]

7. Conscientious Objection to Military Service or Instruction

[H17] "Government, federal and state, each in its own sphere, owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies."[38] In *Gillette*, the petitioners, conscientious objectors to *particular* wars, argued that Section 6(j) of the Military Selective Service Act of 1967, which limited an exemption from military service to those who conscientiously objected to "participation in war in *any form*," infringed their rights under the Free Exercise Clause by requiring them to abandon their religious beliefs and participate in what they deemed an unjust war or go to jail. In rejecting this allegation, the Court noted that "the impact of conscription on objectors to particular wars is far from unjustified. The conscription laws, applied to such

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[34] O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 725–26 (1996).

[35] Cole v. Richardson, 405 U.S. 676, 680 (1972), *citing* Law Students Research Council v. Wadmond, 401 U.S. 154 (1971) and Baird v. State Bar of Arizona, 401 U.S. 1 (1971). "An underlying, seldom articulated concern running throughout the oath cases in the Court is that the oaths under consideration often required individuals to reach back into their past to recall minor, sometimes innocent, activities, [and] put the government into the censorial business of investigating, scrutinizing, interpreting, and then penalizing or approving the political viewpoints and past activities of individuals." *See* Cole v. Richardson, *supra*, at 681.

[36] *Cf.* Am. Communications Ass'n v. Douds, 339 U.S. 382, 415 (1950).

[37] *See* Cole v. Richardson, 405 U.S. 676, 682–84 (1972); Bond v. Floyd, 385 U.S. 116, 135 (1966).

[38] Hamilton v. Regents of Univ. of California, 293 U.S. 245, 262–63 (1934). In that case, the Court held that the liberty guaranteed by the Fourteenth Amendment does not confer upon a conscientious and religious objector to war and military training the right to attend a state university without taking a course in military "science" required by the state as part of the curriculum.

persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by [these persons] are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And, more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies."[39]

[H18] Similarly, in *In re Summers*, the Court upheld the refusal of a state supreme court to admit to membership of its bar an otherwise qualified person on the sole ground that he had conscientious scruples against war and would not use force to prevent wrong under any circumstances. Since the applicant could not swear in good faith to uphold the state Constitution, which required service in the militia in time of war, it was decided that refusal to permit him to practice law did not violate the First and Fourteenth Amendments.[40] In addition, the federal government can bar from national citizenship an alien who refuses to pledge military service.[41]

[H19] *Robison*, who had been exempted from military service as a conscientious objector but who had performed required alternative civilian service, after being denied educational benefits under the Veterans' Readjustment Benefits Act of 1966, brought a class action for a declaratory judgment that the provisions of the Act making him and his

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[39] Gillette v. United States, 401 U.S. 437, 462 (1971). Apart from the government's need for manpower, the Court also noted "the importance of fair, evenhanded, and uniform decisionmaking" in this field, since "opposition to a particular war may more likely be political and nonconscientious than otherwise." Moreover, "the belief that a particular war at a particular time is unjust is, by its nature, changeable and subject to nullification by changing events." Hence, a program of excusing objectors to particular wars may be "impossible to conduct with any hope of reaching fair and consistent results." *Id.* at 455–56.

See also Selective Draft Law Cases, 245 U.S. 366, 378, 389–90 (1918), where the Court upheld the Draft Act of 1917, including its conscientious objector provisions, noting, among other things, that "the very conception of a just government and its duty to the citizen includes the duty of the citizen to render military service in case of need, and the right of the government to compel it." *Id.* at 378.

Section 6(j) of the Universal Military Training and Service Act of 1940, as amended in 1948, exempted from combatant service in the armed forces those who were conscientiously opposed to participation in war by reason of their "religious training and belief." This term was defined in the Act as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." As the Court held in *Seeger*, within that phrase would come "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . . This construction avoid[ed] imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and [wa]s in accord with the well established congressional policy of equal treatment for those whose opposition to service [wa]s grounded in their religious tenets." *See* United States v. Seeger, 380 U.S. 163, 176 (1965). *See also Welsh v. United States*, 398 U.S. 333, 344 (1970), where a four-member plurality admitted that Section 6(j) exempted from military service "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."

[40] *In re* Summers, 325 U.S. 561, 572–73 (1945).

[41] United States v. Macintosh, 283 U.S. 605, 623–24 (1931); United States v. Schwimmer, 279 U.S. 644, 650 (1929).

class ineligible for such benefits violated the First Amendment's guarantee of religious freedom, by increasing the price he and the other members of his class should pay for adherence to their religious beliefs. The Court observed that the withholding of educational benefits involved only an incidental burden upon Robison's free exercise of religion. The Act had been enacted pursuant to Congress' Article I, Section 8, powers "to advance the neutral, secular governmental interests of enhancing military service and aiding the readjustment of military personnel to civilian life." Appellee and his class were not included in this class of beneficiaries, "not because of any legislative design to interfere with their free exercise of religion, but because to do so would not rationally promote the Act's purposes." Thus, in light of *Gillette*, the government's substantial interest in raising and supporting armies was "of a kind and weight clearly sufficient" to sustain the challenged legislation.[42]

8. Beliefs of the Defendant in the Sentencing Context

[H20] "Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant. . . . The defendant's motive for committing the offense is one important factor. . . . But it is equally true that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge."[43] In *Dawson*, the state introduced evidence at a capital sentencing hearing that the defendant was a member of a white supremacist prison gang. Because the evidence proved nothing more than the defendant's abstract beliefs, the Court held that its admission violated the defendant's First Amendment rights. In so holding, however, the Court emphasized that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."[44] Thus, in *Barclay*, the Court allowed the sentencing judge to take into account the defendant's racial animus towards his victim. The evidence in that case showed that the defendant's membership in the Black Liberation Army and desire to provoke a "race war" were related to the murder of a white man for which he had been convicted. Because "the elements of racial hatred in [the] murder" were relevant to several aggravating factors, the plurality held that the trial judge had permissibly taken this evidence into account in sentencing the defendant to death.[45] Similarly, in *Wisconsin v. Mitchell*, the Court rejected a First Amendment challenge to a state statute that enhanced a penalty based on the defendant's racial motive, noting, *inter alia*, that the state could "singl[e] out for enhancement bias-inspired conduct because this conduct [wa]s thought to inflict greater individual and societal harm,"[46] and that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[47]

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42 Johnson v. Robison, 415 U.S. 361, 385 (1974).

43 Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993).

44 Dawson v. Delaware, 503 U.S. 159, 165–67 (1992).

45 Barclay v. Florida, 463 U.S. 939, 949 (1983), (plurality opinion of four Justices); *id.* at 970, and n.18 (Stevens, J., concurring in judgment).

46 Wisconsin v. Mitchell, 508 U.S. 476, 487–88 (1993).

47 *Id.* at 489.

B. FREEDOM OF RELIGION

1. The Free Exercise Clause

a. In General

[H21] The Free Exercise Clause of the First Amendment, which has been made applicable to the states by incorporation into the Fourteenth Amendment,[48] provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Hence, "[m]an's relation to his God [is] made no concern of the State."[49] "Only beliefs rooted in religion are protected by the Free Exercise Clause."[50] "Purely secular views do not suffice."[51]

[H22] The determination of what is a "religious" belief or practice may be a difficult and delicate task.[52] However, "the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[53] Although one can "imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause,"[54] "[g]iven the historical association between animal sacrifice and religious worship, . . . [a person's] assertion that animal sacrifice is an integral part of [his] religion cannot be deemed bizarre or incredible."[55]

[H23] "Men may believe what they cannot prove."[56] "In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."[57] But they can determine whether an individual's beliefs are truly held. Since the "States are entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause," they may require that a professed belief be sincerely held.[58] The relevant determination may be far from easy to make. In that context, "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."[59] And "[i]t is

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48 *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

49 United States v. Ballard, 322 U.S. 78, 87 (1944).

50 Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 713 (1981).

51 Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 833 (1989), *citing* Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).

52 In *United States v. Macintosh*, 283 U.S. 605, 633–34 (1931), Chief Justice Hughes said, in his dissent, that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." *See also* para. H17, n.39.

In *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989), the Court implicitly recognized the *Church of Scientology* as a religious organization.

53 Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 714 (1981).

54 *Id.* at 715.

55 Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993).

56 United States v. Ballard, 322 U.S. 78, 86 (1944).

57 Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144, n.9 (1987), *citing* United States v. Ballard, 322 U.S. 78, 87 (1944). *See also* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).

58 Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 833 (1989).

59 Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 715 (1981).

not within the judicial ken to question the 'centrality' of particular beliefs or practices to a faith."[60]

[H24] "Undoubtedly, membership in an organized religious denomination . . . [may] simplify the problem of identifying sincerely held religious beliefs."[61] Nevertheless, the Court has rejected the notion that, "to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[62] "Intrafaith differences . . . are not uncommon among followers of a particular creed. . . . [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether a person has correctly perceived the commands of his faith. Courts are not arbiters of scriptural interpretation."[63]

[H25] "If judicial inquiry into the truth of one's religious beliefs would violate the free exercise clause, an inquiry into one's reasons for adopting those beliefs is similarly intrusive. So long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from revelation, study, upbringing, gradual evolution, or some other source."[64]

[H26] "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[65] The freedom to hold religious beliefs and opinions is absolute.[66] "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. . . . Government may [not] compel affirmation of a repugnant belief."[67] Thus, in *Torcaso*, the Court struck down a state provision requiring public officials to declare a "belief in the existence of God."[68]

[H27] "The First Amendment prohibits misuse of secular governmental programs to impede the observance of one or all religions or to discriminate invidiously against some or all religious beliefs."[69] In *Fowler*, the Court found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching in the same park during the course of a Catholic mass or Protestant church service.[70] The free exercise of religion

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60 Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989).

61 Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 (1989).

62 *Id.* at 834.

63 Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 715–16 (1981).

64 Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144, n.9 (1987).

65 Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877 (1990).

66 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

67 Sherbert v. Verner, 374 U.S. 398, 402 (1963).

68 Torcaso v. Watkins, 367 U.S. 488, 492–95 (1961).

69 Gillette v. United States, 401 U.S. 437, 462 (1971). *See also* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993).

"[T]he Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." For example, statutory minimum wage provisions do not interfere with the religious freedom of a religious organization's employees, whose beliefs preclude them from accepting the statutory amount, if the law does not prevent them from returning the amounts to the foundation. *See* Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303–04 (1985).

70 Fowler v. Rhode Island, 345 U.S. 67 (1953).

"unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister" of a religious faith.[71] The government cannot impose special disabilities on the basis of one's status as a "minister" or "priest." Thus, in *McDaniel*, the Court invalidated a state law that disqualified members of the clergy from holding certain public offices.[72] Furthermore, the state may not employ the taxing power to inhibit the dissemination of religious views.[73]

[H28] "[N]either a State nor a municipality can completely bar the distribution of literature containing religious ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will."[74] Moreover, a municipality cannot, without jeopardizing the vital freedoms guaranteed by the First Amendment, prohibit door-to-door distribution of religious literature.[75] Of course, reasonable regulations of time and manner of distribution are permissible.[76]

[H29] In addition, the Court has held "that *indirect* coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."[77] Thus, for example, "ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship."[78]

[H30] On the other hand, "the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'"[79] For instance, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[80]

[H31] "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the

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71 McDaniel v. Paty, 435 U.S. 618, 626 (1978).

72 *Id.* at 626–27.

73 *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943). *See, in extenso,* paras. H48–H49.

Some of the Court's cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); W. Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors).

74 Marsh v. Alabama, 326 U.S. 501, 504 (1946).

75 Martin v. Struthers, 319 U.S. 141, 146–47 (1943).

76 The relevant issues pertain to the freedom of speech and are discussed, *in extenso,* in paras. I377 *et seq.*

77 Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988) (emphasis added).

78 *Id.* at 450, *referring to* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

79 Sherbert v. Verner, 374 U.S. 398, 403 (1963), *quoting* Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

80 United States v. Lee, 455 U.S. 252, 261 (1982).

citizen from the discharge of political responsibilities."[81] The Court first had occasion to assert that principle in *Reynolds*, where it rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice.[82] *Prince* held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding.[83] In *Braunfeld*, the Court upheld Sunday closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days.[84] In *Gillette*, the Court sustained the military selective service system against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.[85] In *Lee*, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. The Court rejected the claim that an exemption was constitutionally required, observing, *inter alia*, that "there would be no way . . . to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes."[86] "The only decisions in which [the Court has] held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections,"[87] such as freedom of speech and of the press,[88] or the right of parents to direct the education of their children.[89]

[H32] *Sherbert* established a balancing test, under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[90] Applying that test, on three occasions, the Court invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion.[91] The Court "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although [it] sometimes purported to apply

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81 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940).

82 Reynolds v. United States, 98 U.S. 145 (1879).

83 Prince v. Massachusetts, 321 U.S. 158 (1944).

84 Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion).

85 Gillette v. United States, 401 U.S. 437, 461 (1971).

86 *See* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 880 (1990), *discussing* United States v. Lee, 455 U.S. 252, 260 (1982).

87 Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 881 (1990).

88 *Id.* at 881, *citing* Cantwell v. Connecticut, 310 U.S. 296, 307 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Follett v. McCormick, 321 U.S. 573 (1944) (same).

89 Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 881 (1990), *citing* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

90 Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 883 (1990), *citing* Sherbert v. Verner, 374 U.S. 398, 402–03 (1963).

91 *See* paras. H42–H43.

the *Sherbert* test in contexts other than that, [it] always found the test satisfied."[92] Eventually, *Smith* and *Lukumi* established that that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest, even if the law has the incidental effect of burdening a particular religious practice."[93] "The application of the *Sherbert* test, the *Smith* decision explained, would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability:"[94] "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself' . . .—contradicts both constitutional tradition and common sense."[95] Moreover, it would not be possible to require a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion, since "[j]udging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims."[96] The four dissenters in the *Smith* case concluded that the compelling interest test "reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society."[97]

[H33] "Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest, and must be narrowly tailored to advance that interest. . . . Although a law targeting religious beliefs as such is never permissible, . . . if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are . . . many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, courts must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. [But] the Free Exercise Clause . . . extends beyond facial discrimination. The Clause forbids 'subtle departures from neutrality' . . . and 'covert suppression of particular religious beliefs.' . . . [It] protects against governmental hostility which is masked, as well as overt."[98] As to the question of general applicability, the Court has pointed out that "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause 'protect[s] religious observers against unequal treatment,' . . . and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. The principle that government, in pursuit of legitimate interests, cannot in a selective

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92 *See* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 883 (1990), *citing* United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971).

93 Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 531 (1993), *citing* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 885–86 (1990).

94 *See* City of Boerne v. Flores, 521 U.S. 507, 513 (1997).

95 Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 885 (1990).

96 *Id.* at 887.

97 *Id.* at 903.

98 Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 531–34 (1993).

manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."[99]

[H34] In *Lukumi*, petitioner church and its congregants practiced the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion (the animals are killed by cutting their carotid arteries, and are cooked and eaten following all Santeria rituals except healing and death rites). After the church leased land in the city of Hialeah and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed, among other enactments (1) Resolution 87-66, which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices; (2) Ordinance 87-40, which incorporated the Florida animal cruelty laws and broadly punished whoever unnecessarily or cruelly killed any animal and was interpreted to reach killings for religious reasons; (3) Ordinance 87-52, which defined "sacrifice" as "to unnecessarily kill an animal in a ritual not for the primary purpose of food consumption," and prohibited the "possession, sacrifice, or slaughter" of an animal if it was killed in "any type of ritual" and there was an intent to use it for food, but exempted "any licensed [food] establishment" if the killing was otherwise permitted by law; (4) Ordinance 87-71, which prohibited the sacrifice of animals and defined "sacrifice" in the same manner as Ordinance 87-52; and (5) Ordinance 87-72 which defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouses, but included an exemption for "small numbers of hogs and/or cattle" when exempted by state law. The Court held that the laws in question had been enacted contrary to free exercise principles. The ordinances' texts and operation demonstrated that they were not neutral, but had as their object the suppression of the central element of the Santeria worship service. This conclusion was supported by the use of the words "sacrifice" and "ritual" in Ordinances 87-40, 87-52, and 87-71 and by Resolution 87-66's statements of "concern" and "commitment." Moreover, the design of the regulations at issue accomplished a "religious gerrymander." Almost the only conduct subject to Ordinances 8740, 87-52, and 87-71 was the religious exercise of Santeria church members; their definitions excluded almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrowed the proscribed category even further, in particular by exempting Kosher slaughter. Their drafting ensured that, although Santeria sacrifice was prohibited, killings that were no more necessary or humane in almost all other circumstances were unpunished. The Court also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribed more religious conduct than was necessary to achieve their stated ends. The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice. If improper disposal, not the sacrifice itself, was the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. With regard to the city's interest in ensuring the adequate care of animals and in prohibiting cruel methods of killing, regulation of conditions and treatment, regardless of why an animal was kept, and of the method of slaughter, would be the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. Ordinance 87-72—unlike the three other ordinances—appeared to apply to sub-

[99] *Id.* at 542–43.

stantial non-religious conduct and not to be overbroad. However, since it had been passed the same day as Ordinance 87-71, and had been enacted, as were the three others, in direct response to the opening of the Church, the four substantive ordinances were treated by the Court as a group for neutrality purposes. Hence, it was considered as functioning, with the rest of the enactments in question, to suppress Santeria religious worship. Furthermore, each of the ordinances burdened only conduct motivated by religious belief and, hence, violated the requirement that laws burdening religious practice must be of general applicability. The four ordinances were substantially underinclusive, for they failed to prohibit non-religious conduct that endangered the city's interests in protecting the public health and preventing cruelty to animals in a similar or greater degree than Santeria sacrifice did. In sum, the ordinances had every appearance of a prohibition that society was prepared to impose upon Santeria worshippers but not upon itself. This precise evil is what the requirement of "general applicability" is designed to prevent. In light of these considerations, the Court concluded that the ordinances at issue could not withstand the strict scrutiny that was required upon their failure to meet the *Smith* standard. Even if the asserted governmental interests were compelling, the ordinances were not narrowly tailored to accomplish these interests. All four were overbroad or underinclusive in substantial respects, because the proffered objectives were not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that would burden religion to a far lesser degree.[100]

b. Ecclesiastical Administration

[H35] Legislation, which determines ecclesiastical administration or the appointment of the clergy or transfers control of churches from one group to another, interferes with the free exercise of religion contrary to the Constitution. *Kedroff* grew out of a dispute between the Moscow-based general Russian Orthodox Church and the Russian Orthodox churches located in North America over an appointment to St. Nicholas Cathedral in New York City. The North American churches declared their independence from the general church, and the New York legislature enacted a statute recognizing their administrative autonomy. The New York courts sustained the constitutionality of the statute and held that the North American churches' elected hierarchy had the right to use the cathedral. The Court reversed, finding that the Moscow church had not acknowledged the schism and holding the statute unconstitutional. The Court stressed that, under the First Amendment, religious organizations have the power to decide for themselves, free from secular control or manipulation, "matters of church government." "Freedom to select the clergy, where no improper methods of choice are proven, . . . [has] constitutional protection as a part of the free exercise of religion against state interference." The New York statute displaced one church administrator with another. "It passe[d] the control of matters strictly ecclesiastical from one church authority to another. It thus intrude[d] for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment."[101] This holding invalidating legislative action was extended to judicial action in *Kreshik*, where the Court held that the constitutional guarantees of religious liberty required the reversal of a judgment of the New York courts

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[100] Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 534–40, 543–46 (1993).

[101] Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116, 119 (1952).

that transferred control of St. Nicholas Cathedral from the central governing authority of the Russian Orthodox Church to the independent Russian Church of America.[102]

[H36] "[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them."[103] *Milivojevich* involved a protracted dispute over the control of the Serbian Eastern Orthodox Diocese for the United States and Canada. During the course of this dispute, the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church (Mother Church) suspended and ultimately removed and defrocked the bishop, Dionisije, and appointed another person as Administrator of the diocese, which the Mother Church then reorganized into three dioceses. The Serbian Orthodox Church was a hierarchical church, and the sole power to appoint and remove its bishops rested in the Holy Assembly and Holy Synod. The supreme court of Illinois held that Dionisije's removal and defrockment had to be set aside as "arbitrary," because the proceedings against him had not, in its view, been conducted in accordance with the Church's constitution and penal code, and that the diocesan reorganization was invalid, because it exceeded the scope of the Mother Church's authority to effectuate such changes without diocesan approval. The Court reversed the above decision. The fallacy fatal to the judgment of the Illinois supreme court was that it rested "upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitute[d] its own inquiry into church polity and resolutions based thereon of those disputes."[104]

c. Internal Government Affairs

[H37] In *Roy*, the Court stressed that "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government. . . . [This] Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures. . . . [T]he First Amendment [does not] require the Government *itself* to behave in ways that the indi-

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[102] Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (*per curiam*).

[103] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724–25 (1976).

[104] *Id.* at 708. The Court noted that, "whether or not there is room for 'marginal civil court review' under the narrow rubrics of 'fraud' or 'collusion' when church tribunals act in bad faith for secular purposes, no 'arbitrariness' exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits." *Id.* at 713.

vidual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that one engage in any set form of religious observance, so one may not demand that the Government join in his chosen religious practices by refraining from using a number to identify" him or the members of his family.[105] In *Lyng* the Court held that the building of a road or the harvesting of timber on publicly owned land, used for religious purposes by Indian tribes, could not meaningfully be distinguished from the use of a Social Security number in *Roy*. "In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens. . . . The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. . . . [G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires."[106]

d. Polygamy

[H38] Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, regulated by law. Criminal laws against polygamy are constitutionally applicable to those whose religion commands the practice. In *Reynolds*, the Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed on its male members the duty to practice polygamy. In doing so, the Court noted that polygamy, which had always been an offense against society in every state of the union, "le[d] to the patriarchal principle, and . . . fetter[ed] the people in stationary despotism."[107] Similarly, *Davis* upheld against a free exercise challenge a law denying the right to vote or hold public office to members of organizations that practiced or encouraged polygamy.[108]

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[105] Bowen v. Roy, 476 U.S. 693, 699–700 (1986). There the Court rejected a free exercise challenge to a federal statute that required the states to use Social Security numbers in administering certain welfare programs. Moreover, in applying the test later set forth in *Smith*, a three-member plurality concluded that the statutory requirement that applicants *provide* a Social Security number as a condition of eligibility for welfare benefits did not violate the Free Exercise Clause, because that requirement was facially neutral in religious terms, applied to all applicants for the benefits involved, clearly promoted a legitimate public interest (prevention of fraud in these benefit programs), and the Social Security number requirement was a reasonable means of promoting that goal. *Id.* at 701–08.

[106] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449, 452 (1988).

[107] Reynolds v. United States, 98 U.S. 145, 166 (1879). *Cf.* Cleveland v. United States, 329 U.S. 14, 18–19 (1946).

[108] Davis v. Beason, 133 U.S. 333 (1890).

e. Religious Upbringing of Children

[H39] "[A] State's interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they . . . 'prepare [them] for additional obligations.' . . . It follows that, in order for [a state] to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[109] In *Yoder*, Amish parents challenged a state statute requiring all children within the state to attend school until the age of 16. The parents' claim was that this compulsion interfered with Amish religious teachings emphasizing informal "learning through doing;" a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; separation from, rather than integration with, contemporary worldly society; and avoidance of materialistic goals. In sustaining the parents' claim under the Free Exercise Clause, the Court found it necessary to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the state's goals, on the one hand, against the sincerity and centrality of the objection to the state's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand. The Court stressed that, in view of their long history as an identifiable religious sect and as a successful and self-sufficient segment of American society, the Amish had demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continuing survival of Old Order Amish communities, and the hazards presented by the state's enforcement of a statute generally valid as to others. Beyond this, the Amish carried the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of . . . [the] overall interest that the State advance[d] in support of its program of compulsory high school education." The Court noted that when the interests of parenthood are combined with a free exercise claim of the nature revealed by the record of that case, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the state's requirement under the First Amendment. But the state failed to show, with sufficient particularity, how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. In affirming the reversal of Yoder's conviction, the Court concluded that the record strongly indicated that "accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education [would] not impair the physical or mental health of the child or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society."[110]

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[109] Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

[110] *Id.* at 234–36.

[H40] However, "[t]he right to practice religion freely does not include liberty to expose the child to death, ill health, communicable disease, or other dangerous situations."[111] The zealous though lawful exercise of the right to engage in propagandizing the community, in religious matters, may create situations involving emotional excitement and psychological or physical injury. Hence, a mother may be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding.[112] Moreover, the state may curtail parental authority to withhold necessary medical treatment for the child, even if the treatment violates the parent's and child's religion.[113]

f. Sunday Closing Laws

[H41] *Braunfeld* upheld a Sunday-closing law against the claim that it burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In that case, appellants, Orthodox Jewish retailers, argued that, by compelling the Sunday closing of retail stores and thus making unavailable for business and shopping uses one-seventh part of the week, the challenged statute forced them either to give up the Sabbath observance—an essential part of their faith—or to forego advantages enjoyed by the non-Sabbatarian majority of the community. They pointed out, moreover, that, because of the prevailing five-day working week of a large proportion of the population, Sunday was a day peculiarly profitable to retail sellers. A four-member plurality noted that the statute did not make unlawful any religious practices of Sabbatarians; it simply made the practice of their religious beliefs more expensive. On the other hand, the state had a strong interest in improving the health, morals, and general well-being of the citizens, by establishing a day of community tranquillity, respite, and recreation, a day when the atmosphere would be one of calm and relaxation, rather than one of commercialism. This objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. "People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. . . . It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord."[114] Requiring exemptions for Sabbatarians, while theoretically possible, would present great enforcement problems, since there would be two or more days to police, rather than one, and it would be more difficult to observe whether violations occur. Moreover, to allow only people who rest on a day other than Sunday to keep their businesses open on that day may well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday observers to complain that their religions are being discriminated against. Finally, administration of such a provision might make necessary a state-conducted inquiry into religious belief. Therefore, requiring exemptions for Sabbatarians appeared to present an administrative problem of such magnitude, or to

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111 Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

112 *Id.* at 165–71. The Court found no constitutional infirmity in excluding these children from doing there what no other children could do.

113 *See* Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968).

114 *See* McGowan v. Maryland, 366 U.S. 420, 451–52 (1961).

afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable.[115]

g. Denial of Government Benefits Because of Conduct Mandated by Religious Belief[116]

[H42] Under *Sherbert, Thomas*, and *Hobbie*, "where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists, . . . [which can be justified only by a] showing that it is the least restrictive means of achieving some compelling state interest."[117] However, this test was later abandoned. As the Court held in *Smith*, these cases stand only for "the proposition that where the State has in place a *system of individual exemptions*, it may not refuse to extend that system to cases of religious hardship without compelling reason."[118] A statute providing that a person is not eligible for unemployment compensation benefits if, "without good cause," he quit work or refused available work, creates a mechanism for individualized exemptions. When a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, to consider an employee's religiously motivated resignation to be "without good cause," or to constitute "misconduct connected with his work," "tends to exhibit hostility, not neutrality, towards religion. . . . [Therefore, in such cases, it is] appropriate to require the State to demonstrate a compelling reason for denying the requested exemption."[119]

[H43] In *Sherbert*, the Court considered South Carolina's denial of unemployment compensation benefits to a Sabbatarian who refused to work on Saturdays. The Court held that the state's disqualification of Sherbert forced her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice put "the same kind of burden upon the free exercise of religion as would a fine imposed against" her for her Saturday worship. Moreover, the Court found that no compelling state interest, enforced in the eligibility provisions of the South Carolina statute, justified the substantial infringement of Sherbert's free exercise rights. The state suggested no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. In rejecting the argu-

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115 Braunfeld v. Brown, 366 U.S. 599, 602–09 (1961) (plurality opinion of four members of the Court). In advancing similar arguments, another two Justices rejected appellants' claim under the Free Exercise Clause. *See* Braunfield, *supra*, at 610 (separate opinion of Justices Frankfurter and Harlan in *McGowan v. Maryland*, 366 U.S. 420, 459, 495–522 (1961)).

116 *See also* paras. H19, H52–H53.

117 Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 717–18 (1981). *See also* Sherbert v. Verner, 374 U.S. 398, 402–04 (1963); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141–42 (1987).

118 Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 884 (1990) (emphasis added).

119 *See* Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion of three Justices, *discussing Sherbert* and *Thomas*).

ment, the Court noted, *inter alia*, that, "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon [the state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[120]

[H44] In *Thomas*, too, the Court held that Indiana's denial of unemployment benefits unlawfully burdened an employee's right to free exercise of religion. Thomas, a Jehovah's Witness, held religious beliefs that forbade his participation in the production of armaments. He was forced to leave his job when the employer closed his department and transferred him to a division that fabricated turrets for tanks. Indiana then denied Thomas unemployment compensation benefits. The Court found that the employee had been "put to a choice between fidelity to religious belief or cessation of work," and that the coercive impact of the forfeiture of benefits in this situation was undeniable. The state argued that the disqualifying provisions of its unemployment compensation scheme aimed (1) to avoid the widespread unemployment and the consequent burden on the fund resulting if people were permitted to leave jobs for "personal" reasons; and (2) to avoid a detailed probing by employers into job applicants' religious beliefs. Although these were not unimportant considerations, the Court concluded that the interests advanced by the state did not justify the burden placed on free exercise of religion. First, there was no evidence in the record to indicate that the number of people who found themselves in the predicament of choosing between benefits and religious beliefs was large enough to create widespread unemployment, or even to seriously affect unemployment. Second, although detailed inquiry by employers into applicants' religious beliefs was undesirable, there was no evidence in the record to indicate that such inquiries would occur in Indiana, or that they had occurred in any of the states that extended benefits to people in the petitioner's position. Nor was there any reason to believe that the number of people terminating employment for religious reasons would be so great as to motivate employers to make such inquiries.[121]

[H45] In *Hobbie*, Florida's denial of unemployment compensation benefits to an employee discharged for her refusal to work on her Sabbath, because of religious convictions adopted *subsequent to* employment, was also declared to be a violation of the Free Exercise Clause. In *Sherbert* and *Thomas*, the employees held their respective religious beliefs at the time of hire; subsequent changes in the conditions of employment made by the employer caused the conflict between work and belief. In that case, Hobbie's beliefs changed during the course of her employment, creating a conflict between job and faith that had not previously existed. The state contended that it would be unfair for an employee to adopt religious beliefs that conflict with existing employment and expect to continue the employment without compromising those beliefs, and that this intentional disregard of the employer's interests constituted misconduct. In effect, the state asked the Court "to single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith

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[120] Sherbert v. Verner, 374 U.S. 398, 404, 407 (1963).

[121] Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 717–19 (1981). Similarly, in *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 835 (1989), the Court held that the fact that Sunday work had become a way of life did not constitute a state interest sufficiently compelling to override a legitimate free-exercise claim, since there was no evidence that there would be a mass movement away from Sunday employment if appellant succeeded on his claim.

precede[d] employment." The Court declined to do so, noting that "[t]he First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired."[122]

[H46] "[I]f a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct."[123] In *Smith II*, the Court considered a Free Exercise Clause claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs, because they had used peyote. Their practice was to ingest peyote for sacramental purposes, and they challenged an Oregon statute of general applicability that made use of the drug criminal. In rejecting the claim, the Court declined to apply the balancing test set forth in *Sherbert*, and held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. The Court concluded that if peyote use is prohibited under state law, and because that prohibition is constitutional, a state can, consistent with the Free Exercise Clause, deny an individual unemployment compensation when his dismissal results from use of the drug.[124]

h. Exclusion of the Pursuit of a Devotional Theology Degree from a Scholarship Aid Program

[H47] *Davey* held that Washington, pursuant to its own Constitution, prohibiting even indirectly funding religious instruction that would prepare students for the ministry, could deny them such funding without violating the Free Exercise Clause. In reaching this conclusion, the Court rejected the contention that the challenged scholarship program—under which students might not use the scholarship to pursue a devotional theology degree—was presumptively unconstitutional because it was not facially neutral with respect to religion. The Court, first, noted that the state imposed neither criminal nor civil sanctions on any type of religious service or rite. It did not deny to ministers the right to participate in the political affairs of the community. And it did not require students to choose between their religious beliefs and receiving a government benefit. The state had "merely chosen not to fund a distinct category of instruction." Second, "[t]raining someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit. . . . And the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion."[125] Far from evincing the hostility toward religion, the scholarship program went a long way toward including religion in its benefits. The program permitted students

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[122] Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144 (1987).

[123] Employment Div., Dep't of Human Res. of the State of Oregon v. Smith, 485 U.S. 660, 670 (1988) (*Smith I*).

[124] Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 884, 890 (1990) (*Smith II*).

[125] Locke v. Davey, 540 U.S. 712, 721 (2004).

to attend pervasively religious schools, so long as they were accredited, and to take devotional theology courses. In short, the Court found neither in the history or text of the Washington Constitution, nor in the operation of the scholarship program, anything that suggested animus towards religion. Given the historic and substantial interest of the state in avoiding an establishment of religion, the Court therefore could not conclude that the denial of funding for vocational religious instruction alone was inherently constitutionally suspect. Without a presumption of unconstitutionality, the Court found no violation of the Free Exercise Clause, considering that "the State's interest in not funding the pursuit of devotional degrees [wa]s substantial and the exclusion of such funding place[d] a relatively minor burden on" students. For the same reasons, the Court decided that the program was not a violation of the Equal Protection Clause or of the Establishment Clause.[126]

i. Taxation

[H48] "The exaction of a tax as a condition to the exercise of religious freedom is as obnoxious . . . as the imposition of a censorship or a previous restraint. For . . . 'the power to tax the exercise of a constitutional privilege is the power to control or suppress its enjoyment.'"[127] In *Murdock*, the Court ruled that a city could not impose a flat fee payable by "all persons canvassing for or soliciting orders for goods, paintings, pictures, wares, or merchandise of any kind" on Jehovah's Witnesses who went about from door to door distributing literature and soliciting people to purchase certain religious books and pamphlets. The Court noted that the charge was "not a nominal fee imposed as a regulatory measure to defray the expense of policing the activities in question" and was in no way apportioned to the realized revenues, but constituted "a flat license tax." To the extent this license tax was levied and collected as a condition to the pursuit of activities whose enjoyment was guaranteed by the First Amendment, it was impermissible, since it "restrain[ed] in advance the constitutional liberties of press and religion and inevitably tend[ed] to suppress their exercise."[128] The Court extended *Murdock* the following term by invalidating, as applied to one who earned his livelihood as an evangelist or preacher in his home town, an ordinance that required all booksellers to pay a flat fee to procure an occupational license to sell books.[129]

[H49] Hence, "[t]he constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books."[130] Nevertheless, as the Court pointed out in the *Murdock* case, "the distinction between 'religious' activity and 'purely commercial' activity would at times be 'vital' in determining the constitutionality of flat license taxes."[131] "[W]hen a religious sect uses ordinary commercial methods of sales of articles to raise

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[126] *Id.* at 724–25.

[127] Follett v. McCormick, 321 U.S. 573, 577 (1944), *quoting* Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

[128] Murdock v. Pennsylvania, 319 U.S. 105, 113–14 (1943), *overruling* Jones v. Opelika, 316 U.S. 584 (1942).

[129] Follett v. McCormick, 321 U.S. 573, 576–77 (1944).

[130] Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

[131] Follett v. McCormick, 321 U.S. 573, 576 (1944), *discussing* Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).

propaganda funds, it is proper for the state to charge reasonable fees for the privilege of canvassing. Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial."[132] But preachers of religious faiths "are not engaged in commercial undertakings because they are dependent on their calling for a living."[133] "[T]he mere fact that the religious literature is 'sold' by itinerant preachers, rather than 'donated,' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project."[134]

[H50] "The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property."[135] The Free Exercise Clause of the First Amendment does not prohibit a state from imposing a generally applicable sales and use tax on the distribution of religious materials by a religious organization. Thus, in *Jimmy Swaggart*, the Court upheld a California law requiring retailers to pay a 6-percent sales tax on in-state sales of tangible personal property and to collect from state residents a 6-percent use tax on such property purchased outside the state. In so concluding, the Court observed that it would be "possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices."[136]

[H51] "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. . . . If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a valid claim to be exempt from paying that percentage of the income tax. . . . [F]urthermore, the obligation to pay the social security tax is not fundamentally different from the obligation to pay income taxes."[137] Subsequently, members of the Old Order Amish, who believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the Social Security system, cannot claim that the Free Exercise Clause commands their exemption from Social Security tax obligations. Indeed, "it would be very difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[138] Besides, granting such an exemption would impose the employer's religious faith on the employees.[139]

[H52] *Hernandez* held that the government's disallowance of a tax deduction for religious "auditing" and "training" services did not violate the Free Exercise Clause. The

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[132] Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).

[133] Follett v. McCormick, 321 U.S. 573, 576 (1944).

[134] Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

[135] Follett v. McCormick, 321 U.S. 573, 577–78 (1944).

[136] Jimmy Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378, 392 (1990). *See also* Texas Monthly Inc. v. Bullock, 489 U.S. 1, 21–25 (1989) (three-Justice plurality).

[137] United States v. Lee, 455 U.S. 252, 260 (1982).

[138] *Id.* at 259–60.

[139] *Id.* at 261. The Court also noted that the statute at issue did not compel anyone to accept benefits; hence, it would be possible for an Amish member, upon qualifying for Social Security benefits, to receive and pass them along to an Amish fund having parallel objectives. *Id.* at 261, n.12.

Court reasoned that "[a]ny burden imposed on auditing or training derive[d] solely from the fact that, as a result of the deduction denial, adherents ha[d] less money to gain access to such sessions. This burden [wa]s no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the 'contribution or gift' deduction would seem to pale by comparison to the overall federal income tax burden on an adherent." And the fact that Congress had already crafted some deductions and exemptions in the Internal Revenue Code was of no consequence, "for the guiding principle is that a tax must be uniformly applicable to all, except as Congress provides explicitly otherwise."[140]

[H53] In *Bob Jones*, the Court upheld an IRS ruling that revoked the tax-exempt status of private schools practicing racial discrimination, on the basis of religious beliefs. As the Court noted, although denial of tax benefits would "inevitably have a substantial impact on the operation of private religious schools, . . . [it] would not prevent those schools from observing their religious tenets." In addition, the government had a fundamental, overriding interest in eradicating racial discrimination in education. Thus, the ruling at issue was upheld against a free exercise challenge.[141]

j. Military Regulations

[H54] To accomplish its mission, "the military must foster instinctive obedience, unity, commitment, and *esprit de corps*. . . . The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.' . . . These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. . . . But 'within the military community, there is simply not the same individual autonomy as there is in the larger civilian community.' . . . [Hence,] when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[142] *Goldman* involved military dress regulations that forbade the wearing of a yarmulke (and similar religiously motivated headcoverings), while on duty. Petitioner contended that the Free Exercise Clause required the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accouterments created a "clear danger" of undermining discipline and *esprit de corps*. This argument was rejected. The Court noted that "the First Amendment does not require the military to accommodate such religious practices in the face of its view that they would detract from the uniformity sought by the dress regulations." Consequently, the challenged regulations were upheld, "as reasonably and evenhandedly regulating dress in the interest of the military's perceived need for uniformity."[143]

k. Prison Regulations

[H55] "Inmates clearly retain protections afforded by the First Amendment, . . . including its directive that no law shall prohibit the free exercise of religion."[144] Hence,

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140 Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699–700 (1989).

141 Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983).

142 Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

143 *Id.* at 509–10.

144 O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).

a state violates the First and Fourteenth Amendments when it denies a Buddhist prisoner a reasonable opportunity to pursue his religious faith, comparable to that offered other prisoners adhering to conventional religious precepts.[145]

[H56] However, lawful incarceration brings about the necessary limitation of religious freedom that is justified by the considerations underlying the penal system. When a prison regulation impinges on inmates' free exercise rights, the regulation is valid if it is "reasonably related to legitimate penological interests." In *O'Lone*, the Court refused to apply a "least restrictive alternative" standard for regulation of prisoner work rules having an impact on religious observance. There, prisoners in a state prison, members of the Islamic faith, challenged policies adopted by prison officials that resulted in their inability to attend Jumu'ah, a weekly Muslim congregational service regularly held in the main prison building and in a separate facility known as "the Farm" (Jumu'ah is commanded by the Koran, and must be held every Friday after the sun reaches its zenith and before the Asr, or afternoon prayer). The first such policy, Standard 853, required inmates in respondents' custody classifications to work outside the buildings in which they were housed and in which Jumu'ah was held, while the second, a policy memorandum, prohibited inmates assigned to outside work from returning to those buildings during the day. The Court found that both policies had a logical connection to the legitimate governmental interests in institutional order and security invoked to justify them. Standard 853 was a response to critical overcrowding and was designed to ease tension and drain on the facilities during that part of the day when the inmates were outside the confines of the main buildings. The policy memorandum was necessary, since returns from outside work details generated congestion and delays at the main gate, a high-risk area, and since the need to decide return requests placed pressure on guards supervising outside work details. Rehabilitative concerns also supported the policy memorandum, for corrections officials sought thereby to simulate working conditions and responsibilities in society. In addition, although the policies at issue might prevent some Muslim prisoners from attending Jumu'ah, their reasonableness was supported by the fact that respondents were not deprived of all forms of religious exercise but instead freely observed a number of their religious obligations. Finally, the case for the validity of these regulations was strengthened by examination of the impact that accommodation of respondents' asserted right would have on other inmates, on prison personnel, and on allocation of prison resources generally. Each of respondents' suggested accommodations—including placing all Muslim inmates in one or two inside work details or providing weekend labor for Muslim inmates—would, in the judgment of prison officials, have adverse effects on the institution. Inside work details for gang minimum inmates would be inconsistent with the legitimate concerns underlying Standard 853, and the district court had found that the extra supervision necessary to establish weekend details for Muslim prisoners would be a drain on scarce human resources at the prison. Prison officials determined that the alternatives would also threaten prison security by allowing "affinity groups" in the prison to flourish. Finally, the officials determined that special arrangements for one group would create problems, as other inmates would see that a certain segment was escaping a rigorous work detail and perceive favoritism. These concerns of prison administrators provided adequate support for the conclusion that accommodations of respondents' request to attend Jumu'ah would have undesirable results in the institution. These difficulties also made

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[145] Cruz v. Beto, 405 U.S. 319, 322 (1972) (*per curiam*).

clear that there were no "obvious, easy alternatives" to the policy adopted by the prison administration.[146]

2. The Establishment Clause

a. In General

[H57] The First Amendment provides that "Congress shall make no law respecting an establishment of religion." This provision is operative against the states by virtue of the Fourteenth Amendment.[147] The first and most immediate purpose of the Establishment Clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in [the United States,] showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of the Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[148]

[H58] In the absence of precisely stated constitutional prohibitions, the Court has drawn lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[149] The "establishment of religion" Clause "means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain

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146 O'Lone v. Estate of Shabazz, 482 U.S. 342, 350–53 (1987). The four dissenters noted that the majority's analysis ignored the fact that Jumu'ah is the central religious ceremony of Muslims, comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects. And "to deny the opportunity to affirm membership in a spiritual community [might] extinguish an inmate's last source of hope for dignity and redemption." *Id.* at 368. Moreover, the fact that Muslim inmates were able to participate in Jumu'ah throughout the entire federal prison system suggested that the practice was, under normal circumstances, compatible with the demands of prison administration. Hence, a reasonableness test in this case demanded at least minimal substantiation by prison officials that alternatives that would permit participation in Jumu'ah were infeasible. Therefore, the dissenters would require prison officials to demonstrate that the restrictions they had imposed were necessary to further an important government interest, and that these restrictions were no greater than necessary to achieve prison objectives. *Id.* at 354.

See also para. H61, n.160 (*federal law prohibiting substantial burdens on the religious exercise of prisoners, unless the burden furthers a compelling governmental interest, by the least restrictive means, is not barred by the Establishment Clause*).

147 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 49–50 (1985) (the Fourteenth Amendment, which prohibits any state from depriving any person of liberty without due process of law, imposes the same substantive limitations on the states' power to legislate that the First Amendment has always imposed on the Congress' power).

148 Engel v. Vitale, 370 U.S. 421, 431–32 (1962).

149 Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 668 (1970).

away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[150] "The First Amendment, however, does not say that, in every and all respects, there shall be a separation of Church and State. Rather, it . . . defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other."[151] The First Amendment "requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[152]

b. Relation Between the Two Religious Clauses

[H59] The Court has "said that 'there is room for play in the joints' between [the two religious clauses.] . . . In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[153] In this context, the Court has held, for example, that, given the historic and substantial anti-establishment interest of a state, the denial of state funding for vocational religious instruction alone does not amount to hostility toward religion and is not a violation of the Free Exercise and Establishment Clauses.[154]

[H60] "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so."[155] Hence, the Free Exercise Clause does not mean "that a majority [can] use the machinery of the State to practice its beliefs."[156] Nor does it mean that government may grant an employee a right not to work on his Sabbath.[157]

[H61] Nevertheless, "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause."[158] "The Government's rights to the use of its own land, for example, need not

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150 Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

151 Zorach v. Clauson, 343 U.S. 306, 312 (1952).

152 Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

153 Locke v. Davey, 540 U.S. 712, 718–19 (2004).

154 *Id.* at 720–25. *See, in extenso*, para. H47.

155 Lee v. Weisman, 505 U.S. 577, 587 (1992).

156 Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 226 (1963) (invalidating a state practice of permitting public schools to read Bible verses at the opening of each school day).

157 Estate of Thornton v. Caldor, 472 U.S. 703, 709–10 (1985).

158 Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 673 (1970) (a state tax exemption for church property does not violate the Establishment Clause). *See, in extenso*, para. H107.

and should not discourage it from accommodating religious practices" engaged in by members of certain Indian tribes.[159] Further, religious exercise may be accorded heightened protection from government-imposed lawful burdens, for example, in the prison context.[160] Religious organizations may be exempted from a statutory prohibition of religious discrimination in employment.[161] Moreover, the state may encourage religious instruction or cooperate with religious authorities by adjusting the schedule of public events to sectarian needs, "[f]or it then respects the religious nature of [the American] people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."[162] Thus, in *Zorach*, the Court found no constitutional objection to a municipal program permitting public school children to absent themselves one hour a week for religious observance and education outside the school grounds.[163]

[H62] The Court has recognized that the government sometimes *must* accommodate religious practices, and that such accommodations do not violate the Establishment Clause.[164] In *Yoder*, involving a judicial exemption of Amish children from compulsory attendance at high school, the Court noted that "[t]he purpose and effect of such an exemption [we]re not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society to survive free from the heavy impediment compliance with the [state] compulsory education law would impose."[165] And, in *Sherbert*, the Court disapproved a state's attempt to deny unemployment compensation benefits to a member of the Seventh-Day Adventist Church who declined to work on Saturday, stressing that such an accommodation "reflects nothing more than the governmental obligation

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159 Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 454 (1988).

160 *See* Cutter v. Wilkinson, 544 U.S. 709 (2005). This case involved Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000, providing in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." The Court held that the foregoing provision is, on its face, compatible with the Establishment Clause, because "it alleviates exceptional government-created burdens on private religious exercise," without elevating accommodation of religious observances over an institution's need to maintain order and safety. *Id.* at 720, 722. In this regard, the Court stressed that *"an accommodation must be measured so that it does not override other significant interests." Id.* at 722 (emphasis added). Moreover, it observed that, while the Act adopts a "compelling interest" standard, context matters in the application of that standard, and that lawmakers anticipated that courts would apply the Act's standard with due deference to prison administrators' experience and expertise. Finally, the Court rejected the argument that the Act was invalid "as impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights," noting, in particular, that *"religious accommodations need not come packaged with benefits to secular entities or with additional protections for other fundamental rights." Id.* at 724 (emphasis added).

161 Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334–40 (1987). *See, in extenso*, para. H137.

162 Zorach v. Clauson, 343 U.S. 306, 314 (1952).

163 *Id.* at 313–15.

164 See Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144–45 (1987); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705–06 (1994).

165 Wisconsin v. Yoder, 406 U.S. 205, 234, n.22 (1972).

of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[166]

c. Applicable Standards of Review

[H63] Under *Lemon*, a statute or practice that touches upon religion, if it is to be permissible under the Establishment Clause, "must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion."[167] The Court has recognized that these "are no more than helpful signposts."[168] For example, *Marsh* ignored the *Lemon* framework entirely and was decided by reference to historical practices and understandings.[169] The Court's decision in *Lee* conspicuously avoided using the *Lemon* test, but also declined the invitation to repudiate it.[170] Nevertheless, during recent years, a majority of the members of the Court has disapproved the *Lemon* test.[171]

[H64] *Lemon*'s first prong focuses on the purpose that animated adoption of the challenged law. The purpose prong of the *Lemon* test asks whether government's actual *predominant* purpose is "to endorse or disapprove of religion."[172] "This does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement 'that the government show a callous indifference to religious groups,' . . . and the Establishment Clause has never been so interpreted. Rather, *Lemon*'s 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."[173] This intention may be evidenced by promotion of religion, in gen-

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166 Sherbert v. Verner, 374 U.S. 398, 409 (1963).

167 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

168 Hunt v. McNair, 413 U.S. 734, 741 (1973).

169 *See* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding state legislative chaplains).

170 Lee v. Weisman, 505 U.S. 577, 568–567 (1992).

171 *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–400 (1993) (Scalia, J., joined by Thomas, J., concurring in judgment); Allegheny County v. Am. Civil Liberties Union, 492 U.S. 573, 655–57 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 346–49 (1987) (O'Connor, J., concurring in judgment); Wallace v. Jaffree, 472 U.S. 38, 107–13 (1985) (Rehnquist, J., dissenting).

According to Justice O'Connor, the inquiry framed by the *Lemon* test should be "whether government's purpose is to endorse or disapprove of religion and whether the statute actually conveys a message of endorsement or disapproval." *See* Wallace v. Jaffree, 472 U.S. 38, 69 (1985).

172 *See* Edward v. Aguillard, 482 U.S. 578, 585 (1987), in conjunction with McCreary County v. Am. Civil Liberties Union of Kentucky, 545 U.S. 844 (2005).

173 Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987) ("it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions"). *See also* McCreary County v. Am. Civil Liberties Union of Kentucky, 545 U.S. 844 (2005) ("[T]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. . . . When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.").

eral,[174] or by advancement of a particular religious belief.[175] While the Court is normally deferential to a state's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.[176] For example, in *Stone*, the Court held that a statute requiring the posting of the Ten Commandments in public schools violated the Establishment Clause, even though the Kentucky legislature asserted that its goal was educational.[177] If a statute does not have a clearly secular purpose, no consideration of the second or third criteria of *Lemon* is necessary. For even though a statute, which is motivated in part by a religious purpose, may satisfy the first criterion, the First Amendment requires that a statute must be invalidated if it is entirely or predominantly motivated by a purpose to advance religion.[178]

[H65] "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government *itself* has advanced religion through its own activities and influence."[179] In assessing a law's "effect," the Court examines the character of the institutions benefited or prejudiced (e.g., whether the institutions were predominantly religious)[180] and the nature of the challenged government action (e.g., whether

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[174] *See* Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (the Establishment Clause protects individual freedom of conscience "to select any religious faith or none at all"). *See also* McCreary County v. Am. Civil Liberties Union of Kentucky, 545 U.S. 844 (2005) ("Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding, reached after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens. . . . By showing a purpose to favor religion, the government sends the message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.").

[175] *See, e.g.*, Stone v. Graham, 449 U.S. 39, 41 (1980) (*per curiam*) (invalidating a statute requiring the posting of the Ten Commandments in public school rooms).

[176] *See* Edward v. Aguillard, 482 U.S. 578, 586–87 (1987).

[177] Stone v. Graham, 449 U.S. 39, 41–42 (1980).

[178] *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985); McCreary County v. Am. Civil Liberties Union of Kentucky, 545 U.S. 844 (2005). In the latter case, the Court explicitly rejected the County's request to abandon *Lemon*'s purpose test. In doing so, the Court stated, *inter alia:* "[S]crutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts. . . . The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act. . . . [O]ne consequence of the corollary that Establishment Clause analysis does not look to the veiled psyche of government officers could be that in some of the cases in which establishment complaints failed, savvy officials had disguised their religious intent so cleverly that the objective observer just missed it. But that is no reason for great constitutional concern. If someone in the government hides religious motive so well that the 'objective observer, acquainted with the text, legislative history, and implementation of the statute,' cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides. A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion." *Id.*

[179] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987).

[180] *See* Agostini v. Felton, 521 U.S. 203, 232 (1997), *citing* Meek v. Pittenger, 421 U.S. 349, 363–64 (1975).

it was neutral and non-ideological).[181] "In recent years, [the Court] has paid particularly close attention to whether the challenged governmental practice has the effect of '*endorsing*' religion. . . . Of course, the word 'endorsement' is not self-defining. Rather, it derives its meaning from other words that th[e] Court has found useful over the years in interpreting the Establishment Clause."[182] Thus, it has been noted that the prohibition against governmental endorsement of religion "precludes government from *conveying or attempting to convey a message* that religion or a particular religious belief is *favored or preferred*."[183] "Moreover, the term 'endorsement' is closely linked to the term 'promotion,'"[184] and the Court has held that government "may not promote one religion or religious theory against another or even against the militant opposite."[185] "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,'[186] the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from *appearing to take a position* on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[187]

[H66] "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[188] "When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters."[189] In *Agostini*, "the Court folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same factors, . . . and the degree of entanglement has implications for whether a statute advances or inhibits religion."[190] Indeed, "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause."[191]

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[181] *Cf.* Agostini v. Felton, 521 U.S. 203, 232 (1997), *citing* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947). A law does not have the primary effect of advancing religion merely because it happens to coincide with the tenets of some religions. *See* Bowen v. Kendrick, 487 U.S. 589, 613 (1988).

[182] Allegheny County v. Am. Civil Liberties Union, 492 U.S. 573, 592–93 (1989) (emphasis added).

[183] Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment) (emphasis added).

[184] Allegheny County v. Am. Civil Liberties Union, 492 U.S. 573, 593 (1989).

[185] Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

[186] *See* Wallace v. Jaffree, 472 U.S. 38, 59–60 (1985), using the concepts of "endorsement," "promotion," and "favoritism" interchangeably.

[187] Allegheny County v. Am. Civil Liberties Union, 492 U.S. 573, 593–94 (1989) (emphasis added). In that case, five Justices found the likely reaction of a "reasonable observer" relevant for purposes of determining whether an endorsement was present. *Id.* at 620 (opinion of Blackmun, J.); *id.* at 635–36 (opinion of O'Connor, J.); *id.* at 642–43 (opinion of Brennan, J. joined by Marshall and Stevens, JJ.).

[188] McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

[189] Aguilar v. Felton, 473 U.S. 402, 409–10 (1985).

[190] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 668–69 (2002), *citing* Agostini v. Felton, 521 U.S. 203, 232–33 (1997).

[191] Agostini v. Felton, 521 U.S. 203, 233 (1997), *citing* Bowen v. Kendrick, 487 U.S. 589, 615–17 (1988) (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); Roemer v. Bd. of Pub. Works of

[H67] What is crucial to a non-entangling aid program is the ability of the state to identify and subsidize separate secular functions carried out at the religious institution, without on-site inspections and government analysis of the institution's expenditures on secular, as distinguished from religious, activities being necessary to prevent diversion of the funds to sectarian purposes;[192] "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."[193] Such "pervasive monitoring by public authorities may infringe precisely those Establishment Clause values at the root of the prohibition of excessive entanglement."[194] By contrast, under the Court's current Establishment Clause understanding, the considerations whether a government aid program requires "administrative cooperation" between the government and sectarian institutions, and whether such a program might increase the dangers of "political divisiveness" are deemed insufficient to create an "excessive entanglement."[195] Moreover, "generally applicable administrative and recordkeeping regulations may be imposed on religious organizations without running afoul of the Establishment Clause."[196] "[R]outine regulatory interaction, [such as application of neutral tax laws,] which involves no inquiries into religious doctrine, . . . no delegation of state power to a religious body, . . . and no detailed monitoring, . . . does not of itself violate the nonentanglement command."[197]

[H68] In cases "where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, [the Court has seen] no justification for applying strict scrutiny to a statute that passes the *Lemon* test. The proper inquiry is whether [the legislature] has chosen a rational classification to further a legitimate end."[198]

[H69] The *Lemon* test is "intended to apply to laws affording a uniform benefit to *all* religions and not to provisions . . . that discriminate *among* religions."[199] *Larson* held that a statute granting denominational preferences must be treated as suspect, and strict scrutiny must be applied in adjudging its constitutionality. A statute that facially exempts from state registration and reporting requirements only those religious organizations that derive more than half their funds from members clearly grants denominational preferences and, consequently, is invalid, "unless it is justified by a compelling governmental interest . . . and unless it is closely fitted to further that interest."[200]

Maryland, 426 U.S. 736, 764–65 (1976) (no excessive entanglement where state conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion).

192 *See* Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736, 765 (1976); Tilton v. Richardson, 403 U.S. 672, 688 (1971) (plurality opinion).

193 New York v. Cathedral Acad., 434 U.S. 125, 133 (1977).

194 Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 413 (1985).

195 *See* Agostini v. Felton, 521 U.S. 203, 234 (1997).

196 Jimmy Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378, 395 (1990).

197 Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 696–97 (1989). *See also* Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305–06 (1985) (the non-entanglement principle does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations).

198 Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987).

199 Larson v. Valente, 456 U.S. 228, 252 (1982).

200 *Id.* at 245–47. Appellants asserted that the state had a significant interest in protecting

d. Aid to Religion and Religious Institutions

i. In General

[H70] The Establishment Clause prohibits government-financed indoctrination into the beliefs of a particular religious faith.[201] For example, a tax levied for the direct support of a church or group of churches would run contrary to the First Amendment.[202]

[H71] But "religious institutions need not be quarantined from public benefits that are neutrally available to all."[203] For instance, a state university does not violate the Establishment Clause, when it exacts a student fee for the purpose of funding the whole spectrum of student speech, whether it manifests a religious view, an anti-religious view, or neither.[204]

[H72] "The Court has not been blind to the fact that, in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way."[205] Hence, the argument that all aid to religious institutions is forbidden, because aid to one aspect of an institution frees it to spend its other resources on religious ends, cannot stand.[206]

[H73] In *Agostini*, the Court articulated three primary criteria to guide the determination whether a government aid program impermissibly advances religion: "(1) whether the aid results in governmental indoctrination; (2) whether the aid program defines its recipients by reference to religion; and (3) whether the aid creates an excessive entanglement between government and religion. . . . [T]he same criteria [can] be reviewed to determine whether a program constitutes an endorsement of religion."[207]

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its citizens from abusive practices in the solicitation of funds for charity, and that this interest retained importance when the solicitation was conducted by a religious organization. The Court assumed, *arguendo*, that the Act at issue generally was addressed to a sufficiently "compelling" governmental interest. However, it concluded that appellants had not demonstrated that the challenged 50-percent rule was closely fitted to further the interest. More specifically, appellants' arguments (1) that members of a religious organization could exercise supervision and control over the solicitation activities of the organization when membership contributions exceeded 50 percent; (2) that membership control was an adequate safeguard against abusive solicitations of the public; and (3) that the need for public disclosure rose in proportion with the percentage of non-member contributions, found no substantial support in the record of the case.

[201] Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985).

[202] Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 840 (1995).

[203] Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736, 746 (1976) (plurality opinion).

[204] Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 840–41 (1995). As the Court noted, the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent any mistaken impression that the student newspapers speak for the university.

[205] Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 658, n.6 (1980), *quoting* Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736, 750 (1976) (plurality opinion).

[206] *See* Hunt v. McNair, 413 U.S. 734, 743 (1973).

[207] *See* Mitchell v. Helms, 530 U.S. 793, 845 (2000), *citing* Agostini v. Felton, 521 U.S. 203, 234–35 (1997). Valid aid to non-public, non-sectarian institutions can provide no basis, under

ii. Aid to Religious Schools or to Their Students[208]

[H74] "[P]arents may, in the discharge of their duty under state compulsory education laws, send their children to a religious, rather than a public, school, if the school meets the secular educational requirements which the state has power to impose."[209] "The question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action."[210] In distinguishing between indoctrination that is attributable to the state and indoctrination that is not, *neutrality* is an important factor to be taken into consideration. Indeed, "where the aid is allocated on the basis of neutral, secular criteria, . . . and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," the aid is less likely to have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination.[211] However, a government aid program does not pass constitutional muster *solely* because of the generality of the aid and the evenhandedness of its distribution.[212]

[H75] "At least three main lines of enquiry addressed particularly to school aid have emerged to complement evenhandedness neutrality. First, [the Court has] noted that two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools. Second, [the Court has] identified two important characteristics of the method of distributing aid: directness or indirectness of distribution and distribution by genuinely independent choice. Third, [the Court has] found relevance in at least three characteristics of the aid itself: its religious content; its cash form; and its diversion to religious support."[213]

[H76] "Two types of school aid recipients have raised special concern. First, [the Court has] recognized the fact that the overriding religious mission of certain schools, those sometimes called 'pervasively sectarian,' is not confined to a discrete element of the cur-

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the Equal Protection Clause, for sustaining aid to sectarian establishments that is violative of the Establishment Clause. *See* Sloan v. Lemon, 413 U.S. 825, 833–34 (1973).

[208] *See also* para. H107 (*tax exemptions*).

[209] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947), *citing* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

[210] Mitchell v. Helms, 530 U.S. 793, 809 (2000), *citing* Agostini v. Felton, 521 U.S. 203, 226 (1997).

[211] Agostini v. Felton, 521 U.S. 203, 231 (1997). In that case, the Court declined to conclude that the constitutionality of an educational aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Id.* at 229. *See also* Zelman v. Simmons-Harris, 536 U.S. 639, 658 (2002) ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.").

[212] *See* Mitchell v. Helms, 530 U.S. 793, 838–39 (2000) (O'Connor and Breyer. JJ., concurring in the judgment); *id.* at 883–84 (Souter, Stevens and Ginsburg, JJ., dissenting). The four-Justice plurality held that government aid to religious schools does not have the effect of advancing religion, so long as the aid is offered on a neutral basis and the aid is secular in content. *Id.* at 809–10, 829–35. Hence, the plurality appeared to promote evenhandedness neutrality to a single and sufficient test for constitutionality of school aid under the Establishment Clause.

[213] Mitchell v. Helms, 530 U.S. 793, 885 (2000) (Souter, J., dissenting).

riculum, . . . but permeates their teaching."[214] "Based on record evidence and long experience, [the Court has] concluded that religious teaching in such schools is at the core of the instructors' individual and personal obligations."[215] Although the Court does not assume that public school teachers assigned to religious schools for limited purposes will teach religiously,[216] it presumes that individual religious teachers will teach that way.[217] "As religious teaching cannot be separated from secular education in such schools or by such teachers, direct government subsidies to such schools are prohibited because they will inevitably and impermissibly support religious indoctrination."[218] "Second, [the Court has] expressed special concern about aid to primary and secondary religious schools. . . . On the one hand, . . . the youth of the students in such schools makes them highly susceptible to religious indoctrination."[219] "On the other, . . . the religious element in the education offered in most sectarian primary and secondary schools is far more intertwined with the secular than in university teaching, where the natural and academic skepticism of most older students may separate the two."[220] "Thus, government benefits accruing to these pervasively religious primary and secondary schools raise special dangers of diversion into support for the religious indoctrination of children and the involvement of government in religious training and practice."[221]

[H77] "[The Court has] also evaluated the portent of support to an organization's religious mission that may be inherent in the method by which aid is granted, finding pertinence in at least two characteristics of distribution. First, [the Court has] asked whether aid is direct or indirect, observing distinctions between government schemes with individual beneficiaries and those whose beneficiaries in the first instance might be religious schools."[222] Direct aid obviously raises greater concerns,[223] "although recent cases have discounted this risk factor, looking to other features of the distribution mechanism."[224]

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[214] *Id.* at 885–86 (Souter, J., dissenting), *citing* Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 671 (1970); Lemon v. Kurtzman, 403 U.S. 602, 636–37 (1971).

[215] Mitchell v. Helms, 530 U.S. 793, 886 (2000) (Souter, J., dissenting).

[216] *Id.* at 886, n.7, *citing* Agostini v. Felton, 521 U.S. 203, 223–28 (1997).

[217] Mitchell v. Helms, 530 U.S. 793, 886, n.7 (2000) (Souter, J., dissenting), *citing* Lemon v. Kurtzman, 403 U.S. 602, 615–20 (1971); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973); Meek v. Pittenger, 421 U.S. 349, 369–71 (1975); Wolman v. Walter, 433 U.S. 229, 249–50 (1977).

[218] Mitchell v. Helms, 530 U.S. 793, 887 (2000) (Souter, J., dissenting), *citing* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993).

[219] Mitchell v. Helms, 530 U.S. 793, 887 (2000) (Souter, J., dissenting), *citing* Lemon v. Kurtzman, 403 U.S. 602, 616 (1971).

[220] Mitchell v. Helms, 530 U.S. 793, 887 (2000) (Souter, J., dissenting), *citing* Tilton v. Richardson, 403 U.S. 672, 685–89 (1971) (plurality opinion); Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736, 750 (1976) (plurality opinion).

[221] Mitchell v. Helms, 530 U.S. 793, 887 (2000) (Souter, J., dissenting).

[222] Mitchell v. Helms, 530 U.S. 793, 888 (2000) (Souter, J., dissenting), *citing* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (bus fare supports parents and not schools); Bd. of Educ. v. Allen, 392 U.S. 236, 243–44, n.6 (1968) (textbooks go to benefit children and parents, not schools); Lemon v. Kurtzman, 403 U.S. 602, 621 (1971) (invalidating direct aid to schools, for teachers' salaries); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480, 482 (1973) (invalidating direct testing aid to schools).

[223] *See* Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736, 747 (1976); Tilton v. Richardson, 403 U.S. 672, 679–80 (1971).

[224] Mitchell v. Helms, 530 U.S. 793, 888 (2000) (Souter, J., dissenting), *citing* Agostini v. Felton, 521 U.S. 203, 225–26 (1997).

Second, indirect aid that reaches religious schools only incidentally, a result of numerous individual choices, does not contravene the Establishment Clause. Thus, the Court has "declared the constitutionality of programs providing aid directly to parents or students as scholarship money or tax deductions, where such aid may pay for education at some sectarian institutions, . . . but only as the result of 'genuinely independent and private choices' of aid recipients."[225]

[H78] "In addition to the character of the school to which the benefit accrues and its path from government to school, a number of features of the aid itself have figured in the classifications [the Court has] made. First, the First Amendment bars *aid with actual religious content*, which would obviously run afoul of the ban on the government's participation in religion."[226] "In cases where [the Court has] permitted aid, it has regularly characterized it as 'neutral,' in the sense of being without religious content."[227] Second, direct monetary government aid, which makes its way into the coffers of religious schools, is constitutionally suspect, since it falls precariously close to the original object of the Establishment Clause's prohibition.[228] In this context, lack of a secular content restriction is of decisive importance.[229] Third, government aid is invalid when it is *diverted* to religious education.[230] For example, in upholding a scheme to provide stu-

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[225] Mitchell v. Helms, 530 U.S. 793, 889 (2000) (Souter, J., dissenting), *quoting* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986). *See also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9–10 (1993); Zelman v. Simmons-Harris, 536 U.S. 639, 651 (2002). *Cf.* Mueller v. Allen, 463 U.S. 388, 399 (1983).

[226] Mitchell v. Helms, 530 U.S. 793, 889–90 (2000) (Souter, J., dissenting), *citing* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 668 (1970).

[227] Mitchell v. Helms, 530 U.S. 793, 890 (2000) (Souter, J., dissenting), *citing* Tilton v. Richardson, 403 U.S. 672, 688 (1971) (characterizing buildings as "religiously neutral"); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (describing translator as "neutral service"); Agostini v. Felton, 521 U.S. 203, 232 (1997) (*discussing* need to assess whether nature of aid was "neutral and nonideological").

[228] *See* especially Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) (noting that paying salaries of parochial school teachers creates too much of a risk that such support will aid the teaching of religion, and striking down such programs because of the need for pervasive monitoring that would be required). *See also* Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480, 482 (1973) (striking down direct money grant for testing expenses).

[229] *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 762, 774 (1973) (striking down direct money grants for maintaining and repairing buildings, because there was no attempt to restrict payments to those expenditures related exclusively to secular purposes). *See also Tilton v. Richardson*, 403 U.S. 672 (1971), where the Court considered a federal statute that authorized grants to universities for the construction of buildings and facilities to be used exclusively for secular educational purposes. The statute was held unconstitutional only to the extent that a university's obligation not to use the facility for sectarian instruction or religious worship appeared to expire at the end of 20 years. The plurality opinion emphasized that limiting the prohibition for religious use of the structure to 20 years obviously opened the facility to use for any purpose at the end of that period, and, in that event, the original federal grant would, in part, have the effect of advancing religion. *Id.* at 683. *See also id.* at 659–61 (separate opinion of Justice Brennan) and *id.* at 665, n.1 (Justice White, concurring in judgment), 692 (Justice Douglas, dissenting in part). In *Mitchell v. Helms*, 530 U.S. 793 856–57 (2000), Justice O'Connor noted that "to hold a statute unconstitutional because it lacks a secular content restriction is quite different from resting on a divertibility rationale."

[230] *See* Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor and Breyer, JJ., concurring

dents with secular textbooks, the Court emphasized that nothing in the record supported the proposition that such textbooks were, in fact, used by the parochial schools to teach religion.[231] In *Agostini*, the Court upheld a city program under which public school teachers were sent into parochial schools to provide remedial education to disadvantaged children, taking into account that there was no evidence that any public instructor teaching on parochial school premises had attempted to inculcate religion in students.[232] Diversion also was the issue in an order remanding an "as-applied" challenge to a grant supporting counseling on teenage sexuality for findings that the aid had not been used to support religious education.[233]

[H79] At issue in *Lemon I* were two state-aid plans, a Rhode Island program to grant a 15-percent supplement to the salaries of private, church-related school teachers teaching secular courses, and a Pennsylvania program to reimburse private church-related schools for the entire cost of secular courses also offered in public schools. The statutes had a secular purpose: they were intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. Nevertheless, both of them fostered "excessive entanglement" of church schools and state. In reviewing the Rhode Island program, the Court found that the aided schools, elementary and secondary, were characterized by substantial religious activity and purpose. They were located near parish churches. Religious instruction was considered part of the total educational process. Religious symbols and religious activities abounded. Two-thirds of the teachers were nuns, and their operation of the schools was regarded as an integral part of the religious mission of the Catholic Church. The schooling came at an impressionable age. The form of aid also cut against the programs. Unlike the textbooks in *Allen*[234] and the bus transportation in *Everson*,[235] the services of the state-supported teachers could not be counted on to be purely secular: "in terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." The teachers were bound to mix religious teachings with secular ones, not by conscious design, perhaps, but because the mixture was inevitable when teachers (themselves usually Catholics) were "employed by a religious organization, subject to the direction and discipline of religious authorities, and work[ed] in a system dedicated to rearing children in a particular faith." The state had to be certain, given the Religion Clauses, that subsidized teachers did not inculcate religion. Indeed, the state there had undertaken to do so. To ensure that no trespass occurred, the state had carefully conditioned its aid with pervasive restrictions. An eli-

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in the judgment); *id.* at 890, 909 (Souter, Stevens, and Ginsburg, JJ., dissenting). The four-Justice plurality held that so long as the governmental aid is not itself unsuitable for use in the public schools because of religious content, and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern. *Id.* at 820, 834. The two Justices who concurred in the judgment held that to establish a First Amendment violation, plaintiffs must prove that the aid in question *actually* is, or has been, used for religious purposes. *Id.* at 857. The three dissenters adopted a *divertibility* rationale, considering that a *substantial risk of diversion* suffices to invalidate a government aid program on establishment grounds. *Id.* at 909.

231 Bd. of Educ. v. Allen, 392 U.S. 236, 248 (1968).

232 Agostini v. Felton, 521 U.S. 203, 226–27 (1997).

233 Bowen v. Kendrick, 487 U.S. 589, 621 (1988).

234 *See* para. H87.

235 *See* para. H85.

gible recipient should teach only those courses that were offered in the public schools and use only those texts and materials that were found in the public schools. In addition, the teacher should not engage in teaching any course in religion. "A comprehensive, discriminating, and continuing state surveillance [would] inevitably be required to ensure that these restrictions [we]re obeyed and the First Amendment otherwise respected. . . . [Such] prophylactic contacts [would] involve excessive and enduring entanglement between state and church."[236] The Pennsylvania program, which provided state financial aid directly to church-related schools, foundered for similar reasons. In particular, the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures were religious and which were secular would create "an intimate and continuing relationship between church and state."[237] The Court also pointed to another kind of church-state entanglement threatened by the Rhode Island and Pennsylvania programs, namely, their "divisive political potential." They represented successive and, very likely, permanent annual appropriations that benefited relatively few religious groups. Political factions, supporting and opposing the programs, were bound to divide along religious lines. This was one of the principal evils against which the First Amendment was intended to protect.[238]

[H80] *Lemon II* posed the question of the appropriate relief to be ordered in light of *Lemon I*'s invalidation of the Pennsylvania private school aid statute. Future payments under that statute were enjoined by the district court. The statute's challengers, however, also sought to enjoin the payment of funds intended to reimburse aided schools for expenses incurred in reliance on the statute *prior* to its invalidation in *Lemon I*. The Court affirmed the denial of the injunction, "reasoning that the payments would not substantially undermine constitutional interests, and that there had been reasonable reliance by the schools on receipt of the funds, especially since the challengers, although they had filed suit before the expenses were incurred, had dropped an attempt to enjoin payments pending the outcome of the litigation."[239]

[H81] "The primary constitutional evil that the *Lemon II* injunction was intended to rectify was the excessive governmental entanglement inherent in Pennsylvania's elaborate procedures for ensuring that 'educational services to be reimbursed by the State were kept free of religious influences.' . . . The payments themselves were assumed to be constitutionally permissible, since they were not to be directly supportive of any sectarian activities. Because the State's supervision had long since been completed with respect to expenses already incurred, the proposed payments were held to pose no continued threat of excessive entanglement."[240] Unlike the constitutional defect in the state

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[236] Lemon v. Kurtzman, 403 U.S. 602, 617–19 (1971) (*Lemon I*).

[237] *Id.* at 620–22.

[238] *Id.* at 622–23. The Court found it unnecessary to decide whether the programs were constitutionally infirm on the additional ground that the "primary effect" of any state payments to church-related schools would be to promote the cause of religion in contravention of the Establishment Clause. Subsequent to *Lemon I*, Pennsylvania enacted a statute providing funds to reimburse parents for a portion of tuition expenses incurred in sending their children to non-public schools. This statute was not much different from the program involved in *Nyquist* (*see* para. H102) and was invalidated on similar grounds. *See* Sloan v. Lemon, 413 U.S. 825, 828–33 (1973).

[239] *See* Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736, 745, n.11 (1976), *discussing* Lemon v. Kurtzman, 411 U.S. 192 (1973) (*Lemon II*).

[240] *See* New York v. Cathedral Acad., 434 U.S. 125, 129 (1977).

law reviewed in *Lemon I*, the constitutional invalidity of the New York statute examined in *Levitt*[241] was "in the payment itself, rather than in the process of its administration. The New York statute was held to be constitutionally invalid because 'the aid that [would] be devoted to secular functions [wa]s not identifiable and separable from aid to sectarian activities.' . . . This was so both because there was no assurance that the lump-sum payments reflected actual expenditures for mandated services, and because there was an impermissible risk of religious indoctrination inherent in some of the required services themselves."[242] Under these considerations, the Court held, in *Cathedral Academy*, that a New York statute, which had been enacted in response to a district court's order, enjoining any payments under the Act found unconstitutional in *Levitt*, and authorized payments for the identical services that were to be reimbursed, under the latter Act, amounted to "a new and independently significant infringement of the First and Fourteenth Amendments" and was for the same reasons invalid.[243] The Academy argued, however, that the new statute required a detailed audit in the Court of Claims to establish whether or not the amounts claimed for mandated services constituted a furtherance of the religious purposes of the claimant. The argument was rejected, since, "even if such an audit were contemplated, this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on First Amendment guarantees. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute." Subsequently, the new statute was declared unconstitutional, because it would either have the primary effect of aiding religion or would result in excessive state involvement in religious affairs.[244]

[H82] In 1970, the New York legislature appropriated public funds to reimburse both church-sponsored and secular non-public schools for performing various services mandated by the state. The most expensive of these services was the administration, grading, and the compiling and reporting of the results of tests and examinations. Covered tests included both state-prepared examinations and the more common and traditional teacher-prepared tests. Although the legislature prohibited any payment for religious worship or instruction, the statute did not provide for any state audit of school financial records that would ensure that public funds were used only for secular purposes. In *Levitt*, the Court struck down this enactment as violative of the Establishment Clause. The majority focused its concern on the statute's reimbursement of funds spent by schools on traditional teacher-prepared tests. "[D]espite the obviously integral role of such testing in the total teaching process, no attempt [wa]s made under the statute, and no means [we]re available, to assure that internally prepared tests [we]re free of religious instruction."[245] "Thus, the inherent teacher discretion in devising, presenting, and grading traditional tests, together with the failure of the legislature to provide for a

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241 *See* para. H82.

242 *See* New York v. Cathedral Acad., 434 U.S. 125, 131 (1977).

243 *Id.* at 134.

244 *Id.* at 132–33.

245 Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973). *See also* para. H81.

method of auditing to ensure that public funds would be spent exclusively on secular services, disabled the enactment from withstanding constitutional scrutiny."[246]

[H83] In *Wolman*, the Court sustained, in relevant part, an Ohio statutory scheme that authorized, *inter alia*, the expenditure of state funds to supply, for use by pupils attending non-public schools, such standardized tests and scoring services as were in use in the public schools of the state. The Court held that this provision, which was aimed at providing the young with an adequate secular education, reflected a secular state purpose. As the Court's opinion stated, "[t]he State may require that schools that are utilized to fulfill the State's compulsory education requirement meet certain standards of instruction, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." The Court further explained that, under the Ohio provision, the non-public school did not control the content of the test or its result. This served to prevent the use of the test as a part of religious teaching and thus avoided that kind of direct aid to religion found present in *Levitt*. The provision of testing services, hence, did not have the primary effect of aiding religion. Moreover, the inability of the school to control the test eliminated the need for the supervision that might give rise to excessive entanglement. The Court, thus, concluded that the Ohio statute, insofar as it concerned examinations, passed constitutional muster.[247]

[H84] In *Regan*, the Court upheld a New York program whereby private schools were reimbursed for the actual cost of administering state-required tests, which addressed secular academic subjects. Although the Ohio statute, under review in *Wolman*, and the New York statute, involved in *Regan*, were not identical, the differences were not of constitutional dimension. In both cases, the tests were prepared by the state; the non-public school, thus, had no control whatsoever over the content of the tests. But the New York statute, unlike the Ohio statute at issue in *Wolman*, provided for direct cash reimbursement to the non-public school for administering the state-prescribed examinations and for grading two of them. However, the Court declined to draw a formalistic constitutional distinction "between paying the nonpublic school to do the grading and paying state employees or some independent service to perform that task," noting that "the grading function is the same regardless of who performs it and would not have the primary effect of aiding religion whether or not performed by nonpublic school personnel." Furthermore, in view of the nature of the tests, the Court found that the grading of the examinations by non-public school employees afforded no control to the school over the outcome of any of the tests. The tests that were graded by non-public school employees consisted largely or entirely of objective, multiple-choice questions, which could be graded by machine and, even if graded by hand, afforded the schools no more control over the results than if the tests were graded by the state. Even though some of the tests might include an essay question or two, the Court found that the chance that grading the answers to state-drafted questions in secular subjects could or would be used to gauge a student's grasp of religious ideas was minimal, especially in light of the state procedures designed to guard against serious inconsistencies in grading and any misuse of essay questions. These procedures included the submission of completed and graded comprehensive tests to the state department of education for review off the school premises. Hence, there was no substantial risk that the examinations could be

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[246] Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 650 (1980), *discussing Levitt*.

[247] Wolman v. Walter, 433 U.S. 229, 240 (1977).

used for religious educational purposes. In addition, under the New York law, each year, private schools should submit to the state a report containing information with respect to the student body, faculty, support staff, physical facilities, and curriculum of each school. This reporting function was ministerial and lacking ideological content or use. Reimbursement for the costs of so complying with state law, therefore, had primarily a secular, rather than a religious, purpose and effect. Finally, the plan, on its face, did not violate the non-entanglement command, since the services for which the private schools would be reimbursed were "discrete and clearly identifiable," and the reimbursement process was straightforward and incorporated an extensive auditing system, safeguarding against excessive or misdirected reimbursement.[248]

[H85] *Everson* sustained a statute authorizing repayment to parents of their children's transportation expenses to public and Catholic schools. The Court recognized that children were helped to get to church schools. But it found that the purpose and effect of the statute in question was general "public welfare legislation:" to protect all school children from the "very real hazards of traffic." Hence, the expenditure of public funds for school transportation, to religious schools or to any others, was like the expenditure of public funds to provide policemen to safeguard these same children or to provide "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."[249]

[H86] By contrast, *Wolman* struck down the employment of publicly funded buses for field trips controlled by parochial school teachers. First, the Court noted that the nonpublic school controlled the timing of the trips and, within a certain range, their frequency and destinations. Thus, the schools, rather than the children, truly were the recipients of the service. Second, although a trip might be to a location that would be of interest to those in public schools, it was the individual teacher who made a field trip meaningful. The field trips were an integral part of the educational experience and, where the teacher worked within and for a sectarian institution, an unacceptable risk of fostering of religion was an inevitable byproduct. Moreover, the public school authorities would be unable adequately to insure secular use of the field trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement.[250]

[H87] In *Allen*, a state program, whereby secular textbooks were loaned to all children in accredited schools, was approved as consistent with the Establishment Clause, even though the Court recognized that free books made it more likely that some children would choose to attend a sectarian school. The Court focused on the fact that the textbooks lent out were secular and approved by secular authorities, and assumed that the secular textbooks and the secular elements of education they supported were not so intertwined with religious instruction as in fact to be instrumental in the teaching of religion. Furthermore, it emphasized that no funds or books were furnished to parochial schools, and that, therefore, the financial benefit was to parents and children, not to schools.[251]

[H88] In *Meek* and *Wolman*, the Court adhered to *Allen*, holding that the textbook lending programs at issue in each case did not violate the Establishment Clause.[252] At

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[248] Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 654–61 (1980).

[249] Everson v. Bd. of Educ., 330 U.S. 1, 17–18 (1947).

[250] Wolman v. Walter, 433 U.S. 229, 253–54 (1977).

[251] Bd. of Educ. v. Allen, 392 U.S. 236, 243–48 (1968).

[252] Meek v. Pittenger, 421 U.S. 349, 359–62, 388 (1975); Wolman v. Walter, 433 U.S. 229, 236–38, 255 (1977).

the same time, however, the Court invalidated a direct loan to non-public schools of instructional material and equipment, despite the apparent secular nature of the goods.[253] The Court "reasoned that, because the religious schools receiving the materials and equipment were pervasively sectarian, any assistance in support of the schools' educational missions would inevitably have the impermissible effect of advancing religion."[254] For example, in *Meek* the Court explained: "[I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize [the statute] as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion."[255] Thus, the Court held that the aid program "necessarily result[ed] in aid to the sectarian school enterprise as a whole," and "inescapably result[ed] in the direct and substantial advancement of religious activity."[256] Similarly, in *Wolman*, the Court concluded that, "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flow[ed] in part in support of the religious role of the schools."[257]

[H89] *Meek*'s and *Wolman*'s holding regarding direct loans to religious schools of instructional material and equipment was explicitly overruled in *Mitchell v. Helms*.[258] There the Court considered a program of distribution of federal funds to state and local governmental agencies, which in turn would lend educational, secular materials, and equipment—such as library and media materials and computer software or hardware—to public and private schools, with the enrollment of each participating school determining the amount of aid that it received. In applying the *Agostini* criteria, the Court upheld the program, as applied to religiously affiliated schools in a certain district. In so concluding, a majority of the members of the Court relied primarily on the fact that the aid was allocated on the basis of neutral, secular criteria,[259] and rejected the allegation that the implementation and administration of the aid program violated the Establishment Clause.[260]

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[253] *See* Meek v. Pittenger, 421 U.S. 349, 362–66 (1975); Wolman v. Walter, 433 U.S. 229, 248–51 (1977).

[254] *See* Mitchell v. Helms, 530 U.S. 793, 850 (2000) (O'Connor, J., concurring).

[255] Meek v. Pittenger, 421 U.S. 349, 365–66 (1975).

[256] *Id.* at 366.

[257] Wolman v. Walter, 433 U.S. 229, 250 (1977).

[258] Mitchell v. Helms, 530 U.S. 793, 835–36 (2000) (plurality opinion of four members of the Court); *id.* at 837 (O'Connor and Breyer, JJ., concurring in the judgment).

[259] *Id.* at 829–31 (plurality opinion); *id.* at 845–48 (O'Connor and Breyer, JJ., concurring in the judgment).

[260] There were three statutory safeguards against diversion of the government aid to religious objectives: (1) signed assurances that the aid would be used only for secular, neutral, and non-ideological purposes; (2) monitoring visits; and (3) the requirement that equipment be labeled as government property. Seven Justices found that these safeguards were too weak to prevent and detect diversion, and that there was evidence of actual diversion. *Id.* at 833, 903–09. However, a four-member plurality held that these considerations were not relevant to the Establishment Clause inquiry. *Id.* at 822–24, 833–34. The plurality also stressed that scattered *de minimis* statutory violations, discovered and remedied by the relevant authorities themselves prior to any litigation, should not be elevated to such a level as to convert an otherwise unob-

[H90] The aid challenged in *Tilton* was in the form of federal grants for the construction of academic facilities at private colleges, some of them church-related, with the restriction that the facilities not be used for any sectarian purpose. Applying *Lemon*'s three-part test, the Court found the purpose of the federal aid program there under consideration to be secular (expansion of college and university facilities to meet the sharply rising number of young people demanding higher education). Its primary effect was not the advancement of religion, for sectarian use of the facilities was prohibited. "Enforcement of this prohibition was made possible by the fact that religion did not so permeate the defendant colleges that their religious and secular functions were inseparable. On the contrary, there was no evidence that religious activities took place in the funded facilities. Courses at the colleges were 'taught according to the academic requirements intrinsic to the subject matter,' and 'an atmosphere of academic freedom, rather than religious indoctrination,' was maintained."[261] Turning to the problem of excessive entanglement, the four-Justice plurality first stressed the character of the aided institutions. "It pointed to several general differences between college and pre-college education: college students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level. It found no evidence that the colleges [at issue] varied from this pattern. Though controlled and largely populated by Roman Catholics, the colleges were not restricted to adherents of that faith. No religious services were required to be attended. Theology courses were mandatory, but they were taught in an academic fashion, and with treatment of beliefs other than Roman Catholicism. There were no attempts to proselytize among students, and principles of academic freedom prevailed. With colleges of this character, there was little risk that religion would seep into the teaching of secular subjects, and the state surveillance necessary to separate the two, therefore, was diminished. The [plurality] next looked to the type of aid provided, and found it to be neutral and non-ideological in nature. Like the textbooks and bus transportation in *Allen* and *Everson*, but unlike the teachers' services in *Lemon I*, physical facilities were capable of being restricted to secular purposes. Moreover, the construction grant was a one-shot affair, not involving annual audits and appropriations."[262] Consequently, the Court upheld the grant of federal financial assistance to church-related colleges for secular purposes.[263]

[H91] However, in *Tilton*, the Court circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court con-

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jectionable aid program into a law that had the effect of advancing religion. *Id.* at 835. Justice O'Connor concurred in the judgment, dismissing, as *de minimis*, the evidence of actual diversion and statutory violations. *Id.* at 864–65, 866.

[261] *See* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 750 (1976), *discussing and quoting* Tilton v. Richardson, 403 U.S. 672, 680–82 (1971) (plurality opinion).

[262] *See* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 750–51 (1976), *discussing* Tilton v. Richardson, 403 U.S. 672 (1971).

[263] Tilton v. Richardson, 403 U.S. 672, 689 (1971) (plurality opinion); *id.* at 665, n.1 (White, J., concurring in judgment). On similar grounds, a three-member plurality in *Roemer* approved state grants to religiously affiliated institutions of higher learning. Two Justices concurred in the judgment, finding that there was a secular legislative purpose and that the primary effect of the legislation was neither to advance nor inhibit religion. *See* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 754–70 (1976).

sidered this restriction insufficient: if, at the end of 20 years, the building would be, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant would, in part, have the constitutionally impermissible effect of advancing religion.[264] Similarly, *Nyquist* invalidated direct money grants to non-public schools for maintaining and repairing buildings, because there was no attempt to restrict payments to those expenditures related to the upkeep of facilities used exclusively to secular purposes.[265]

[H92] In *Hunt*, the challenged aid was also for the construction of secular college facilities, the state plan being one to finance the construction by revenue bonds issued through the medium of a state authority. In effect, the college serviced and repaid the bonds but at the lower cost resulting from the tax-free status of the interest payments. The Court upheld the program on reasoning analogous to that in *Tilton*. In applying the second of the *Lemon I*'s three-part test, that concerning "primary effect," the following refinement was added: "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."[266] Although the college that *Hunt* concerned was subject to substantial control by its sponsoring Baptist Church, it was found to be similar to the colleges in *Tilton*, and not "pervasively sectarian." As in *Tilton*, state aid went to secular facilities only, and thus not to any specifically religious activity.[267]

[H93] "[P]roviding diagnostic services on the nonpublic school premises [does] not create an impermissible risk of fostering ideological views. . . . Diagnostic services, unlike teaching or counseling, have little or no educational content, and are not closely associated with the educational mission of the non-public school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. [In addition,] the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. [Hence,] [t]he nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student. . . . It follows that, in that context, there is no need for excessive surveillance, and there will not be impermissible entanglement."[268]

[H94] *Meek* invalidated a Pennsylvania program in which full-time public employees provided supplemental "auxiliary services"—remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services—to non-public school

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[264] Tilton v. Richardson, 403 U.S. 672, 680–89 (1971) (plurality opinion of four Justices). *See also id.* at 692 (Douglas, dissenting in part); *id.* at 659–61 (separate opinion of Brennan, J.); *id.* at 665, n.1 (White, J., concurring in judgment).

[265] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 762, 774 (1973).

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

[267] *See* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 752 (1976), *discussing* Hunt v. McNair, 413 U.S. 734 (1973).

[268] Wolman v. Walter, 433 U.S. 229, 244 (1977). In that case, the Court also held that providing therapeutic and remedial services at a neutral site off the premises of the non-public schools does not have the impermissible effect of advancing religion, and since such services are administered by public employees, no excessive entanglement is created. *See id.* at 247–48.

children at their schools. Although the auxiliary services themselves were secular, they were mostly dispensed on the premises of parochial schools, where an atmosphere dedicated to the advancement of religious belief was constantly maintained. Instruction in that atmosphere was sufficient to create the potential for impermissible fostering of religion. "The danger existed there not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course."[269]

[H95] In *Ball*, the Court evaluated two programs implemented by the school district of Grand Rapids, Michigan. The district's Shared Time program provided remedial and "enrichment" classes, at public expense, to students attending non-public schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of non-public schools. The Shared Time courses were in subjects designed to supplement the "core curriculum" of the non-public schools. The community education program was offered throughout the Grand Rapids community in schools and on other sites, for children as well as adults. The classes at issue in *Ball* were taught in the non-public elementary schools and commenced at the conclusion of the regular schoolday. Among the courses offered were Arts and Crafts, Home Economics, Spanish, Gynmastics, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation. Although certain community education courses offered at non-public school sites were not offered at the public schools on a community education basis, all community education programs were otherwise available at the public schools, usually as a part of their more extensive regular curriculum. Community education teachers were part-time public school employees. Because well-known teachers were necessary to attract the requisite number of students, the school district accorded a preference in hiring to instructors already teaching within the school. Thus, virtually every community education course conducted on facilities leased from non-public schools had an instructor otherwise employed full time by the same non-public school. The Court found that both programs had the primary effect of impermissibly promoting religion in three ways. First, "[t]he state-paid teachers, influenced by the pervasively sectarian nature of the religious schools in which they work[ed], [might] subtly or overtly indoctrinate the students in particular religious tenets at public expense. [Second,] the symbolic union of church and state inherent in the provision of secular state-provided public instruction in the religious school buildings threaten[ed] to convey a message of state support for religion to students and to the general public. [Third,] the programs in effect subsidize[d] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects."[270]

[H96] In *Aguilar*, the Court held that the Establishment Clause barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. The New York City program closely resembled the Shared Time program struck down in *Ball*, but the Court found fault with an aspect of the program not present in *Ball:* the Board of Education had "adopted a system for monitoring the religious content of publicly funded classes in the religious schools." Even though this monitoring system might

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[269] *See* Wolman v. Walter, 433 U.S. 229, 247 (1977), *discussing* Meek v. Pittenger, 421 U.S. 349 (1975).

[270] Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985).

prevent the program from being used to inculcate religion, the Court concluded that the level of monitoring necessary to be "certain" that the program had an exclusively secular effect would inevitably result in the excessive entanglement of church and state. In the majority's view, the program suffered from the same critical elements of entanglement present in *Lemon* and *Meek:* because the assistance was provided in a pervasively sectarian environment, in the form of teachers, ongoing inspection was required to ensure the absence of a religious message. The Court noted two further forms of entanglement inherent in the program: the "administrative cooperation" required to implement the plan and the "dangers of political divisiveness" along religious lines that might grow out of the day-to-day decisions public officials would have to make in order to provide services under the program.[271]

[H97] *Aguilar* and the portion of *Ball* addressing the Shared Time program were overruled in *Agostini*, where the Court reconsidered the constitutionality of the program invalidated in *Aguilar*. On remand, following the Court's decision in *Aguilar*, the District Court for the Eastern District of New York had entered a permanent injunction reflecting the Court's ruling. Twelve years later, the parties bound by that injunction sought relief from its operation, maintaining that *Aguilar* could not be squared with the Court's intervening Establishment Clause jurisprudence and asked for an explicit recognition that *Aguilar* was no longer good law. A five-member majority agreed that *Aguilar* was not consistent with the Court's subsequent Establishment Clause decisions in *Witters*[272] and *Zobrest.*[273] These decisions had abandoned "the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[274] Furthermore, they had departed "from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid."[275] In all relevant respects, the provision of the instructional services under the New York City program at issue in *Aguilar* was indistinguishable from the provision of a sign language interpreter in *Zobrest.* New York City's program did not give aid recipients any financial incentive to undertake religious indoctrination, since the aid was "allocated on the basis of neutral, secular criteria that neither favor[ed] nor disfavor[ed] religion, and [wa]s made available to both religious and secular beneficiaries on a nondiscriminatory basis."[276] Hence, *Zobrest* and *Witters* had made clear that the Shared Time program in *Ball* and New York City's program could not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Moreover, the *Aguilar* Court had erred in concluding that New York City's program resulted in an excessive entanglement between church and state. The finding had rested on three grounds: (1) the program would require "pervasive monitoring by public authorities" to ensure that city employees did not inculcate religion; (2) the program required "administrative cooperation" between the government and parochial schools; and (3) the program might increase the dangers of "political divisiveness." The *Agostini* Court noted that the last two considerations were insufficient to create an excessive

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271 Aguilar v. Felton, 473 U.S. 402, 408–14 (1985), *discussed in* Agostini v. Felton, 521 U.S. 203, 221–22 (1997).

272 Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986). *See* para. H99.

273 Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). *See* para. H100.

274 Agostini v. Felton, 521 U.S. 203, 223 (1997).

275 *Id.* at 225.

276 *Id.* at 231.

entanglement, because they were present no matter where program services were offered (no court had held that program services could not be offered off-campus). Further, the first consideration had been undermined by *Zobrest*. Since *Zobrest* had abandoned the presumption that public employees would inculcate religion simply because they happened to be in a sectarian environment, there was no longer any need to assume that pervasive monitoring of public teachers was required.[277] And there was no suggestion in the record that the system New York City had in place to monitor its employees was insufficient to prevent or to detect inculcation.[278] The Court concluded that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid, under the Establishment Clause, when such instruction is given on the premises of sectarian schools by government employees, under a program containing safeguards such as" those present in New York City's program.[279]

[H98] The Court has repeatedly rejected Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. *Mueller* involved a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96 percent) were parents of children in religious schools. The Court began by focusing on the class of beneficiaries, finding that because the class included "all parents," including parents with children who attended non-sectarian private schools or sectarian private schools, the program was "not readily subject to challenge under the Establishment Clause." Then, viewing the program as a whole, the Court emphasized the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children; . . . no imprimatur of state approval [could] be deemed to have been conferred on any particular religion, or on religion generally."[280] Moreover, the Court found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools. "That the program was

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[277] *Id.* at 234.

[278] Before any public employee could provide instruction at a private school, he or she would be given a detailed set of written and oral instructions emphasizing the secular purpose of the program and setting out the rules to be followed to ensure that this purpose was not compromised. Specifically, employees would be told that (1) they were employees of the Board and accountable only to their public school supervisors; (2) they had exclusive responsibility for selecting students for the program and could teach only those children who met the eligibility criteria for the program; (3) their materials and equipment would be used only in the program; (4) they could not engage in team teaching or other cooperative instructional activities with private school teachers; and (5) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. All religious symbols were to be removed from classrooms used for program services. The rules acknowledged that it might be necessary for public teachers to consult with a student's regular classroom teacher to assess the student's particular needs and progress, but the rules admonished instructors to limit those consultations to mutual professional concerns regarding the student's education. To ensure compliance with these rules, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month. *Id.* at 211–12.

[279] *Id.* at 234–35.

[280] Mueller v. Allen, 463 U.S. 388, 399–400 (1983).

one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause."[281]

[H99] In *Witters*, the Court used identical reasoning to reject an Establishment Clause challenge to a vocational rehabilitation program that provided tuition aid to a student studying at a religious institution to become a pastor. Looking at the program as a whole, the Court observed that "[a]ny aid . . . that ultimately flow[ed] to religious institutions [did] so only as a result of the genuinely independent and private choices of aid recipients." The Court further remarked that the program was "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[282] In light of these factors, the Court held that the program was not inconsistent with the Establishment Clause.

[H100] *Zobrest* concerned a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. The program distributed benefits neutrally to any child qualifying as disabled; its "primary beneficiaries," the Court observed, were disabled children, not sectarian schools. "Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated."[283]

[H101] In *Zelman*, the Court faced an Ohio scholarship program providing tuition aid for students to attend participating public or private schools of their parent's choosing. The program was part of a general and multi-faceted undertaking by the state of Ohio to provide educational opportunities to the children of a failed school district. Both religious and non-religious schools in the district could participate. Tuition aid was distributed to parents according to financial need, and where the aid was spent depended solely upon where parents chose to enroll their children. Reviewing its earlier decisions in *Mueller, Witters*, and *Zobrest*, the Court announced that "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."[284] The Ohio program at issue was "entirely neutral with respect to religion. It provide[d] benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permit[ted] such individuals to exercise genuine choice among options public and private, secular and religious." The program was, therefore, upheld, as one of "true private choice."[285]

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[281] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 650 (2002), *discussing Mueller.*

[282] Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986).

[283] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002), *discussing* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10–12 (1993).

[284] Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

[285] *Id.* at 662.

[H102] *Nyquist* involved a New York program that established a tuition reimbursement plan for parents of children attending non-public elementary or secondary schools and gave tax relief to parents failing to qualify for tuition reimbursement. The fact that public assistance was provided only to parents of children in non-public schools had considerable bearing on the Court's decision striking down the statute. Although the program had been enacted for ostensibly secular purposes (to perpetuate a pluralistic educational environment and to preserve the fiscal integrity and educational quality of overburdened public schools), the Court found that its "function" was "unmistakably" to "offe[r] . . . an incentive to parents to send their children to sectarian schools" and "to provide desired financial support for nonpublic, sectarian institutions." And the tax relief program was essentially "the same form of encouragement and reward" for sending children to non-public schools. "The amount of the tax deduction [wa]s unrelated to the amount of money actually expended by any parent on tuition, but [wa]s calculated on the basis of a formula . . . [that was] apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families."[286]

iii. Funding for Services Relating to Pregnancy and Parenthood

[H103] In *McRae*, the Court rejected an Establishment Clause challenge to a federal statute that severely limited the use of any federal funds to reimburse the cost of abortions under the Medicaid program. In so concluding, the Court noted that the fact that the funding restrictions at issue might coincide with the religious tenets of the Roman Catholic Church did not, without more, contravene the Establishment Clause.[287]

[H104] *Bowen* involved the Adolescent Family Life Act (AFLA), a federal grant program providing funds to institutions for counseling and educational services related to adolescent sexuality and pregnancy. The Act provided, *inter alia*, that the complexity of the problem required the involvement of religious and charitable organizations, voluntary associations, and other groups in the private sector, as well as governmental agencies; and grantees might not use funds for certain purposes, including family planning services and the promotion of abortion. Federal funding under the Act had gone to a wide variety of recipients, including organizations with institutional ties to religious denominations. With regard to the first factor of the *Lemon* test, the Court found that the AFLA had a valid secular purpose, since it "was motivated primarily, if not entirely, by the legitimate purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood." Although the Act, in amending its predecessor, increased the role of religious organizations in programs sponsored by the Act, the challenged provisions were "also motivated by other, entirely legitimate secular concerns," such as attempting to enlist the aid of not only religious organizations, but also family members, charitable organizations, voluntary associations, and other groups in the private sector, in addressing the problems associated with adolescent sexuality, which reflected "the appropriate aim of increasing broad-based community involvement." The Court further held that the Act did not have the primary

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[286] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783, 786, 790–91 (1973). In *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002), the Court also made clear that *Nyquist* "does not govern neutral educational assistance programs that offer aid directly to a broad class of individual recipients defined without regard to religion."

[287] Harris v. McRae, 448 U.S. 297, 319–20 (1980).

effect of advancing religion. It authorized grants to institutions that were capable of providing certain services to adolescents, and required that potential grantees describe how they would involve other organizations, including religious organizations, in the funded programs. However, there was no requirement that grantees be affiliated with any religious denomination, and the services to be provided under the Act were not religious in character. The Act's approach toward dealing with adolescent sexuality and pregnancy was "not inherently religious, although it [might] coincide with the approach taken by certain religions." The provisions expressly mentioning the role of religious organizations reflected, at most, Congress' considered judgment that religious organizations could help solve the problems to which the Act was addressed. Since Congress had found that prevention of adolescent sexual activity and pregnancy depended primarily upon developing strong family values and close family ties, "it seem[ed] quite sensible for Congress to recognize that religious organizations can influence values, and can have some influence on family life, including parents' relations with their adolescent children. To the extent that this congressional recognition ha[d] any effect of advancing religion, the effect [was,] at most, 'incidental and remote.'" Moreover, the Act's face was neutral with respect to the grantee's status as a sectarian or purely secular institution. And "the possibility that AFLA grants [might] go to religious institutions that [could] be considered 'pervasively sectarian' [was not] sufficient to conclude that no grants whatsoever [could] be given under the statute to religious organizations." In addition, the Court rejected the presumption adopted by the district court that religiously affiliated AFLA grantees were not capable of carrying out their functions under the AFLA in a lawful, secular manner. The Court also disagreed with the district court's conclusion that the AFLA was invalid because it authorized "teaching" by religious grant recipients on matters that were fundamental elements of religious doctrine, such as the harm of pre-marital sex and the reasons for choosing adoption over abortion. "[T]he possibility, or even the likelihood, that some of the religious institutions which received AFLA funding [would] agree with the message that Congress intended to deliver to adolescents through the AFLA [wa]s insufficient to warrant a finding that the statute, on its face, ha[d] the primary effect of advancing religion. . . . Nor [did] the alignment of the statute and the religious views of the grantees run afoul of [the] proscription against 'funding a specifically religious activity in an otherwise substantially secular setting.' . . . The facially neutral projects authorized by the AFLA—including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, and consumer education—[we]re not themselves 'specifically religious activities' and they [we]re not converted into such activities by the fact that they [we]re carried out by organizations with religious affiliations." Moreover, whatever "symbolic link" might, in fact, be created by the AFLA's disbursement of funds to religious institutions was not sufficient to justify striking down the statute on its face. Indeed, if the contrary reasoning was to be adopted, "it could be argued that any time a government aid program provides funding to religious organizations in an area in which the organization also has an interest, an impermissible 'symbolic link' could be created, no matter whether the aid was to be used solely for secular purposes." Finally, although there was no express statutory limitation on religious use of funds, a Senate Report on the AFLA stated that the use of AFLA funds to promote religion, or to teach the religious doctrines of a particular sect, was contrary to the intent of this legislation. In addition, the Act required each grantee to undergo evaluations of the services it provided, and it also required grantees to make such reports concerning its use of federal funds as the Secretary of Health and Human Services might require. These provisions,

taken together, created a mechanism whereby the Secretary could police the grants that were given out under the Act to ensure that federal funds were not used for impermissible purposes. Hence, the programs established under the authority of the AFLA could be monitored to determine whether the funds were, in effect, being used by the grantees in such a way as to advance religion. "Given this statutory scheme, [the Court did] not think that the absence of an express limitation on the use of federal funds for religious purposes mean[t] that the statute, on its face, ha[d] the primary effect of advancing religion." Turning to the third prong of the *Lemon* test, the Court noted that, unquestionably, the Secretary would review the programs set up and run by the AFLA grantees, and undoubtedly this would involve a review of, for example, the educational materials that a grantee proposed to use. The Secretary might also wish to have government employees visit the clinics or offices where AFLA programs were being carried out to see whether they were, in fact, being administered in accordance with statutory and constitutional requirements. But "this type of grant monitoring does not amount to 'excessive entanglement,' at least in the context of a statute authorizing grants to religiously affiliated organizations that are not necessarily 'pervasively sectarian.'" For the foregoing reasons, the Court concluded that the AFLA did not violate the Establishment Clause on its face.[288]

e. Taxation—Tax Exemptions or Deductions

[H105] "[A] generally applicable tax, [like a sales and use tax,] has a secular purpose and neither advances nor inhibits religion, for the very essence of such a tax is that it is neutral and nondiscriminatory on questions of religious belief. . . . [Moreover, such a tax] threatens no excessive entanglement between church and state. . . . Even assuming that the tax imposes substantial administrative burdens on [a religious institution,] such administrative and recordkeeping burdens do not rise to a constitutionally significant level. . . . [And the fact that the religious establishment] must bear the cost of collecting and remitting a generally applicable sales and use tax does not enmesh government in religious affairs, . . . [as long as] the statutory scheme requires neither the involvement of state employees in, nor on-site continuing inspection of, [the establishment's] day-to-day operations. . . . Most significantly, the imposition of [a] sales and use tax without an exemption for [sectarian institutions] does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items, because the materials are subject to the tax regardless of content or motive."[289]

[H106] In *Hernandez*, the Court held that taxpayers may not deduct, as "charitable contributions" under 26 U.S.C. Section 170, payments made to branch churches of the

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[288] Bowen v. Kendrick, 487 U.S. 589, 602–18 (1988). Although there was no dispute that the record contained evidence of specific incidents of impermissible behavior by AFLA grantees, the Court felt that the case should be remanded to the district court for consideration of the evidence presented by appellees insofar as it shed light on the manner in which the statute was being administered. Should the court conclude that the Secretary had wrongfully approved certain AFLA grants, an appropriate remedy would require the Secretary to withdraw such approval. *Id.* at 620–22.

[289] Jimmy Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378, 394–96 (1990).

Church of Scientology, in order to receive services known as "auditing" and "training." In doing so, the Court found that disallowance of such deductions does not violate the Establishment Clause. The argument that Section 170 created an unconstitutional denominational preference, by according disproportionately harsh tax status to those religions that raised funds by imposing fixed costs for participation in certain religious practices, was found unpersuasive. Section 170 passed constitutional muster, since it did not facially differentiate among religious sects but applied to all religious entities, and since it satisfied the *Lemon* test. First, the Court noted that the section was "neutral both in design and purpose," there being no allegation that it had been born of animus to religion in general or to Scientology in particular. Second, "its primary effect"—encouraging gifts to charitable entities, including, but not limited to, religious organizations—did not advance religion, there being no allegation that it involved direct governmental action endorsing religion or a particular religious practice. Its primary secular effect was not rendered unconstitutional merely because it happened to harmonize with the tenets of religions that raised funds primarily by soliciting unilateral donations. Third, the section threatened no excessive entanglement between church and state. "To be sure, ascertaining whether a payment to a religious institution [wa]s part of a *quid pro quo* transaction [might] require the IRS to ascertain from the institution the prices of its services and commodities, the regularity with which payments for such services and commodities [we]re waived, and other pertinent information about the transaction. But routine regulatory interaction which involves no inquiries into religious doctrine, . . . no delegation of state power to a religious body, . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies, . . . does not of itself violate the nonentanglement command. . . . Nor [did] the application of [Section] 170 require the Government to place a monetary value on particular religious benefits. . . . [T]he need to ascertain what portion of a payment was a purchase and what portion was a contribution [did] not ineluctably create entanglement problems. In cases where the economic value of a good or service [wa]s elusive—where, for example, no comparable good or service is sold in the marketplace—the IRS ha[d] eschewed benefit-focused valuation. Instead, it ha[d] often employed as an alternative method of valuation an inquiry into the cost (if any) to the donee of providing the good or service. This valuation method, while requiring qualified religious institutions to disclose relevant information about church costs to the IRS, involve[d] administrative inquiries that, as a general matter, 'bear no resemblance to the kind of government surveillance the Court has . . . held to pose an intolerable risk of government entanglement with religion.'"[290]

[H107] Property tax exemptions for religious institutions historically reflect the concern of authors of constitutions and statutes as to dangers of government hostility toward religion inherent in the imposition of property taxes; "exemption constitutes a reasonable and balanced attempt to guard against those dangers."[291] Property tax exemptions for religious bodies have been in place for over 200 years without disruption to the interests represented by the Establishment Clause. Taking into account this historical consideration, the Court held in *Walz* that New York's tax exemption for "religious organizations for religious properties used solely for religious worship," as part of a general exemption for non-profit institutions, did not violate the Establishment Clause. The legislative purpose of the property tax exemption was neither the advancement nor the

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290 Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 695–98 (1989).

291 Walz v. Tax Comm'n of the City of New York, 397 U.S. 673 (1970).

inhibition of religion; it was neither sponsorship nor hostility. "New York, in common with the other States, ha[d] determined that certain entities that exist[ed] in a harmonious relationship to the community at large, and that foster[ed] its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It ha[d] not singled out one particular church or religious group, or even churches as such; rather, it ha[d] granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, *quasi*-public corporations which included hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." Consequently, the Court could not read New York's statute as attempting to establish religion; it was "simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions."[292] The Court further found that the exemption did not have the primary effect of sponsoring religious activity. The Court noted that, although tax exemptions may have the same economic effect as state subsidies, "the grant of a tax exemption is not sponsorship, since the government does not transfer part of its revenue to churches, but simply abstains from demanding that the church support the state; . . . there is no genuine nexus between tax exemption and establishment of religion."[293] Moreover, "the exemption create[d] only a minimal and remote involvement between church and state, and far less than taxation of churches. It restrict[ed] the fiscal relationship between church and state, and tended to complement and reinforce the desired separation insulating each from the other."[294]

[H108] In *Texas Monthly*, the Court struck down a state tax exemption benefiting only religious periodicals. Even though the statute in question worked no discrimination among sects, a majority of the Court found that its preference for religious publications, over all other kinds, "effectively endorse[d] religious belief."[295]

[H109] *Nyquist* invalidated a statute that gave tax relief to parents of children in nonpublic schools, insofar as it had the impermissible effect of advancing the sectarian activities of religious schools.[296] By contrast, *Mueller* upheld a general tax deduction available to parents of all schoolchildren for school expenses, including tuition to religious schools.[297]

f. Government Sponsorship of Religion

i. In the Public School Context

[H110] A state cannot, consistently with the First and Fourteenth Amendments, utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals. Hence, a public school may not permit part-time

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[292] *Id.* at 672–73.

[293] *Id.* at 675.

[294] *Id.* at 676.

[295] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14–17 (1989), (plurality opinion of three Justices); *id.* at 28 (Blackmun and O'Connor, JJ., concurring in judgment and stating that "a statutory preference for the dissemination of religious ideas offends the most basic understanding of what the Establishment Clause is all about, and hence is constitutionally intolerable").

[296] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 790–91 (1973). *See, in extenso*, para. H102.

[297] Mueller v. Allen, 463 U.S. 388 (1983). *See, in extenso*, para. H98.

religious instruction on its premises as a part of the school program, even if participation in that instruction is entirely voluntary and even if the instruction itself is conducted only by non-public school personnel. *McCollum* concerned the action of a board of education permitting religious instruction—by religious teachers who were employed at no expense to the school authorities, but were subject to the approval and supervision of the superintendent of schools—during school hours, in public school buildings, and requiring those children who chose not to attend to remain in their classrooms. Thus, "[t]he operation of the State's compulsory education system . . . assist[ed] and [wa]s integrated with the program of religious instruction carried on by separate religious sects. . . . This [wa]s beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it [fell] squarely under the ban of the First Amendment."[298]

[H111] However, "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of [the American] traditions. For it then respects the religious nature of [the American] people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."[299] In light of these considerations, the *Zorach* Court found no constitutional objection to a New York City program permitting public schoolchildren to absent themselves one hour a week for religious observance and education outside the school grounds.

[H112] "[T]he First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[300] *Epperson* involved a facial challenge to a statute regulating the teaching of Darwin's theory of evolution. In that case, the Court struck down an Arkansas statute that made it unlawful for an instructor to teach evolution or to use a textbook that referred to this scientific theory. Although the Arkansas anti-evolution law did not explicitly state its predominate religious purpose, the Court could not ignore that the statute "was a product of the upsurge of 'fundamentalist' religious fervor" that had long viewed this particular scientific theory as contradicting the literal interpretation of the Bible. And since there was no suggestion Arkansas' law might be justified by considerations of state policy other than the religious views of some of its citizens, the Court determined that the motivation for the challenged statute was "to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." Because there can be no legitimate state interest in "protecting any or all religions from views distasteful to them," the law was held violative of the First and Fourteenth Amendments.[301]

[H113] *Edwards* invalidated Louisiana's "Creationism Act," which forbade the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of "creation science." The Court noted that "teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction." But if the Act's purpose "was solely to maximize the comprehensive-

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298 Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 209–10 (1948).

299 Zorach v. Clauson, 343 U.S. 306, 313–14 (1952).

300 Epperson v. Arkansas, 393 U.S. 97, 106 (1968).

301 *Id.* at 106–09.

ness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind." The statute failed even to ensure that creationism would be taught, but instead required the teaching of this theory only when the theory of evolution was taught. Thus, the law did "not serve to protect academic freedom, but ha[d] the distinctly different purpose of discrediting evolution by counterbalancing its teaching at every turn with the teaching of creationism. . . . [Its purpose] was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature ha[d] chose[n] to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. As in *Epperson*, the legislature [had] passed the Act to give preference to those religious groups which ha[d] as one of their tenets the creation of humankind by a divine creator. . . . [The Act was] designed either to promote the theory of creation science, which embodies a particular religious tenet, by requiring that creation science be taught whenever evolution [wa]s taught, *or* to prohibit the teaching of a scientific theory disfavored by certain religious sects, by forbidding the teaching of evolution when creation science [wa]s not also taught." In either case, the Act endorsed religion in violation of the First Amendment.[302]

[H114] *Abington* involved state rules requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. Although this requirement might serve secular purposes, such as "the promotion of moral values, the contradiction to the materialistic trends of our times, . . . and the teaching of literature," the Court stressed that, even if the purpose of the foregoing exercises was not strictly religious, it was "sought to be accomplished through readings, without comment, from the Bible, . . . an instrument of religion." Moreover, these exercises were prescribed as part of the curricular activities of students who were required by law to attend school. And they were held in the school buildings under the supervision and with the participation of teachers employed in those schools. Consequently, the Court held that the schools' opening exercises were government-sponsored religious ceremonies and had the impermissible primary effect of advancing religion; the fact that individual students might absent themselves upon parental request was irrelevant. Nevertheless, the Court specifically noted that nothing in its holding was intended to indicate that "such study of the Bible or of religion, when presented objectively as part of a secular program of education, [might] not be effected consistently with the First Amendment."[303]

[H115] In *Stone*, the Court held that a statute requiring the posting of a copy of the Ten Commandments on public classroom walls violated the Establishment Clause. While the state legislature required the notation in small print at the bottom of each display that "the secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States," such an "avowed" secular purpose was not sufficient to avoid conflict with the First Amendment. The preeminent purpose of the statute was plainly religious in nature. As the Court emphasized, the Ten Commandments are "a sacred text in the Jewish and Christian faiths. . . . The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments

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302 Edwards v. Aguillard, 482 U.S. 578, 588–89, 593–94 (1987).

303 Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 223–25 (1963).

concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. . . . [The Ten Commandments can be] integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. . . . [But] [p]osting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments [we]re to have any effect at all, it [would] be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." This was not a permissible state objective under the Establishment Clause. And that the posted copies were financed by voluntary private contributions was immaterial, for the mere posting under the auspices of the legislature provided the state support prohibited by the First Amendment.[304]

[H116] In *Engel*, the Court considered, for the first time, the constitutionality of prayer in a public school. Students said aloud a short prayer selected by the State Board of Regents. The Court, made clear that the First Amendment forbids the use of the power or prestige of the government to control, support, or influence the religious beliefs and practices of the American people. Although the prayer was denominationally neutral and its observance on the part of the students was voluntary, the Court found that it violated this essential precept of the Establishment Clause.[305]

[H117] In *Wallace*, the Court held unconstitutional Alabama's moment-of-silence statute because it had been enacted "for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday." Although the state characterized its law as one designed to provide a one-minute period for meditation, the Court rejected that stated purpose as insufficient, taking into account that a previously adopted Alabama law already provided for such a one-minute period.[306]

[H118] In *Lee v. Weisman*, state officials directed the performance and the content of a formal religious exercise at secondary schools' promotional and graduation ceremonies. As the Court stressed, "prayer exercises in elementary and secondary schools carry a particular risk of indirect coercion. . . . What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. . . . [T]he school district's supervision and control of a high school graduation ceremony place[d] subtle and indirect public and peer pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction." A "reasonable dissenter" of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it. And the state might not place the student objector in the dilemma of participating or protesting. "Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. . . . To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more

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304 Stone v. Graham, 449 U.S. 39, 41–42 (1980) (*per curiam*).

305 Engel v. Vitale, 370 U.S. 421, 429–30 (1962). A year later, the Court again invalidated government-sponsored prayer in public schools in *School District of Abington v. Schempp*, 374 U.S. 203, 223–26 (1963). *See, in extenso*, para. H114.

306 Wallace v. Jaffree, 472 U.S. 38, 58–60 (1985).

direct means." Furthermore, the argument that the option of not attending the ceremony excused any inducement or coercion in the ceremony itself was rejected. The Court noted that high school graduation is one of life's most significant occasions, and a student is not free to absent herself from the exercise in any real sense of the term "voluntary." "The Constitution forbids the State to exact religious conformity from a student at the price of attending his own high school graduation." Also not dispositive was the contention that prayers are an essential part of these ceremonies because, for many persons, the occasion would lack meaning without the recognition that human achievements cannot be understood apart from their spiritual essence. This position failed to acknowledge that what, for many, was a spiritual imperative was, for the Weismans, religious conformance compelled by the state. Hence, the Court held that a prayer delivered by a rabbi at a middle school graduation ceremony violated the Establishment Clause.[307]

[H119] In *Santa Fe*, the Court held that a school's policy of permitting prayer at school-sponsored football games contravened the First Amendment. Prior to 1995, a student, elected as Santa Fe High School's student council chaplain, delivered a prayer over the public address system before each home varsity football game. This practice was challenged in district court as a violation of the Establishment Clause. While the suit was pending, the school district adopted a different policy, which authorized two student elections, the first to determine whether "invocations" should be delivered at games and the second to select the spokesperson to deliver them. The Court decided that such student-led invocations should not be regarded as "private speech." "These invocations [we]re authorized by a government policy and occurr[ed] on government property at government-sponsored, school-related events." The school district had attempted to disentangle itself from the religious messages by developing the two-step student election process. However, the elections would take place only because "the school board *ha[d] chosen to permit* students to deliver a brief invocation;" and they would be conducted by the high school student council and upon advice and direction of the high school principal. "In addition to involving the school in the selection of the speaker, the policy, by its terms, invite[d] and encourage[d] religious messages, . . . [since it] state[d] that the purpose of the message was 'to solemnize the event.'" The actual or perceived endorsement of the message, moreover, was established by factors beyond just the text of the policy. The invocation was "delivered to a large audience assembled as part of a regularly scheduled school-sponsored function conducted on school property. The message [wa]s broadcast over the school's public address system, which remain[ed] subject to the control of school officials. . . . In this context, the members of the listening audience must perceive the pre-game message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. . . . Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student [would] unquestionably perceive the inevitable pre-game prayer as stamped with her school's seal of approval."[308]

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[307] Lee v. Weisman, 505 U.S. 577, 592–96 (1992). The Court distinguished this case from *Marsh*, which approved *legislative prayers* (*see* para. H132), observing that "[t]he atmosphere at a state legislature's opening, where adults are free to enter and leave with little comment and for any number of reasons, cannot compare with the constraining potential of the one school event most important for the student to attend." *See id.* at 597.

[308] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302, 306–08 (2000).

ii. Display of Religious Symbols by the Government—Religious Speech on Public Property

[H120] The Establishment Clause prohibits the government from appearing to take a position on questions of religious belief. The government's use of religious symbolism is unconstitutional if its purpose is to advance religion or if it has the effect of endorsing religious beliefs, in view of its *context*.[309] In *Stone*, for example, the Court invalidated a state statute requiring the posting of a copy of the Ten Commandments in public schools, pointing out that the Commandments were posted as a religious admonition, and were not integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, or comparative religion.[310]

[H121] In *Lynch*, the Court held that a city's display of a creche did not violate the Establishment Clause because, in context, the display did not endorse religion. The city of Pawtucket annually erected a Christmas display in a park owned by a non-profit organization and located in the heart of the city's shopping district. The display included such objects as a Santa Claus house, a Christmas tree, a banner that read "SEASONS GREETINGS," and a creche or Nativity scene, which had been part of this annual display for 40 years. The Court noted that the display was sponsored by the city "to celebrate the Holiday and to depict the origins of that Holiday." These were legitimate secular purposes. Furthermore, although the creche was identified with one religious faith, display of the creche was no more an advancement or endorsement of religion than the congressional and executive recognition of the origins of the holiday itself as "Christ's Mass" or the exhibition of literally hundreds of religious paintings in governmentally supported museums. Whatever benefit there was to one faith or religion was "indirect, remote, and incidental." The creche, like a painting, was "passive." Even the traditional, purely secular displays extant at Christmas, with or without a creche, would inevitably recall the religious nature of the holiday. The Court concluded that "[i]t would be ironic, . . . if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in [the United States] by the people, by the Executive Branch, by the Congress, and the courts for two centuries, would so 'taint' the city's exhibit as to render it violative of the Establishment Clause."[311]

[H122] *Allegheny* concerned the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first, a creche depicting the Christian nativity scene, was placed on the Grand Staircase of the Allegheny County Courthouse. The creche had been donated by a Roman Catholic group and bore a sign

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309 *See* Allegheny County v. Am. Civil Liberties Union, 492 U.S. 573, 597 (1989). *See also* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 773–82 (1995) (O'Connor, Souter, and Breyer, JJ., concurring in the judgment); *id.* at 797–16 (Stevens, J., dissenting); *id.* at 817–18 (Ginsburg, J., dissenting).

310 Stone v. Graham, 449 U.S. 39, 42 (1980). *See, in extenso*, para. H115.

311 Lynch v. Donnelly, 465 U.S. 668, 681–86 (1984). The Court also noted that the creche did not create excessive entanglement between religion and government. The four dissenters concluded that the other elements of the Pawtucket display did not negate the endorsement of Christian faith caused by the presence of the creche. They viewed the inclusion of the creche in the city's overall display as placing "the government's imprimatur of approval on the particular religious beliefs exemplified by the creche." *Id.* at 701.

to that effect. Its manger had at its crest an angel bearing a banner proclaiming "Gloria in Excelsis Deo," meaning "Glory to God in the Highest." The Court held that the creche display, viewed in its overall context, violated the Establishment Clause. The creche angel's words endorsed "a patently Christian message:" Glory to God for the birth of Jesus Christ. Moreover, in contrast to *Lynch*, "nothing in the context of the display detract[ed] from the creche's religious message. The *Lynch* display comprised a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the creche, and had their specific visual story to tell. Similarly, whatever a 'talking' wishing well may be, it obviously was a center of attention separate from the creche. [In *Allegheny*], in contrast, the creche [stood] alone: it [wa]s the single element of the display on the Grand Staircase. The floral decoration surrounding the creche [could] not be viewed as somehow equivalent to the secular symbols in the overall *Lynch* display. . . . Nor did the fact that the creche [wa]s the setting for the county's annual Christmas carol program diminish its religious meaning. . . . Furthermore, the creche [sat] on the Grand Staircase, the main and most public part of the building that [wa]s the seat of county government. No viewer could reasonably think that it occupie[d] this location without the support and approval of the government. Thus, by permitting the display of the creche in this particular physical setting, . . . the county sent an unmistakable message that it support[ed] and promote[d] the Christian praise to God that [wa]s the creche's religious message. The fact that the creche [bore] a sign disclosing its ownership by a Roman Catholic organization [did] not alter this conclusion. On the contrary, the sign simply demonstrate[d] that the government [wa]s endorsing the religious message of that organization, rather than communicating a message of its own." The Court concluded that "[t]he government may acknowledge Christmas as a cultural phenomenon, but, under the First Amendment, it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus." The display of the creche in this context, therefore, should be permanently enjoined.[312]

[H123] The second of the holiday displays at issue in *Allegheny* was an 18-foot Chanukah menorah or candelabrum, which was placed just outside the City-County Building next to the city's 45-foot decorated Christmas tree. At the foot of the tree was a sign bearing the mayor's name and containing text declaring the city's "salute to liberty." The menorah was owned by a Jewish group, but was stored, erected, and removed each year by the city. A majority of the Court decided that the menorah did not violate the Establishment Clause. The two Justices who provided the decisive votes to distinguish this situation relied on the presence of the tree and the sign to find that the menorah, in context, could not be interpreted by a reasonable observer as an endorsement of Judaism or Christianity or disapproval of alternative beliefs.[313]

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[312] Allegheny County v. Am. Civil Liberties Union, 492 U.S. 573, 598–601 (1989).

[313] *Id.* at 613–21 (opinion of Blackmun, J., who noted that the menorah's display with a Christmas tree and a sign saluting liberty simply recognized that both Christmas and Chanukah were part of the same winter holiday season); *id.* at 632–37 (opinion of O'Connor, J., who found that, in this particular physical setting, the city conveyed a message of pluralism and freedom of belief during the holiday season); *id.* at 663–67 (opinion of Kennedy, J., joined by Renquist, C.J., White, and Scalia, JJ., who thought that the creche and the menorah were purely passive symbols of religious holidays and, thus, permissible, under *Lynch*).

[H124] In *Capitol Square*, Ohio denied, on Establishment Clause grounds, the application of the Ku Klux Klan to place, during the Christmas season, an unattended cross on the Statehouse plaza in Columbus, a forum for discussion of public questions and for public activities, situated close to the seat of state government. The Klan filed a suit, and the district court entered an injunction requiring issuance of the requested permit. The Court affirmed this judgment. The display was private religious speech and, therefore, protected under the Free Speech Clause. Because Capitol Square was a traditional public forum, the state could regulate the content of the Klan's expression there only if such a restriction was necessary, and narrowly drawn, to serve a compelling state interest. The Court further noted that "compliance with the Establishment Clause may be a state interest sufficiently compelling to justify content-based restrictions on speech."[314] However, such an interest was not implicated in that case. A four-Justice plurality noted the difference between "*government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." As to the argument that "that distinction disappears when the private speech is conducted too close to the symbols of government," the plurality observed that the proposition "that the distinction disappears whenever private speech can be mistaken for government speech . . . cannot be accepted at least where, as here, the government has not fostered or encouraged the mistake." Thus, the plurality denied to apply the so-called "endorsement test," considering that where the Court had tested for endorsement, the subject of the test had been either expression by the government itself or government action alleged to discriminate in favor of private religious expression or activity. Subsequently, the plurality held that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." Those conditions were satisfied there.[315] By contrast, five other members of the Court held that the "endorsement test" is applicable, even where a neutral state policy toward private religious speech in a public forum is at issue.[316] Three of these Justices decided that, on the facts of this case, a reasonable observer would not fairly interpret the state's tolerance of the Klan's religious display as an endorsement of religion: such an observer would view the Klan's cross display fully aware that Capitol Square was a public space in which a multiplicity of groups, both secular and religious, engaged in expressive conduct, and would certainly be able to read and understand an adequate disclaimer, which the Klan had informed the state it would include in the display. Furthermore, the same Justices observed that Ohio's denial of the Klan's application was not a narrowly tailored response necessary to ensure that the state did not appear to take a position on questions of religious belief: Ohio could have either required a sufficiently large and clear disclaimer or instituted a policy of restricting all private, unattended displays to one area of the square, with a permanent sign marking the area as a forum for private speech carrying no state endorsement.[317]

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[314] Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 761–62 (1995). *See also* Widmar v. Vincent, 454 U.S. 263, 271 (1981). However, it is not clear whether a state's interest in avoiding an Establishment Clause violation would justify *viewpoint* discrimination. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2001).

[315] *Id.* at 765–70.

[316] *Id.* at 773–78 (O'Connor, Souter, and Breyer, JJ., concurring in the judgment); *id.* at 799–800 (Stevens, J., dissenting); *id.* at 817–18 (Ginsburg, J., dissenting).

[317] *Id.* at 778–82, 792–94 (O'Connor, Souter, and Breyer, JJ., concurring in the judgment).

[H125] In *McCreary*, executives of two counties posted a version of the Ten Commandments on the walls of their courthouses. After suits were filed charging violations of the Establishment Clause, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code." The result, in each instance, was a modified display of the Commandments surrounded by texts containing religious references as their sole common element. After changing counsel, the counties revised the exhibits again by eliminating some documents, quoting the Ten Commandments at greater length, and adding some new ones, such as the Star Spangled Banner's lyrics and the Declaration of Independence, accompanied by statements about their historical and legal significance. After stating that its inquiry should look to the historical context of the counties' actions at issue, the Court noted that the first display in question "set out a text of the Commandments as distinct from any traditionally symbolic representation, and . . . stood alone, not part of an arguably secular display. . . . [The Commandments are] a central point of reference in the religious and moral history of Jews and Christians. They proclaim the existence of a monotheistic god (no other gods). They regulate details of religious obligation (no graven images, no sabbath breaking, no vain oath swearing). And they unmistakably rest even the universally accepted prohibitions (as against murder, theft, and the like) on the sanction of the divinity proclaimed at the beginning of the text. Displaying that text is thus different from a symbolic depiction, like tablets with ten roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith." "In the second display, unlike the first, the Commandments were not hung in isolation, merely leaving the Counties' purpose to emerge from the pervasively religious text of the Commandments themselves. Instead, the second version was required to include the statement of the government's purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents with highlighted references to God as their sole common element. The display's unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content. That demonstration of the government's objective was enhanced by serial religious references and the accompanying resolution's claim about the embodiment of ethics in Christ." After the counties changed lawyers, they mounted a third display, without a new resolution or repeal of the old one. The result was the "Foundations of American Law and Government" exhibit, which placed the Commandments in the company of other documents the counties thought especially significant in the historical foundation of American government. In trying to persuade the district court to lift its preliminary injunction, ordering the removal of the display at issue, the counties cited several new purposes for the third version, including a desire "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." However, the Court held that these "new statements of purpose were presented only as a litigating position, there being no further authorizing action by the counties' governing boards." In addition, this third display quoted more of the purely religious language of the Commandments than the first two displays had done. Hence, "[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays." "Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object." As the Court pointed out, in a collection of documents said to be "foundational" to American government, it is, at least, odd to include a patriotic anthem, but to omit the Fourteenth Amendment, or to leave out the

original Constitution of 1787. Under these considerations, the Court did not disturb the challenged conclusions of the lower courts, which had been unable to find a legitimizing secular purpose in the third version of the display.[318]

[H126] *Van Orden* involved the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. The 22 acres surrounding the Texas State Capitol contained 17 monuments and 21 historical markers commemorating the "people, ideals, and events that compose Texan identity." The monolith challenged in that case stood six-feet high and three-feet wide. It was located to the north of the Capitol building, between the Capitol and the Supreme Court building. Its primary content was the text of the Ten Commandments. An eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appeared to be an ancient script were carved above the text of the Ten Commandments. Below the text were two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ. The bottom of the monument bore the inscription "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS," a national social, civic, and patriotic organization. The Court held that the Establishment Clause allowed the display of this monument. In so concluding, a four-member plurality held that the *Lemon* test is not useful in dealing with such a passive monument and based its analysis on the nature of the monument and on the nation's history, noting, in particular, that (1) the Ten Commandments have an "undeniable historical meaning," and that such acknowledgments of the role played by the Ten Commandments in the nation's heritage are common throughout America; (2) the text of the Ten Commandments was used in a "passive" way, which was demonstrated by the fact that the petitioner apparently walked by the monument for a number of years before bringing a lawsuit; (3) Texas "treated [its] Capitol grounds monuments as representing the several strands in the State's political and legal history."[319] Justice Breyer concurred in the judgment, stressing that "[t]he circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest[ed] that the State itself intended the . . . nonreligious aspects of the tablets' message to predominate," and that the fact that the display had stood apparently uncontested for nearly two generations suggested that "the public visiting the capitol grounds . . . considered the religious aspect of the tablets' message as part of a broader moral and historical message reflective of a cultural heritage."[320]

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[318] McCreary County v. Am. Civil Liberties Union of Kentucky, 545 U.S. 844 (2005) (opinion of Souter, J., in which Stevens, O'Connor, Ginsburg, and Breyer, JJ., joined). In holding the preliminary injunction adequately supported by evidence that the counties' purpose had not changed at the third stage, the Court emphasized that it did not decide that the counties' past actions would forever taint any effort on their part to deal with the subject matter. Nor did the Court hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history. In this regard, the Court observed that its own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments. However, the Court added, in the company of 17 other lawgivers, most of them secular figures, "there is no risk that Moses would strike an observer as evidence that the National Government violates neutrality in religion."

[319] Van Orden v. Perry, 545 U.S. 677 (2005) (opinion of Rehnquist, C.J., in which Justices Scalia, Kennedy and Thomas joined).

[320] *Id.*

[H127] In *Widmar*, the Court examined a public university's exclusion of a student religious group from facilities available to other student groups. The state claimed that its compelling interest in complying with the Establishment Clause justified the content-based restriction of access to a public forum. The Court rejected the defense. An open-forum policy, including non-discrimination against religious speech, would have a secular purpose, and would in fact avoid entanglement with religion.[321] The Court further held that an "equal access" policy would provide only incidental benefit to religion. Two factors were especially relevant. First, a university's forum did not confer any "imprimatur of state approval on religious sects or practices." Second, the university's provision of benefits to a broad spectrum of groups was "an important index of secular effect." In addition, the Court stressed that the state's interest in achieving greater separation of church and state, than was already ensured under the Establishment Clause, was limited by the Free Exercise and Free Speech Clauses and was not sufficiently "compelling" to justify content-based discrimination against religious speech of the student group in question.[322]

[H128] In 1984, Congress extended the reasoning of *Widmar* to public secondary schools. Under the Equal Access Act, a public secondary school with a "limited open forum" was prohibited from discriminating against students who wished to conduct a meeting within that forum on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." In *Mergens*, the Court upheld the Act on its face. A four-Justice plurality thought that the logic of *Widmar* applied with equal force to the Equal Access Act. First, the Act's prohibition of discrimination on the basis of "political, philosophical, or other" speech, as well as religious speech, was a sufficient basis for meeting the secular purpose prong of the *Lemon* test. Second, the Act did not have the primary effect of advancing religion. As the plurality noted, there is a crucial difference between government and private speech endorsing religion, and high school students "are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." Moreover, the Act expressly limited participation by school officials at student religious group meetings and required that such meetings be held during "noninstructional time;" thereby the Act avoided the problems of "the students' emulation of teachers as role models" and "mandatory attendance requirements" that might otherwise indicate official endorsement or coercion. Moreover, the Act created no risk of excessive entanglement between government and religion, since it prohibited faculty monitors from participating in, non-school persons from directing, controlling, or regularly attending, and school "sponsorship" of, religious meetings.[323]

[H129] In *Lamb's Chapel*, a school district allowed private groups to use school facilities during off-hours for a variety of civic, social, and recreational purposes, excluding,

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[321] Widmar v. Vincent, 454 U.S. 263, 271–72, n.11 (1981). The Court noted that "the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.' . . . Initially, the University would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule."

[322] *Id.* at 274–76.

[323] Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 248–53 (1990) (plurality opinion).

however, religious purposes. Under "public forum" analysis, "control over access to a limited public forum or to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral."[324] The Court decided that the school district violated an applicant's free speech rights by denying it use of the facilities solely because of the *religious viewpoint* of the films that the applicant wished to present and that dealt with an otherwise permissible subject under the school board's regulations. As the Court stressed, "it discriminates on the basis of *viewpoint* to permit school property to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint."[325] Further, the Court found that because the films would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members, there was "no realistic danger that the community would think" that the district was endorsing religion. Hence, the Establishment Clause could not justify the viewpoint-based exclusion of religious speech from the school grounds, after hours.[326]

[H130] *Good News Club* struck down a school policy, similar to the one at issue in *Lamb's Chapel*. The parties agreed, and the Court assumed, that the school operated a limited public forum. The Court rejected the school's attempt to distinguish *Lamb's Chapel* by emphasizing that its policy involved *elementary* schoolchildren, who would perceive that the school was endorsing religion and would feel coerced to participate, because the religious club's activities would take place on school grounds, even though they would occur during non-school hours. That argument was found unpersuasive, mainly because (1) "allowing the club to speak on school grounds would ensure neutrality [toward religion,] not threaten it;" (2) as to the question whether the community would feel coercive pressure to engage in the club's activities, "the relevant community would be the parents" who chose whether their children would attend club meetings, not the children themselves; and (3) in any event, the danger that children would misperceive the endorsement of religion was no greater than the danger that they would perceive a hostility toward the religious viewpoint if the club were excluded from the public forum. The Court concluded that there was not any significance in this case to the possibility that elementary schoolchildren might witness the club's activities on school premises.[327]

[H131] In *Rosenberger*, a public university declined to authorize disbursements from its student activities fund, a limited public forum, to finance the printing of a Christian student newspaper. Relying on *Lamb's Chapel*, the Court held that the university's refusal

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[324] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993) (emphasis added), *quoting* Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 806 (1985). In *Lamb's Chapel, supra*, at 391–92, the Court declined to decide whether the school district's opening of its facilities created a limited or a traditional public forum.

[325] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993).

[326] *Id.* at 395.

[327] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114–19 (2001). The Court also noted that (1) there was no evidence that young children were permitted to loiter outside classrooms after the school day had ended; (2) the meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom; (3) the instructors were not schoolteachers; and (4) the children in the group were not all the same age as in the normal classroom setting. These circumstances simply did not support the theory that small children would perceive endorsement in that case.

to fund the student publication, because it addressed issues from a *religious perspective* constituted viewpoint discrimination and transgressed the Free Speech Clause. Besides, to obey the Establishment Clause, it was not necessary for the university to deny eligibility to student publications because of their religious viewpoint. *Rosenberger* reaffirmed that "[i]t does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises." As the Court noted, "[t]his is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses is paid from a student activities fund to which students are required to contribute." And "[t]here is no difference in logic or principle, and no difference of constitutional significance, between a school's using its funds to operate a facility to which students have access and a school's paying a third-party contractor to operate the facility on its behalf." Consequently, since printing is "a routine, secular, and recurring attribute of student life," a state university may authorize payments from its student activities fund to outside contractors for the printing costs of a variety of student publications, including publications that address issues from a religious perspective. In such a case, any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Were the contrary view to become law, the university could only avoid a constitutional violation by scrutinizing the content of student speech, lest it contain too great a religious message. Such censorship "would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis."[328]

g. Permissible Forms of "Ceremonial Deism" (Legislative Prayers—National Motto—Pledge of Allegiance)

[H132] In *Marsh*, the Court upheld the constitutionality of the Nebraska state legislature's practice of opening each of its sessions with a prayer offered by a chaplain paid out of public funds. In doing so, the Court relied primarily on the fact that the First Congress had authorized the appointment of paid chaplains for its own proceedings at the same time that it had produced the Bill of Rights, and that the practice of opening sessions of Congress with prayer had continued without interruption for almost 200 years. Hence, the practice of opening legislative sessions with prayer had become part of the fabric of the American society. In addition, the particular chaplain had removed all references to Christ, and there was no indication that the prayer opportunity had been exploited to proselytize or advance any one, or to disparage any other, faith or belief. The Court also rejected the suggestion that choosing a clergyman of one denomination advanced the beliefs of a particular church. Absent proof that the chaplain's reappointment stemmed from an impermissible motive, his long tenure did not, in itself, conflict with the Establishment Clause. The Court concluded that "to invoke Divine guidance" on a public body entrusted with making the laws was not, in those circumstances, an establishment of religion or a step toward establishment; it was simply "a tolerable acknowledgment of beliefs widely held among the American people."[329]

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[328] Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 830–31, 842–45 (1995).

[329] Marsh v. Chambers, 463 U.S. 783, 787–95, n.14 (1983). Justice Brennan emphasized,

[H133] The Court has considered in *dicta* the national motto ("In God We Trust") and the Pledge of Allegiance (with the phrase "under God," added in 1954), characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. In *Lynch*, four members of the Court found that such practices as the designation of "In God We Trust" as the national motto, or the references to God contained in the Pledge of Allegiance to the flag, can best be understood as a form a "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have "lost through rote repetition any significant religious content. . . . [In addition,] these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served if government were limited to purely nonreligious phrases. . . . [T]hat necessity, coupled with their long history, gives those practices an essentially secular meaning."[330] Moreover, in the same case, Justice O'Connor noted that such governmental "acknowledgments" of religion, as legislative prayers of the type approved in *Marsh*, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court," serve "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs."[331]

h. Delegation of Governmental Authority

[H134] In *Grendel's Den*, the Court struck down a Massachusetts statute granting religious bodies veto power over applications for liquor licenses. Under the statute, the governing body of any church, synagogue, or school located within 500 feet of an applicant's premises could, simply by submitting written objection, prevent the Alcohol Beverage Control Commission from issuing a license. In spite of the state's valid interest in protecting churches, schools, and like institutions from "the hurly-burly" associated with liquor outlets, the Court found that, in two respects, the statute violated the very neutrality the Establishment Clause requires. The Act brought about "a fusion of governmental and religious functions," by delegating important, discretionary governmental powers to religious bodies, thus impermissibly entangling government and religion. And it lacked "any effective means of guaranteeing that the delegated power would be used exclusively for secular, neutral, and nonideological purposes." This, along with the "significant symbolic benefit to religion" associated with "the mere appearance of a joint

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in his dissent, that "Prayer is religion *in act*. . . . Praying means to take hold of a word, the end, so to speak, of a line that leads to God." *Id.* at 811.

330 Lynch v. Donnelly, 465 U.S. 668, 716–17 (1984), (dissenting opinion of Justice Brennan, in which Justices Marshall, Blackmun, and Stevens joined).

331 *Id.* at 692–93 (concurring opinion of Justice O'Connor). *See also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 31 (2004), where three members of the Court (Rehnquist, C.J., O'Connor, and Thomas, JJ.) in their concurring opinion, held that the phrase "under God" in the Pledge is not a prayer, nor an endorsement of any religion, but a simple recognition of the fact that from the time of the nation's earliest history, the people and the country's institutions have reflected the traditional concept that the nation was founded on a fundamental belief in God. In that case, the majority did not reach the foregoing constitutional issue.

exercise of legislative authority by Church and State," led the Court to conclude that the statute had a primary and principal effect of advancing religion.[332]

[H135] Comparable constitutional problems inhered in the statute at issue in *Kiryas Joel*. In that case, a special state statute carved out a separate school district, following village lines, to serve the distinctive population of the Village of Kiryas Joel, which was a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism. Since the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, a four-member plurality treated this district "as the reflection of a religious criterion for identifying the recipients of civil authority." Hence, this unusual law was "tantamount to a forbidden allocation of political power on a religious criterion."[333]

i. Exemption from Military Service

[H136] *Gillette* rejected an Establishment Clause attack upon Section 6(j) of the Military Selective Service Act of 1967, which afforded "conscientious objector" status to any person who, "by reason of religious training and belief," was "conscientiously opposed to participation in war in any form." The statute, on its face, simply did not discriminate on the basis of religious affiliation or religious belief, apart, of course, from beliefs concerning war. Section 6(j) served "a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions. There [we]re considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, but the section also reflect[ed] as well the view that, 'in the forum of conscience, duty to a moral power higher than the State has should be maintained.' . . . These affirmative purposes are neutral in the sense of the Establishment Clause. . . . The relevant individual belief [wa]s simply objection to all war, not adherence to any extraneous theological viewpoint. And while the objection [should] have roots in conscience and personality that were 'religious' in nature, this requirement ha[d] never been construed to elevate conventional piety or religiosity of any kind above the imperatives of a personal faith."[334] Furthermore, the Court held that valid neutral reasons existed for limiting the exemption to objectors to all war, and that the section, therefore, could not be said "to reflect a religious preference." Apart from the government's need for manpower, the Court noted the importance of "fair, evenhanded, and uniform decisionmaking" in this context. This interest would be jeopardized by expansion of Section 6(j) to include conscientious objection to a particular war; "[w]hile the danger of erratic decisionmaking exists in any system of conscription that takes individual differences into account, no doubt the dangers would be

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[332] Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125–27 (1982).

[333] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690, 702 (1994). Justice Kennedy agreed that the Kiryas Joel Village School District violated the Establishment Clause, finding that the school district's vice was that New York had created it by drawing political boundaries on the basis of religion. *See id.* at 728–30. The Court also noted that there were several alternatives for providing bilingual and bicultural special education to Satmar children that would not implicate the Establishment Clause; for example, the state could offer an educationally appropriate program at one of its public schools or at a neutral site near one of the village's parochial schools. *See id.* at 705–08.

[334] Gillette v. United States, 401 U.S. 437, 452–54 (1971).

enhanced if a conscientious objection of indeterminate scope were honored in theory." The Court concluded that there were neutral, secular reasons for the lines Congress had drawn, and, therefore, the Establishment Clause was not violated.[335]

j. Labor Legislation[336]

[H137] In *McGowan*, the Court upheld mandatory Sunday closing laws, finding that the statutes' purpose and primary effect was not to aid religion but "to set aside one day apart from all others as a day of rest, repose, recreation and tranquility." The Court stressed that obviously "a State is empowered to determine that a 'rest one day in seven' statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends and relatives might spend together." Besides, "the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a 'common day of rest' provision." Moreover, as the Court noted, "[p]eople of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. . . . Sunday is a day apart from all others. The cause is irrelevant; the fact exists." Hence, "[I]t would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord." For these reasons, the Court held that the challenged statutes were not laws respecting an establishment of religion.[337]

[H138] In *Caldor*, the Court struck down a Connecticut statute prohibiting an employer from requiring an employee to work on a day designated by the employee as his Sabbath. "In essence, the Connecticut statute impose[d] on employers and employees an absolute duty to conform their business practices to the particular religious practices of an employee by enforcing observance of the Sabbath the employee unilaterally designated. The State thus command[ed] that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute [took] no account of the convenience or interests of the employer or those of other employees who [did] not observe a Sabbath. . . . There [wa]s no exception under the statute for special circumstances, such as the Friday Sabbath observer employed in an occupation with a Monday through Friday schedule, a school teacher, for example; the statute provide[d] for no special consideration if a high percentage of an employer's workforce assert[ed] rights to the same Sabbath. Moreover, there was no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers. Finally, the statute

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335 *Id.* at 454–60. The Draft Act of 1917 exempted ministers of religion and theological students, under certain conditions, and relieved from strictly military service members of certain religious sects whose tenets denied the moral right to engage in war. These provisions were upheld in the *Selective Draft Law Cases*, 245 U.S. 366, 389–90 (1918), at an early stage in the development of First Amendment doctrine, against an Establishment Clause attack. The Court reached its conclusion essentially without supporting reasoning.

336 *See also* paras. H60–H62.

337 McGowan v. Maryland, 366 U.S. 420, 450–52 (1961).

allow[ed] for no consideration as to whether the employer . . . made reasonable accommodation proposals." Hence, in granting "unyielding weighting in favor of Sabbath observers over all other interests," the statute had a "primary effect that impermissibly advance[d] a particular religious practice."[338]

[H139] *Amos* concerned a legislative exemption of religious organizations from a statutory prohibition of religious discrimination in employment. There, the Court held that application of the exemption to the secular non-profit activities of religious institutions did not violate the Establishment Clause. First, this exemption served the legitimate purpose of "alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." The Court assumed, for the sake of argument, that an exemption only with respect to employment involving religious activities would be adequate in the sense that the Free Exercise Clause required no more. Nonetheless, it would be "a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court [would] consider religious." Fear of potential liability might affect the way an organization would carry out what it would understand to be its religious mission. Second, by the challenged statute, the government did not advance religion "through its own activities and influence;" it simply "*allow[ed]* churches to advance religion, which is their very purpose." Finally, the statute did not impermissibly entangle church and state; rather, it effectuated "a more complete separation of the two."[339]

k. Church Property Disputes[340]

[H140] There can be no doubt "about the general authority of civil courts to resolve church property questions. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively. . . . It is also clear, however, that 'the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.' . . . As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization."[341]

[H141] *Presbyterian Church in U.S.* (PCUS) was a property dispute between the PCUS and two local Georgia churches that had withdrawn from the PCUS. The Georgia supreme court resolved the controversy by applying a theory of implied trust, whereby the property of a local church affiliated with a hierarchical church organization was deemed to be held in trust for the general church, provided the general church had not "substantially abandoned" the tenets of faith and practice as they existed at the time of affiliation. The Court reversed, holding that Georgia would have to find some other

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[338] Estate of Thornton v. Caldor, 472 U.S. 703, 709–10 (1985).

[339] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336–39 (1987). The Court also found that the exemption did not violate the Equal Protection Clause, because it was rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.

[340] *See also* para. H36.

[341] Jones v. Wolf, 443 U.S. 595, 602 (1979).

way of resolving church property disputes that did not draw the state courts into religious controversies.[342]

[H142] "[T]he First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. . . . [However,] there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded. . . . The primary advantages of the 'neutral principles' approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral principles analysis shares the peculiar genius of private law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members. This is not to say that the application of the neutral principles approach is wholly free of difficulty. The neutral principles method . . . [may] requir[e] a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If, in such a case, the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body. . . . On balance, however, the promise of nonentanglement and neutrality inherent in the neutral principles approach more than compensates for what will be occasional problems in application." Therefore, a state is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.[343]

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[342] Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445–52 (1969).

[343] Jones v. Wolf, 443 U.S. 595, 599, 602–04 (1979).

CHAPTER 9

FREEDOMS OF SPEECH, PRESS, ASSEMBLY, AND ASSOCIATION

PART I: FREEDOM OF SPEECH AND OF THE PRESS

A. INTRODUCTION

[I1] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." These freedoms secured by the First Amendment against abridgment by the United States are similarly secured to all persons by the Fourteenth Amendment against abridgment by a state.[1]

[I2] "As a general principle, the First Amendment bars the government from dictating what [the people] see or read or speak or hear."[2] The constitutional guarantee of free speech "'serves significant societal interests' wholly apart from the speaker's interest in self-expression."[3] "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."[4] This constitutional provision embodies a "profound national commitment to the free exchange of ideas,"[5] to the principle that "debate on public issues should be uninhibited, robust, and wide-open."[6] "'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating speech and the press. . . . In this field, every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for [the people.]'"[7] Indeed, "[u]nder the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, one must depend for its correction not on the conscience of judges and juries, but on the competition of other ideas."[8] Hence, the protection of the First Amendment

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1 *See, e.g.*, Schneider v. State, 308 U.S. 147, 160 (1939). In addition, the Free Speech Clause of the First Amendment fully applies to *Puerto Rico. See* Balzac v. Porto Rico, 258 U.S. 298, 314 (1922); El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 149, n.1 (1993).

2 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002).

3 Pac. Gas & Electric Co. v. Pub. Util. Comm'n of California, 475 U.S. 1, 8 (1986), *quoting* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978).

4 Pac. Gas & Electric Co. v. Pub. Util. Comm'n of California, 475 U.S. 1, 8 (1986), *citing* Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

5 Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 686 (1989).

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

7 Meyer v. Grant, 486 U.S. 414, 419–20 (1988), *quoting* Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

8 Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974).

is not dependent on "the truth, popularity, or social utility of the ideas and beliefs which are offered."[9] However, "there is no constitutional value in false statements of fact."[10]

[I3] A wide range of expressive activities are within the protections of the First Amendment. This Amendment covers not only "pure speech," but also "expressive conduct." For example, a march of protest against racial segregation, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment.[11] "[T]he Constitution looks beyond written or spoken words as medi[a] of expression."[12] Noting that "[s]ymbolism is a primitive but effective way of communicating ideas,"[13] the Court has recognized that the First Amendment shields such acts as wearing an armband to protest a war[14] or displaying a red flag as a sign of peaceful and orderly opposition to government by legal means.[15] "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."[16] "[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another."[17] "Speech likewise is protected even though it is carried in a form that is 'sold' for profit,"[18] and "even though it may involve a solicitation to purchase or otherwise pay or contribute money."[19] Indeed, the First Amendment's safeguards are not inapplicable to business or economic activity[20] and to commercial speech.[21]

[I4] "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, . . . does First Amendment protection require a speaker to generate, as an original matter, each item featured in the com-

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9 NAACP v. Button, 371 U.S. 415, 445 (1963).

10 Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

11 Gregory v. Chicago, 394 U.S. 111, 112 (1969).

12 Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

13 W. Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

14 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–506 (1969).

15 Stromberg v. California, 283 U.S. 359, 369 (1931).

16 Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981). *See also* Kaplan v. California, 413 U.S. 115, 119–20 (1973), with regard to artistic expression ("pictures, films, paintings, drawings, and engravings . . . have First Amendment protection").

17 Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976), *citing* Buckley v. Valeo, 424 U.S. 1, 35–59 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

18 Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976), *citing* Smith v. California, 361 U.S. 147, 150 (1959) (books); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (motion pictures); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (religious literature).

19 Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976), *citing* Cantwell v. Connecticut, 310 U.S. 296, 306–07 (1940); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

20 Thomas v. Collins, 323 U.S. 516, 531 (1945).

21 Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762–63 (1976) (the fact that the advertiser's interest in a commercial advertisement is purely economic does not disqualify him from protection under the First and Fourteenth Amendments).

munication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. . . . For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, . . . as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper. . . . The selection of contingents to make a parade is entitled to similar protection."[22]

[I5] "The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[23] Similarly, First Amendment rights are available to teachers and students,[24] public employees,[25] and prisoners.[26] Freedom of speech and of press is also accorded aliens residing in the United States.[27]

[I6] "[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[28] "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the Constitution, unless excludable because they encroach upon the limited area of more important interests."[29] Indeed, certain "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[30] These categories of speech include "defamation, incitement to imminent lawless action, 'fighting words,' obscenity, and pornography produced with real children."[31]

[I7] Even in the area of protected expression, the Court has recognized that "not all speech is of equal First Amendment importance."[32] It is speech on *matters of public concern* that is at the heart of the First Amendment's protection.[33] "Public concern is something that is a subject of legitimate news interest—that is, a subject of general interest and of value and concern to the public at the time of publication."[34] This special concern for speech on public issues is no mystery. The First Amendment was "fashioned

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[22] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 569–70 (1995).

[23] Pac. Gas & Electric Co. v. Pub. Util. Comm'n of California, 475 U.S. 1, 8 (1986), *quoting* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

[24] *See* paras. I211 *et seq.*

[25] *See* paras. I198 *et seq.*

[26] *See* paras. I217 *et seq.*

[27] Bridges v. Wixon, 326 U.S. 135, 148 (1945). *See also* paras. I236 *et seq.*, with respect to *anonymous speech.*

[28] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983), *quoting* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[29] Roth v. United States, 354 U.S. 476, 484 (1957).

[30] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[31] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246 (2002).

[32] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985).

[33] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978), *citing* Thornhill v. Alabama, 310 U.S. 88, 101 (1940).

[34] City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (*per curiam*).

to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[35] "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."[36] Accordingly, the Court has emphasized that "speech on public issues occupies 'the highest rung of the hierarchy of First Amendment values' and is entitled to special protection."[37] In contrast, "speech on matters of purely private concern is of less First Amendment concern."[38] Another prominent example of reduced protection concerns commercial speech. Such speech occupies a "subordinate position in the scale of First Amendment values"[39] and is "more easily verifiable and less likely to be deterred by proper regulation."[40] Accordingly, "it may be regulated in ways that might be impermissible in the realm of noncommercial expression."[41]

[I8] Generally applicable statutes that purport to regulate non-speech have been struck down if they unduly penalize speech, political or otherwise.[42] The Court has held that a criminal or civil regulation of general application having some *incidental effect* on First Amendment activities is subject to First Amendment scrutiny "only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *[United States v.] O'Brien*, [that involved symbolic draft card burning,] or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star*" [striking down a tax imposed on the sale of large quantities of newsprint and ink because the tax had the effect of singling out newspapers to shoulder its burden].[43] For example, "[t]he First Amendment

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[35] Roth v. United States, 354 U.S. 476, 484 (1957).

[36] Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

[37] Connick v. Myers, 461 U.S. 138, 145 (1983), *quoting* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982).

[38] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985), *citing* Connick v. Myers, 461 U.S. 138, 146–47 (1983). Whether speech addresses a matter of public concern must be determined by the expression's "content, form, and context, as revealed by the whole record." *See Connick, supra*, at 147–48. Private remarks may also touch on matters of public concern. *See Rankin v. McPherson*, 483 U. S. 378 (1987), where one co-worker commented to another co-worker on an item of political news (attempted murder of the President of the United States).

[39] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[40] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758, n.5 (1985), *citing* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976).

[41] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758, n.5 (1985), *citing* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). There are numerous examples of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[42] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946) (trespass in order to distribute religious literature); Cantwell v. Connecticut, 310 U.S. 296 (1940) (breach of peace prosecution based upon distribution of religious literature). Nevertheless, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

[43] *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 706–07 (1986). Applying that standard, the Court held that prostitution and lewdness, the criminal conduct at issue in *Arcara*, involved

has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget. The fact that an economic regulation may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech."[44]

[I9] "[T]he government need not exempt speech from a generally applicable tax."[45] Moreover, "a tax scheme does not become suspect simply because it exempts only some speech."[46] Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes and "the presumption of constitutionality of such laws can be overcome only by a demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."[47] Hence, "[d]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. . . . The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion. A tax is also suspect if it targets a small group of speakers. . . . Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech."[48]

[I10] The history of the Court's First Amendment jurisprudence is one of continual development, as the constitutional guarantee of the freedom of speech, or of the press, has been applied to new circumstances requiring different adaptations of prior principles and precedents. "The essence of that protection is that Congress may not regulate speech except in cases of compelling need and with the exercise of a degree of care that [the Court has] not elsewhere required. . . . Over the years, th[e] Court has restated and refined these basic First Amendment principles, adopting them more particularly to the *balance of competing interests and the special circumstances of each field of application*. . . . [Thus, the] Court, in different contexts, has consistently held that the Government may directly regulate speech to address grave problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech."[49] Both the content and the context of speech are critical elements of

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neither situation, and thus concluded that the First Amendment was not implicated by the enforcement of a general health regulation resulting in the closure of an adult bookstore. *Id.* at 707.

[44] Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 470 (1997).

The power to prohibit or to regulate particular conduct (e.g., gambling) does not necessarily include the power to prohibit or regulate speech about that conduct (e.g., advertisements of lawful casino gambling). *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 193 (1999).

[45] Leathers v. Medlock, 499 U.S. 439, 451 (1991), *citing* Cammarano v. United States, 358 U.S. 498 (1959).

[46] Leathers v. Medlock, 499 U.S. 439, 451 (1991), *citing* Regan v. Taxation with Representation of Washington, 461 U.S. 540, 547 (1983).

[47] Regan v. Taxation with Representation of Washington, 461 U.S. 540, 547 (1983).

[48] Leathers v. Medlock, 499 U.S. 439, 447 (1991).

[49] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Communications Comm'n, 518 U.S. 727, 740–41 (1996) (plurality opinion) (emphasis added).

First Amendment analysis.[50] Additionally, each mode of expression has its own unique characteristics, and each "must be assessed for First Amendment purposes by standards suited to it;"[51] "[t]he economics and the technology of each medium affect both the burden of a speech restriction and the Government's interest in maintaining it."[52]

[I11] When the government restricts speech, the government bears the burden of proving the constitutionality of its actions.[53] Content-based regulations and prior restraints are presumptively invalid, and the government bears the burden to rebut that presumption.[54] "Deference to a legislative finding cannot limit judicial inquiry when

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"A rule governing speech, even speech entitled to full constitutional protection, need not use the words 'clear and present danger' in order to pass constitutional muster." *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1036 (1991). The Court has stated that the *"clear and present danger"* test, devised by Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 49–51 (1919), with respect to convictions for subversive speech, "was never intended to express a technical legal doctrine or to convey a formula for adjudicating cases. This test, properly applied, requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance, and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed." *See* Landmark Communications Inc. v. Virginia, 435 U.S. 829, 843 (1978).

In *borderline cases*, the scales must be tipped in favor of protecting free speech. *Cf.* Pennekamp v. Florida, 328 U.S. 331, 347 (1946); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986). *See also* United States v. Playboy Entm't Group, 529 U.S. 803, 819 (2000) ("a tie goes to free expression").

[50] *See* Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 744 (1978) (plurality opinion). "Illicit legislative intent is not a *'sine qua non'* of a violation of the First Amendment." *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983).

[51] Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

[52] Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 595 (2002) (Kennedy, J., concurring).

[53] *See, e.g.*, Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620, n.9 (2003) ("[th]e Court has long cautioned that, to avoid chilling protected speech, the Government must bear the burden of proving that the speech it seeks to prohibit is unprotected"), *citing* Speiser v. Randall, 357 U.S. 513, 525–26 (1958) and Freedman v. Maryland, 380 U.S. 51, 58 (1965); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 183 (1999) ("the Government bears the burden of identifying a substantial interest and justifying the challenged restriction"); Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) ("a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 879 (1997) ("the breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective"); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000) ("when a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) ("in order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

[54] *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817 (2000) (content-based restrictions); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (prior restraints).

First Amendment rights are at stake."[55] Further, "in cases raising First Amendment issues, an appellate court has an obligation to 'make an independent examination of the whole record,' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"[56]

B. PRIOR RESTRAINTS

1. In General

[I12] "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in the American law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."[57] "A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it, at least for the time."[58] Thus, it has been clearly established that a prior restraint on expression comes to the Court with "a heavy presumption against its constitutional validity."[59] The government carries a heavy burden of showing justification for the imposition of such a restraint.[60] This most extraordinary measure is permissible "only where the gravity of the evil sought to be prevented by the restriction, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[61] And even where this presumption might otherwise be overcome—for example when a publication would present a serious threat to national security[62]—the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. A non-criminal process of prior restraints upon expression "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."[63]

[I13] The term prior restraint is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such com-

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55 Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978).

56 Bose Corp. v. Consumers Union of United States, Inc. 466 U.S. 485, 499 (1984), *quoting* New York Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1964).

57 Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59 (1975).

58 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

59 *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

60 Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

61 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976).

62 *See* Near v. Minnesota, Inc., 283 U.S. 697, 716 (1931). In New York Times Co. v. United States, 403 U.S. 713 (1971) (*per curiam*), the Court specifically addressed the scope of the *"military security"* exception alluded to in *Near*. There, the government sought to enjoin the publication of excerpts from a massive, classified study of the country's involvement in the Vietnam conflict, going back to the end of the Second World War. The dispositive opinion of the Court simply concluded that the government had not met its heavy burden of showing justification for the prior restraint. Each of the six concurring Justices and the three dissenting Justices expressed his views separately.

63 Freedman v. Maryland, 380 U.S. 51, 58 (1965).

munications are to occur."[64] A state court's decision, which, pursuant to a criminal statute, finds that certain booklets displayed for sale are obscene and enjoins their further distribution and orders their destruction does not amount to a prior restraint, since, in this situation, the law moves after publication and a provision for the seizure and destruction of the instruments of ascertained wrongdoing expresses resort to a legal remedy sanctioned by the long history of Anglo-American law.[65] Likewise, if an individual is convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO), forfeiture of his "adult entertainment" businesses, pursuant to this Act, is a form of criminal monetary punishment and not a prior restraint. Indeed, a RICO forfeiture order does not forbid the convicted person from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities; it only deprives him of specific assets that were found to be related to his previous racketeering violations.[66] *Arcara* sustained a court order, issued under a general nuisance statute, that closed down an adult bookstore that was being used as a place of prostitution and lewdness. In rejecting out-of-hand a claim that the closure order amounted to an improper prior restraint on speech, the Court pointed out that the closure order differed from a prior restraint in two significant respects. "First, the order would impose no restraint at all on the dissemination of particular materials, since respondents were free to carry on their bookselling business at another location, even if such locations were difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials was prohibited—indeed, the imposition of the closure order had nothing to do with any expressive conduct at all."[67]

[I14] "A licensing system need not effect total suppression in order to create a prior restraint."[68] In *Interstate Circuit*, it was observed that the evils attendant on prior restraint "are not rendered less objectionable because the regulation of expression is one of classification, rather than direct suppression."[69] In that case, the Court held that a prior restraint was created by a system whereby an administrative board in Texas classified films as "suitable for young persons" or "not suitable for young persons." The "not suitable" films were not suppressed, but exhibitors were required to have special licenses and to advertise their classification in order to show them. Similarly, in *Southeastern Promotions*, a municipal board classified a rock musical as unfit for showing in municipal facilities. The Court found that denying use of the municipal facility constituted a prior restraint, notwithstanding that the board's decision might not have had the effect of total suppression of the musical in the community.[70]

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64 Alexander v. United States, 509 U.S. 544, 550 (1993).

65 Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442–444 (1957).

66 Alexander v. United States, 509 U.S. 544, 550–51 (1993). As the Court noted, "[t]he RICO forfeiture statute calls for the forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise. The statute is oblivious to the expressive or non-expressive nature of the assets forfeited; books, sports cars, narcotics, and cash are all forfeitable alike under RICO. Indeed, a contrary scheme would be disastrous from a policy standpoint, enabling racketeers to evade forfeiture by investing the proceeds of their crimes in businesses engaging in expressive activity." *Id.* at 551–52.

67 Arcara v. Cloud Books, Inc., 478 U.S. 697, 705–06, n.2 (1986).

68 Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 556, n.8 (1975).

69 Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 688 (1968).

70 Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555–56 (1975).

[I15] In *Bantam Books*, the Court decided that a system of "informal censorship" working by exhortation and advice sufficiently inhibited expression to constitute a prior restraint and warrant injunctive relief. There, the Court held unconstitutional a system in which a commission was charged with reviewing material "manifestly tending to the corruption of the youth." "[T]hough the [c]ommission [wa]s limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrate[d] that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable,' and succeeded in its aim."[71]

[I16] "[S]eizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where . . . there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film."[72] In *Heller*, state authorities seized a copy of a film, temporarily, in order to preserve it as evidence. The Court held that the film had not been subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with destruction.[73]

[I17] *Ward v. Rock Against Racism* involved a city's control over sound amplification at musical concerts performed in a city park. The sound amplification regulation granted no authority to forbid speech, but it merely permitted the city to regulate volume to the extent necessary to avoid excessive noise. It was true that "the city's sound technician theoretically possesse[d] the power to shut off the volume for any particular performer, but that hardly distinguishe[d] this regulatory scheme from any other; government will *always* possess the raw power to suppress speech through force, and indeed it [wa]s in part to avoid the necessity of exercising its power to 'pull the plug' on the volume that the city [had] adopted the sound amplification guideline. The relevant question was whether the challenged regulation *authorize[d]* suppression of speech in advance of its expression, and the challenged regulation [did] not." Under these considerations, the Court rejected the suggestion that the regulation at issue constituted a prior restraint.[74]

2. Licensing

[I18] "Generally, speakers need not obtain a license to speak."[75] In *Lovell*, the Court invalidated an ordinance that "prohibited the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager, thus striking at the very foundation of the freedom of the press by subjecting it to license and censorship."[76] *Murdock* struck down a flat license tax imposed on religious colpor-

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71 Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963).

72 Heller v. New York, 413 U.S. 483, 492 (1973).

73 *Id.* at 490.

74 Ward v. Rock Against Racism, 491 U.S. 781, 795, n.5 (1989).

75 Riley v. Nat'l Fed'n. of Blind of N.C., Inc., 487 U.S. 781, 802 (1988).

76 *See* Cox v. New Hampshire, 312 U.S. 569, 577 (1941), *discussing* Lovell v. Griffin, 303 U.S. 444, 450–52 (1938). In the latter case, the Court noted, *inter alia*, that the ordinance was "not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." *Id.* at 451.

teurs as a condition to the pursuit of their activities.[77] And in *Thomas v. Collins*, the Court held that the First Amendment barred enforcement of a state statute requiring a permit before soliciting membership in any labor organization.[78] Nevertheless, the foregoing principle is not absolute. For example, *Cox* upheld a licensing requirement for parades through city streets, recognizing that the regulation, which was based on time, place, or manner criteria, served the municipality's legitimate interests in regulating traffic, securing public order, and insuring that simultaneous parades did not prevent all speakers from being heard.[79]

[I19] The Court's cases addressing prior restraints have identified two evils that will not be tolerated in licensing schemes. First, a licensing scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."[80] There are two major First Amendment risks associated with unbridled licensing schemes that have not been given a narrow and precise scope by well-established practice or judicial construction: "self-censorship by speakers in order to avoid being denied a license to speak, and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action."[81] Second, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible. . . . The failure to confine the time within which the licensor must make a decision 'contains the same vice as a statute delegating excessive administrative discretion.' . . . Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decision maker creates the risk of indefinitely suppressing permissible speech."[82]

[I20] *Lakewood* was a facial challenge against a city ordinance, which vested in the mayor authority to grant or deny a newspaper's application for a newsrack permit, but

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77 Murdock v. Pennsylvania, 319 U.S. 105, 113–16 (1943).

78 Thomas v. Collins, 323 U.S. 516, 540–541 (1945). Solicitation and speech were deemed to be so intertwined that a prior registration could not be required. The Court conceded that the collection of funds might be subject to reasonable regulation, but it concluded that such regulation should be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly.

79 *See* Cox v. New Hampshire, 312 U.S. 569, 574–76 (1941).

80 FW/PBS, Inc. v. Dallas, 493 U.S. 215, 225–26 (1990) (principal opinion), *quoting* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988) (four-Justice majority opinion).

81 City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988) (four-Justice majority opinion). For example in *Saia v. New York*, 334 U.S. 558 (1948), the Court "held that an ordinance prohibiting the use of sound trucks without permission from the Chief of Police was unconstitutional because the licensing official was able to exercise unbridled discretion in his decision making, and therefore could, in a calculated manner, censor certain viewpoints." *See City of Lakewood, supra*, at 764, *discussing Saia*. Just seven months later, the Court held, in *Kovacs v. Cooper*, 336 U.S. 77 (1949), that a city could absolutely ban the use of sound trucks. "The plurality distinguished *Saia* precisely on the ground that, there, the ordinance constituted censorship by allowing some to speak, but not others; in *Kovacs*, the statute barred a particular manner of speech for all" and, hence, did not afford the kind of potential for censorship condemned in *Saia*. *See City of Lakewood, supra*, at 764, *discussing Kovacs*.

82 FW/PBS, Inc. v. Dallas, 493 U.S. 215, 226–27 (1990) (principal opinion).

contained no explicit limit on the scope of the mayor's discretion. A four-Justice majority held that when a licensing statute vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without first submitting to the licensing process; "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks."[83] "Laws of general application which are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship. For example, a law requiring building permits is rarely effective as a means of censorship. To be sure, on rare occasion, an opportunity for censorship will exist, such as when an unpopular newspaper seeks to build a new plant. But such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse. And if such charges are made, the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision."[84] The regulatory scheme at issue in *Lakewood* contained two features that, at least in combination, justified the allowance of a facial challenge. First, Lakewood's ordinance required annual permit applications. "When such a system is applied to speech, or to conduct commonly associated with speech, the licensor does not necessarily view the text of the words about to be spoken, but can measure their probable content or viewpoint by speech already uttered. . . . [A] multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern. [Second, the challenged licensing system was] directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers. Such a framework creates an agency that might tend to favor censorship over speech. [W]ithout standards to bound the licensor, speakers denied a license [would] have no way of proving that the decision [wa]s unconstitutionally motivated, and, faced with that prospect, they [would] be pressured to conform their speech to the licensor's unreviewable preference. . . . The Constitution require[d] that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered."[85] The ordinance's minimal requirement that the Mayor state his reasons for denying a permit could not provide the standards necessary to insure constitutional decisionmaking, nor would it, of necessity, provide a solid foundation for eventual judicial review, since the Mayor's statement could be made without any degree of specificity, nor were there any limits as to what reasons he might give.[86] In light of these considerations, the Court held those portions of the Lakewood ordinance giving the Mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deemed "necessary and reasonable" to be unconstitutional.

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[83] City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988).

[84] *Id.* at 761.

[85] *Id.* at 759–61.

[86] *Id.* at 771.

[I21] A licensing law that is unconstitutional on its face is as though it does not exist and, therefore, there can be no offense in violation of such a law.[87] A law subjecting the right of free expression in publicly owned places to the prior restraint of a license, without narrow, objective, and definite standards is unconstitutional, and "a person faced with such a law may ignore it" and exercise his First Amendment rights.[88] But where a licensing ordinance is valid on its face and prohibits certain conduct unless the person has a license, one who without a license engages in that conduct can be criminally prosecuted without being allowed to show that his application for a license was rejected in violation of the principles of the First Amendment, at least when there is appropriate remedial state procedure for the correction of the error.[89]

[I22] The power of government to regulate the professions is not lost whenever the practice of a profession entails speech. In *Lowe*, three members of the Court addressed the question whether any given legislation restrains speech, and, hence, must survive the level of scrutiny demanded by the First Amendment, or is merely a permissible regulation of a profession. They analyzed the issue as follows: "One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny. Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to" the First Amendment."[90]

[I23] A municipality is not precluded from controlling "the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a suffi-

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87 Poulos v. New Hampshire, 345 U.S. 395, 414 (1953).

88 Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969).

89 Poulos v. New Hampshire, 345 U.S. 395, 414 (1953).

90 Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181 (1985), at 232 (opinion of White, J., joined by Burger, C.J., and Rehnquist, J.). These Justices concluded that, "[a]s applied to limit entry into the profession of providing investment advice tailored to the individual needs of each client, the Investment Advisers Act is not subject to scrutiny as a regulation of speech—it can be justified as a legitimate exercise of the power to license those who would practice a profession, and it is no more subject to constitutional attack than state-imposed limits on those who may practice the professions of law and medicine. The application of the Act's enforcement provisions to prevent unregistered persons from engaging in the business of publishing investment advice for the benefit of any who would purchase their publications, however, is a direct restraint on freedom of speech and of the press subject to the searching scrutiny called for by the First Amendment." *Id.* at 233.

cient reason for invalidating such city ordinances as impermissible prior restraints on free speech."[91]

[I24] The Court has refused to strike down, against a broad and generalized attack, a prior restraint requirement that motion pictures be submitted to censors in advance of exhibition.[92] However, precision of regulation must be the touchstone in this area. "[T]o the extent that vague standards do not sufficiently guide the censor, the problem is not cured merely by affording *de novo* judicial review. Vague standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial."[93] In *Joseph Burstyn*, the Court dealt with a film licensing standard of "sacrilegious," which was found to have such an all-inclusive definition as to result in substantially unbridled censorship.[94] Following *Burstyn*, the Court held the following film licensing standards to be unconstitutionally vague: "of such character as to be prejudicial to the best interests of the people of said City;"[95] "moral, educational or amusing and harmless;"[96] "approve such films . . . [as] are moral and proper; . . . disapprove such as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals."[97]

[I25] In *Freedman*, the Court struck down a state scheme for administrative licensing of motion pictures, holding that, "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."[98] "To insure that a judicial determination occurs promptly so that administrative delay does not, in itself, become a form of censorship, [the Court] further held, (1) there must be assurance, 'by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film;' (2) '[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the *status quo* for the shortest fixed period compatible with sound judicial resolution;' and (3) 'the procedure must also assure a prompt final judicial decision' to minimize the impact of possibly erroneous administrative action."[99] Similar cases followed. For example, *Blount* invalidated postal rules permitting restrictions on the use of the mails for allegedly obscene materials, because the

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91 Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 62 (1976).

92 *See* Times Film Corp. v. City of Chicago, 365 U.S. 43, 44–50 (1961).

93 Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 682, 685 (1968).

94 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

95 Gelling v. Texas, 343 U.S. 960 (1952).

96 Superior Films, Inc. v. Dep't of Educ., 346 U.S. 587 (1954).

97 Holmby Prods., Inc. v. Vaughn, 350 U.S. 870 (1955).

98 Freedman v. Maryland, 380 U.S. 51, 58 (1965).

99 United States v. Thirty-seven Photographs, 402 U.S. 363, 367 (1971), *quoting* Freedman v. Maryland, 380 U.S. 51, 58–59 (1965).

The would-be "censor . . . must bear the burden of proof once in court." *See* Thomas v. Chicago Park Dist., 534 U.S. 316, 321 (2002), *quoting* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227 (1990) (principal opinion), *citing, in turn*, Freedman v. Maryland, 380 U.S. 51, 58–60 (1965).

The requirement of prompt judicial review means a prompt judicial *determination* (a *prompt final judicial decision*), not merely a prompt commencement of judicial proceedings. Indeed, "[a] delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being issued within a reasonable period of time." *See* City of Littleton v. Z.J. Gifts D-4, 541 U.S. 774, 781 (2004).

rules lacked the procedural safeguards required under *Freedman*.[100] In *Vance*, the Court held that a general public nuisance statute could not be applied to enjoin a motion picture theater's future exhibition of films for a year, based on a presumption that such films would be obscene merely because prior films had been, when such a determination could be constitutionally made only in accordance with *Freedman* procedures.[101] *Teitel* held that a motion picture censorship ordinance allowing 50 to 57 days to complete the administrative process before initiation of the judicial proceeding does not satisfy the standard that the procedure must assure "that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film."[102]

[I26] "Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license."[103] *Southeastern Promotions* found unconstitutional a city's refusal to rent municipal facilities for a musical because of its content, absent *Freedman* procedures.[104] In *Riley*, the Court applied *Freedman* to a professional licensing scheme, because the professionals involved, charity fundraisers, were engaged in First Amendment-protected activity. The Court held that, even if North Carolina's interest in licensing fundraisers was sufficient to justify such a regulation, the state should set a time limit for actions on license applications. The North Carolina statute did not so provide, and the Court struck it down.[105] In *FW/PBS* a three-Justice plurality applied the last two of the *Freedman* standards to a municipal ordinance conditioning the operation of sexually oriented businesses on receipt of a license.[106] Three other members of the Court believed that all three of the procedural safeguards specified in *Freedman* should be applied.[107]

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100 Blount v. Rizzi, 400 U.S. 410 (1971).

101 Vance v. Universal Amusement Co., 445 U.S. 308, 315–17 (1980) *(per curiam)*.

102 Teitel Film Corp. v. Cusack, 390 U.S. 139, 141–42 (1968) *(per curiam)*. A state court's decision that certain magazines are obscene does not bind a bookstall operator who had not been given notice of or made a party to the relevant civil adjudication, at least when the respondents in that action were not in privity with the bookstall operator, and cannot be presumed to have had interests sufficiently identical to those of the bookstall operator as adequately to protect his First Amendment rights, which he had a right to assert in his own behalf in a proceeding to which he was a party. *See* McKinney v. Alabama, 424 U.S. 669, 673–76 (1976).

103 FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 226 (1990) (principal opinion).

104 Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

105 Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 802 (1988). The Court noted that the state could not assert that its history of issuing licenses quickly constituted a practice effectively constraining the licensor's discretion, since such history related to a time (prior to amendment of the challenged Act) when professional fundraisers were permitted to solicit as soon as their applications were filed. *Id.* at 803.

106 FW/PBS, Inc. v. Dallas, 493 U.S. 215, 229–30 (1990) (opinion of Justice O'Connor, joined by Justices Stevens and Kennedy). Justice O'Connor based her disinclination to require the first *Freedman* procedure on two grounds: the Dallas licensing scheme did not involve an administrator's passing judgment on whether the content of particular speech was protected or not; and the Dallas scheme licensed entire businesses, not just individual films. O'Connor found the first distinction significant, considering that suppression of speech on the ostensible ground of content is presumptively invalid. She found the second significant, because it anticipated that applicants with an entire business at stake would pursue their interests in court rather than abandon them.

107 *Id.* at 238–42 (opinion of Brennan, J., joined by Justices Marshall and Blackmun). Justice Brennan stressed that the danger posed by a license that prevents a speaker from speaking at all

[I27] Nevertheless, the Court has "never required that a *content-neutral* permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*. 'A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like.' . . . Regulations of the use of a public forum that ensure the safety and convenience of the people are not 'inconsistent with civil liberties but . . . [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.'" Such a traditional exercise of authority does not raise the grave dangers of a censorship system.[108]

3. Injunctions

[I28] In *Near*, Minnesota had "empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive."[109] The

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is not derived from the basis on which that license was purportedly denied. The danger posed is the unlawful stifling of speech that results. It is the transcendent value of speech that places the burden of persuasion on the state. The heavy presumption against prior restraints requires no less. In distributing the burdens of initiating judicial proceedings and proof, the courts are obliged to place them such that they err on the side of speech, not on the side of silence.

City of Littleton v. Z.J. Gifts D-4, 541 U.S. 774 (2004), involved a city's "adult business license" ordinance. There, the Court held that Colorado's ordinary "judicial review" rules sufficed to assure a prompt judicial decision, as long as the courts remained sensitive to the need to prevent First Amendment harms and administered those procedures accordingly. And whether the courts did so was a matter normally fit for case-by-case determination rather than a facial challenge. Four considerations supported this conclusion. First, ordinary court procedural rules and practices in Colorado gave reviewing courts judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, courts could arrange their schedules to "accelerate" proceedings, and higher courts could grant expedited review. Second, there was no reason to doubt state judges' willingness to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. And federal remedies would provide an additional safety valve in the event of any such problem. Third, the typical First Amendment harm at issue in *Littleton* differed from that at issue in *Freedman*, diminishing the need in the typical case for procedural rules imposing special decision-making time limits. *Freedman* considered a Maryland statute that created a Board of Censors, which had to decide whether a film was "pornographic," "tended to "debase or corrupt morals," and lacked "whatever other merits." If so, it denied the permit, and the film could not be shown. Thus, *Freedman* addressed a scheme with "rather subjective standards and where a denial likely meant complete censorship." In contrast, the *Littleton* ordinance did not "seek to *censor* material." And its licensing scheme applied "reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business [might] sell or display." Those criteria were "simple enough to apply and their application simple enough to review that their use [wa]s unlikely in practice to suppress totally any specific item of adult material in the community. . . . Nor should zoning requirements suppress that material, for a constitutional zoning system seeks to determine *where*, not *whether*, protected adult material can be sold. . . . The upshot [wa]s that Littleton's 'adult business' licensing scheme [did] not present the 'grave dangers of a censorship system.' . . . And the simple objective nature of the licensing criteria means that in the ordinary case, judicial review, too, should prove simple, hence expeditious." Finally, nothing in *Freedman* required a city or state to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme.

[108] Thomas v. Chicago Park Dist., 534 U.S. 316, 322–23 (2002).

[109] *See* Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957), *discussing* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

Court found that the scheme embodied "the essence of censorship" and constituted impermissible prior restraint.[110] Similarly, *Vance* struck down a Texas statute that authorized courts, upon a showing that obscene films had been shown in the past at an adult theater, to issue an injunction of indefinite duration prohibiting the future exhibition of films not yet found to be obscene.[111] In *Keefe*, the Court vacated an order enjoining petitioners from distributing leaflets of any kind anywhere in the town of Westchester. In so holding, the Court noted that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets does not warrant the use of the injunctive power of a court.[112]

[I29] "Respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom. . . . An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void licensing law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them" constitutes punishable contempt of its lawful authority, at least where the injunction is not "transparently invalid" or does not have only "a frivolous pretense to validity."[113]

[I30] A content-neutral injunction that may incidentally affect expression is not treated as a prior restraint. *Madsen* held that an injunction preventing picketing around an abortion clinic was not subject to "prior restraint" analysis, since alternative channels of communication were left open to the protesters, and the injunction had been issued not because of the content of the protesters' expression, but because of their prior unlawful conduct.[114]

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[110] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931).

[111] Vance v. Universal Amusement Co., 445 U.S. 308, 311 (1980) *(per curiam)*.

[112] Org. for a Better Austin v. Keefe, 402 U.S. 415, 419–20 (1971). Respondent was a real estate broker who, allegedly, aroused the fears of the local white residents that black people were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings and sell homes to African-Americans.

[113] Walker v. City of Birmingham, 388 U.S. 307, 314–15, 321 (1967). There the Court held that demonstrators, who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction.

In this context the Court has disapproved the issuance of *ex parte* restraining orders. In *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179–85 (1968), the Court found it clear that the failure to give notice, formal or informal, and to provide an opportunity for an adversary proceeding, before the holding of a rally was restrained by court order, was incompatible with the First Amendment. At the same time, the Court reserved the question whether an *ex parte* restraining order for a minimum period may be justified because of the unavailability of the adverse parties or their counsel, or perhaps for other reasons.

[114] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764, n.2 (1994). *See also* Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 374, n.6 (1997).

C. VAGUENESS AND OVERBREADTH

[I31] In the First Amendment area, government may regulate "only with narrow specificity."[115] In addition to problems that arise when any statute fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or authorizes arbitrary and discriminatory enforcement, a vague statute in the areas of speech and press creates a second level of difficulty, because of its obvious chilling effect on protected expression. Hence, "the general test of vagueness applies with particular force in review of laws dealing with speech."[116]

[I32] The plaintiff generally must assert his own legal rights and interests, and he cannot rest his claim to relief on the legal rights or interests of third parties. "The reason for this rule is twofold. The limitation 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy,' . . . and it assures the court that the issues before it will be concrete and sharply presented."[117] The seminal cases in which the Court held unconstitutional "on its face" state legislation restricting speech did not involve any departure from the general rule that a litigant only has standing to vindicate his own constitutional rights. In *Stromberg*[118] and *Lovell*,[119] the statutes were unconstitutional as applied to the defendants' conduct, but they were also unconstitutional on their face, because it was apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas.[120] "In cases of this character, a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner. Such holdings invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court. Subsequently, however, the Court did recognize an exception to this general rule for laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties. . . . The Court has repeatedly held

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115 NAACP v. Button, 371 U.S. 415, 433 (1963).

116 *See, e.g.*, Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976). *See, in extenso*, paras. E66 *et seq.* (*"void for vagueness"* doctrine).

The need for clarity and definiteness in the determination of standards for *selective government funding* of speech is rather weak. *See* Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 588–89 (1998) (*see, in extenso*, para. I343).

117 Sec'y of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 955 (1984), *quoting* United States v. Raines, 362 U.S. 17, 22 (1960).

118 Stromberg v. California, 283 U.S. 359, 369–70 (1931). Stromberg was a supervisor at a summer camp for children. The camp's curriculum stressed class consciousness and the solidarity of workers. Each morning at the camp, a red flag was raised and the children recited a pledge of allegiance to the "workers' flag." The statute under which Stromberg was convicted prohibited peaceful display of a symbol of opposition to organized government.

119 Lovell v. Griffin, 303 U.S. 444, 451–52 (1938). Lovell was convicted of distributing religious pamphlets without a license. A local ordinance required a license to distribute any literature, and it gave the chief of police the power to deny a license in order to abate anything he considered to be a "nuisance."

120 In *Stromberg*, the only justification for the challenged statute was the suppression of ideas. In *Lovell*, since no attempt was made to tailor the licensing requirement to a substantive evil unrelated to the suppression of ideas, the statute created an unacceptable risk that it would be used to suppress.

that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it."[121] This exception from the general rule is predicated on "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. . . . In such cases, . . . the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."[122]

[I33] "In the development of the *overbreadth doctrine*, the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule. In order to decide whether the overbreadth exception is applicable in a particular case, [the Court has] weighed the likelihood that the statute's very existence will inhibit free expression."[123] "Thus, the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker,"[124] "and in cases where the ordinance sweeps too broadly, penalizing a *substantial* amount of speech that is constitutionally protected."[125]

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[121] Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 797–99 (1984). A representative statement of the "overbreadth" doctrine is found in *Gooding v. Wilson*, 405 U.S. 518, 520–21 (1972): "At least when statutes regulate or proscribe speech and when no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."

Where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish, or who seek to publish both protected and unprotected material, there is "no want of a proper party to challenge the statute, no concern that an attack on the statute will be unduly delayed or protected speech discouraged. The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." *See* Brockett v. Spokane Arcades, Inc. 472 U.S. 491, 504 (1985).

[122] Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). The overbreadth doctrine applies to both expressive conduct and pure speech. Moreover, it applies to statutory challenges that arise in defense of a criminal prosecution, as well as civil enforcement or actions seeking a declaratory judgment. *See* New York v. Ferber, 458 U.S. 747, 771–73 (1982).

[123] Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984).

[124] Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992), *citing* Thornhill v. Alabama, 310 U.S. 88, 97 (1940); Freedman v. Maryland, 380 U.S. 51, 56 (1965).

[125] Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (emphasis added), *citing* Broadrick v. Oklahoma, 413 U.S. 601 (1973); Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc. 482 U.S. 569, 574–75 (1987).

"The requirement that a statute be 'substantially overbroad' before it will be struck down on its face is a 'standing' question only to the extent that, if the plaintiff does not prevail on the merits of its facial challenge and cannot demonstrate that, as applied to it, the statute is unconstitutional, it has no 'standing' to allege that, as applied to others, the statute might be unconstitutional." *See* Sec'y of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 959

[I34] "At the root of [the first line of cases] is the time-tested knowledge that, in the area of free expression, a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. . . . And these evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge. First, the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . . Self-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power. . . . Second, the absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression. . . . Further, the difficulty and delay inherent in the "as applied" challenge can itself discourage litigation."[126] Hence, when a licensing statute vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without first submitting to the licensing process.[127]

[I35] "The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation."[128] "The concept of substantial overbreadth is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. . . . [Instead,] there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."[129] "[H]owever, there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful,

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(1984). Hence, the question whether the claimed overbreadth of a statute is sufficiently "substantial" to produce facial invalidity involves the determination of a First Amendment challenge on the merits. *See* Virginia v. Hicks, 539 U.S. 113, 120 (2003).

126 City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758–59 (1988) (4-to-3 decision).

127 *Id.* at 755.

128 New York v. Ferber, 458 U.S. 747, 772 (1982).

129 Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800–01 (1984). For example, in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the Court unanimously invalidated on its face a regulation that prohibited "all First Amendment activities" in the Los Angeles International Airport. And in *City of Houston v. Hill*, 482 U.S. 451, 461–63 (1987), the Court held that a municipal ordinance, which makes it unlawful to interrupt a police officer in the performance of his duty, is substantially overbroad and, therefore, invalid on its face under the First Amendment, which "protects a significant amount of verbal criticism and challenge directed at police officers."

constitutionally unprotected conduct.' . . . For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law 'overbroad,' [the Court has] insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, . . . before applying the 'strong medicine' of overbreadth invalidation."[130]

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[130] Virginia v. Hicks, 539 U.S. 113, 119–20 (2003), *quoting and citing* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). *See also* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580–81 (1973) (facial invalidation is inappropriate in cases where, despite some possibly impermissible application, "the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct").

Virginia v. Hicks, 539 U.S. 113 (2003), provides a good example. There, the Richmond Redevelopment and Housing Authority (RRHA), a political subdivision of Virginia, owned and operated Whitcomb Court, a low-income housing development. In 1997, the Richmond City Council conveyed Whitcomb Court's streets to the RRHA, in an effort to combat crime and drug dealing by non-residents. In accordance with the terms of conveyance, the RRHA enacted a policy—in accordance with the foregoing decision of the Richmond City Council—authorizing the Richmond police to serve notice on any person lacking "a legitimate business or social purpose" for being on the premises and to arrest for trespassing any person who remained or returned after having been so notified. The RRHA gave respondent Hicks, a non-resident, written notice barring him from Whitcomb Court. Subsequently, he trespassed there and was arrested and convicted. At trial, he claimed that RRHA's policy was, among other things, unconstitutionally overbroad. The Court rejected this contention, holding that, even assuming the invalidity of the policy's "unwritten" requirement that demonstrators and leafleters obtain advance permission, Hicks had not shown that the RRHA policy prohibited a substantial amount of protected speech in relation to its many legitimate applications. Both the notice-barment rule and the "legitimate business or social purpose" rule applied to *all* persons entering Whitcomb Court's streets, not just to those seeking to engage in expression. Further, neither the basis for the barment sanction (a prior trespass) nor its purpose (preventing future trespasses) implicated the First Amendment. As the Court pointed out, "[r]arely if ever will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Id.* at 124 (emphasis added). Under these considerations, the Court concluded that the RRHA's policy was not facially invalid under the overbreadth doctrine, and that any applications of the policy that violated the First Amendment could be remedied through as-applied litigation.

Overbreadth claims, "if entertained at all, have been curtailed when invoked against *ordinary criminal laws that are sought to be applied to protected expressive conduct.*" *See* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (emphasis added). For example, in *Cantwell v. Connecticut*, 310 U.S. 296, 308–311 (1940), a Jehovah's Witness, was convicted of common law breach of the peace for playing a phonograph record attacking the Catholic Church before two Catholic men on a New Haven street. The Court reversed the judgment affirming Cantwell's conviction but only on the ground that his conduct, considered in the light of the First Amendment guarantees, could not be punished under the common law offense in question. "The Court did not hold that the offense 'known as breach of the peace' must fall *in toto* because it was capable of some unconstitutional applications, and, in fact, the Court seemingly envisioned its continued use against 'a great variety of conduct destroying or menacing public order and tranquility.'" *See* Broadrick v. Oklahoma, 413 U.S. 601, 614 (1973), *discussing Cantwell.*

Considering the necessity for imposition of discipline within the military, the Court has held that Congress is permitted "to legislate both with greater breadth and with greater flexibility when the statute governs military society." Accordingly, "the weighty countervailing poli-

[I36] "The showing that a law punishes a 'substantial' amount of protected free speech, . . . suffices to invalidate all enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'"[131] A statute as construed to obviate overbreadth may be applied to conduct occurring *before* the construction, provided such application affords fair warning to the defendant.[132] By contrast, the overbreadth defense is available when the statute alleged to run afoul of that doctrine has been amended to eliminate the basis for the overbreadth challenge. In *Oakes*, five Justices emphasized that "[t]he overbreadth doctrine serves to protect constitutionally legitimate speech not merely *ex post* that is, after the offending statute is enacted, but also *ex ante* that is, when the legislature is contemplating what sort of statute to enact. If the promulgation of overbroad laws affecting speech was cost free, . . . that is, if no conviction of constitutionally proscribable conduct would be lost so long as the offending statute was narrowed before the final appeal, then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place. When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within constitutional bounds, a substantial amount of legitimate speech would be 'chilled.'"[133] "In other words, five of the *Oakes* Justices feared that, if [the Court] allowed a legislature to correct its mistakes without paying for them (beyond the inconvenience of passing a new law), [it] would decrease the legislature's incentive to draft a narrowly tailored law in the first place."[134]

[I37] The overbreadth doctrine does not apply to commercial speech. Considering that the overbreadth doctrine derives from the recognition that unconstitutional restric-

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cies . . . which permit the extension of standing in First Amendment cases involving civilian society, must be accorded a good deal less weight in the *military context*." *See* Parker v. Levy, 417 U.S. 733, 756, 760 (1974).

[131] Virginia, v. Hicks, 539 U.S. 113, 118–19 (2003), *quoting* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). "[W]hen a state law has been authoritatively construed so as to render it constitutional, or a well understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits. That rule applies even if the face of the statute might not otherwise suggest the limits imposed. . . . Further, th[e] Court will presume any narrowing construction or practice to which a state law is 'fairly susceptible.'" *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770, n.11 (1988). Nevertheless, a federal litigant does not have to await a state court construction or the development of an established practice before bringing the federal suit. *Id.* at 770, n.11, *citing* City of Houston v. Hill, 482 U.S. 451 (1987) (declining to abstain or order certification to allow the state courts to construe a criminal statute where the statute was not fairly susceptible to a narrowing construction).

[132] *See* Osborne v. Ohio, 495 U.S. 103, 115–22 (1990). Where a state supreme court narrows an unconstitutionally overbroad statute, the state must ensure that defendants are convicted under the statute, as it is subsequently construed, and not as it was originally written. *See* Shuttlesworth v. Birmingham, 382 U.S. 87, 91–92 (1965).

[133] Massachusetts v. Oakes, 491 U.S. 576, 586 (1989). In that case, the petitioner challenged a Massachusetts pornography statute as overbroad; since the time of the defendant's alleged crime, however, the state had substantially narrowed the statute through a subsequent legislative enactment—an amendment to the statute. Five Justices agreed that the state legislature could not cure the potential overbreadth problem through the subsequent legislative action; the statute was void as written.

[134] Osborne v. Ohio, 495 U.S. 103, 121 (1990).

tion of expression may deter protected speech by parties not before the court and thereby escape judicial review, the Court has found that "[t]his restraint is less likely where the expression is linked to 'commercial wellbeing,' and therefore is not easily deterred by 'overbroad regulation.'"[135]

[I38] "Overbreadth" is not used only to describe the doctrine that allows a litigant who has engaged in no constitutionally protected activity to assert the rights of third parties to challenge a statute. "Overbreadth" has also been used to describe a challenge to a statute that directly restricts the litigant's protected First Amendment activities and does not employ means *narrowly tailored* to serve a compelling governmental interest. Quite obviously, the rule that a statute regulating protected speech must be "narrowly tailored" prevents a statute from being overbroad. The overbreadth doctrine differs from that rule principally in this: "[w]here an overbreadth attack is successful, the statute is invalid in all its applications, since every person to whom it is applied can defend on the basis of the same overbreadth. A successful attack upon a speech restriction on narrow-tailoring grounds, by contrast, does not assure a defense to those whose own [speech] can be constitutionally [regulated.]"[136] Nevertheless, "the rationale of the narrow-tailoring holding may be so broad as to render the statute effectively unenforceable."[137]

D. THE DISTINCTION BETWEEN CONTENT-BASED AND CONTENT-NEUTRAL REGULATION OF SPEECH

1. General Considerations

[I39] "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. [The American] political system and cultural life rest upon this ideal. . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion, rather than persuasion. These restrictions 'rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.' . . . For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."[138] Hence, "[c]ontent-based regulations are presumptively invalid."[139] For

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[135] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 565, n.8 (1980), *citing* Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977) (since overbreadth is "strong medicine," which "has been employed sparingly and only as a last resort," the Court declines to apply it to commercial speech, "a context where it is not necessary to further its intended objective").

[136] *See* Bd. of Trs. of State Univ. of New York v. Fox, 492 U.S. 469, 483 (1989).

[137] *Id.* at 483, *citing* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 565, n.8, 569–71 (1980). *See also* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637–39 (1980).

[138] Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 641 (1994), *quoting* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 116 (1991).

[139] R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992). "[A] regulation that 'does not favor either

instance, a government determination of the publishability of photographic reproductions of U.S. currency, based on whether the message of the photographs is "newsworthy or educational," constitutes a content-based discrimination transgressing the First Amendment.[140] "When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[141] For example, in *Lamb's Chapel*, the Court held that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from presenting films at the school based solely on the films' discussions of family values from a religious perspective.[142]

[I40] Deciding whether a particular regulation is content-based or content-neutral is not always a simple task. "The principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. . . . Government regulation of expressive activity is content-neutral so long as it is 'justified without reference to the content of the regulated speech.'"[143] "The purpose, or justification, of a regulation will often be evident on its face. . . . But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases. . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content. . . . As a general rule, laws that, by their terms, distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. . . . By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are, in most instances, content-neutral."[144]

[I41] The Court applies "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[145] Such a statute "must be narrowly tailored to promote a compelling Government interest; . . . [i]f a less restrictive alternative would serve the Government's purpose, the legislature

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side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire subject and topic.'" *See* Boos v. Barry, 485 U.S. 312, 319 (1998), *quoting* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980).

140 Regan v. Time, Inc. 468 U.S. 641, 648–49 (1984).

141 Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 829 (1995).

142 Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–95 (1993). The constitutionality of restrictions on *religious speech in public fora*, is discussed, *in extenso*, in paras. H124 *et seq.*

143 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), *quoting* Clark v. Cmty. for Creative NonViolence, 468 U.S. 288, 293 (1984). A statute that "suppresses expression out of concern for its *likely communicative impact*" is content-based. *See* United States v. Eichman, 496 U.S. 310, 317–18 (1990) (flag burning) (emphasis added).

144 Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 642–43 (1994).

145 *Id.* at 642.

must use that alternative."[146] "Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny."[147] In contrast, regulations that are unrelated to the content of speech "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue,"[148] and, consequently, are subject to an intermediate level of scrutiny: restrictions of this kind are valid, provided that they are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[149] However, injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." Hence, in evaluating a *content-neutral injunction*, the governing standard is whether the injunction's challenged provisions "burden no more speech than necessary to serve a significant government interest."[150]

[I42] "A statute is presumptively inconsistent with the First Amendment if it imposes a *financial burden* on speakers because of the content of their speech."[151] As the Court emphasized in invalidating a content-based magazine tax, "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."[152] In *Simon & Schuster*, the Court evaluated the constitutionality of New York's "Son of Sam" law,[153] which required "that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account;" these funds were then made available to the victims of the crime and the criminal's other creditors. The statute broadly defined "person convicted of a crime" to include "any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." The Court noted that the law implicated First Amendment concerns, because it imposed a financial disincentive only on speech of a particular content. Further the Court held that the state's interest in compensating victims from the fruits of crime was a compelling one, but the Son of Sam law was not narrowly tailored to advance that objective. The law was significantly overinclusive, since it applied to works on *any* subject provided that they expressed the author's thoughts or recollections about his crime, "however tangentially or incidentally," and since its broad definition of "person convicted of a

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146 United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000). When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the government's obligation to prove that the alternative will be ineffective to achieve its goals; a court should not assume a plausible less restrictive alternative would be ineffective. *Id.* at 816, 824.

147 Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 642 (1994), *citing* Riley v. Nat'l Fed'n for Blind of N.C., 487 U.S. 781, 798 (1988).

148 Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 642 (1994).

149 Clark v. Cmty. for Creative NonViolence, 468 U.S. 288, 293 (1984). *"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." See* Frisby v. Schultz, 487 U.S. 474, 485 (1988) (emphasis added).

150 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764–65 (1994). *See also* Schenck v. Pro-Choice Network of W. New York, 519 U.S. 357, 371–74 (1997).

151 Simon & Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. 105, 115 (1991).

152 Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987). The Court also observed that, while the state certainly has an important interest in raising revenue through taxation, that interest hardly justified selective taxation of the press, as it was completely unrelated to a press/non-press distinction. *Id.* at 238.

153 The statute had been named after a serial killer popularly known as the "Son of Sam."

crime" enabled the state to escrow the income of an author who admitted in his work to having committed a crime, whether or not he had ever actually been accused or convicted. These two provisions combined to encompass a wide range of literature that did enable a criminal to profit from his crime while a victim remained uncompensated. For example, should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years and would make that income available to all of the author's creditors, despite the fact that the statute of limitations for this minor incident had long since run.[154]

[I43] "The Court long has recognized that, by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others."[155] "Although *prohibitions foreclosing entire media* may be completely free of content or viewpoint discrimination and narrowly tailored,[156] the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech."[157] For example, in *City of Ladue*, the Court invalidated an ordinance banning almost all residential signs, including signs protesting an imminent governmental decision to go to war, finding that the local government had "almost completely foreclosed a venerable means of communication that is both unique and important."[158]

[I44] "[T]he notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles. Thus, an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.' . . . Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the 'permissible subjects for public debate,' and thereby to 'control . . . the search for political truth.'"[159]

[I45] Although the First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed, the Court has permitted restrictions upon the content of speech in a few lim-

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154 Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 115–23 (1991). The Court also noted that the state did not have a legitimate interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers. *Id.* at 118.

155 *See* City of Ladue v. Gilleo, 512 U.S. 43, 55, n.13 (1994).

156 "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *See* Frisby v. Schultz, 487 U.S. 474, 485 (1988). For example, in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808–10 (1984), the Court upheld an ordinance that banned all signs on public property, because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil; complete prohibition was necessary because "the substantive evil—visual blight—[wa]s not merely a possible byproduct of the activity, but [wa]s created by the medium of expression itself." *Id.* at 810.

157 City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994) (emphasis added).

158 *Id.* at 54.

159 *Id.* at 51. "Like other classifications, regulatory distinctions among different kinds of speech may fall afoul of the *Equal Protection Clause*." *Id.* at 51, n.9 (emphasis added), *citing* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98–102 (1972) (an ordinance that forbids certain kinds of picketing but exempts labor picketing violates the Equal Protection Clause).

ited areas, like obscenity, defamation, or incitement to lawless action, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[160] The fact that these areas of speech, which embody "a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey,"[161] can, "consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*" does not mean that they constitute "categories of expression entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." The Court has rejected the "proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government may regulate them freely. That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense."[162]

[I46] The Court has emphasized that the prohibition on content-based regulations "applies differently in the context of proscribable speech than in the context of fully protected speech. The rationale of the general prohibition [of content-based regulations,] after all, is that content discrimination 'rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.' . . . But content discrimination among various instances of a class of proscribable speech often does not pose this threat. When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: a State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. . . . And the Federal Government can criminalize only those threats of violence that are directed against the President, . . . since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example, . . . a State may choose to regulate price advertising in one industry, but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection), . . . is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion."[163]

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[160] R.A.V. v. St. Paul, 505 U.S. 377, 383 (1992), *quoting* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[161] R.A.V. v. St. Paul, 505 U.S. 377, 393 (1992).

[162] *Id.* at 383–84.

[163] R.A.V. v. St. Paul, 505 U.S. 377, 387–89 (1992). That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of "fighting" words that "insult, or pro-

[I47] "Another valid basis for according differential treatment to even a content-defined sub-class of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is *justified* without reference to the content of the speech."[164] In *Renton*, a zoning regulation explicitly treated "adult" movie theaters differently from other theaters and defined "adult" theaters solely by reference to the content of their movies. The Court nonetheless treated the regulation as content-neutral, because the ordinance was aimed at the secondary effects of adult theaters in the surrounding community (i.e., prevention of crime, maintenance of property values, and protection of the city's retail trade and residential neighborhoods), a justification unrelated to the content of the adult movies themselves.[165] But in *Alameda Books*, a case involving a similar adult theater zoning ordinance, five members of the Court deviated from this view of *Renton*. Justice Kennedy thought that such an ordinance is content-based but is subject to intermediate rather than strict scrutiny, since it is "more in the nature of a typical land use restriction and less in the nature of a law suppressing speech;" the ordinance "may be a covert attack on speech, but [the courts] shouldn't presume it to be so," for it has "the *prima facie* legitimate purpose" of "limit[ing] the negative externalities of land use."[166] Four other Justices char-

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voke violence, on the basis of race, color, creed, religion or gender." Because the ordinance only proscribed a class of fighting words deemed particularly offensive by the city—i.e., those that contained messages of bias-motivated hatred, the Court held that it violated the rule against content-based discrimination. *See id.* at 392–94. In the same case, Justice White conceded that a city council cannot prohibit only those legally obscene works that contain criticism of the city government but asserted that, to be the consequence not of the First Amendment but of the *Equal Protection Clause*; such content-based discrimination would not, he said, "be rationally related to a legitimate government interest." *Id.* at 406. Nevertheless, as the majority pointed out, "*the only reason that government interest is not a 'legitimate' one is that it violates the First Amendment. See id.* at 384, n.4 (emphasis added).

The Court itself has occasionally fused the First Amendment into the Equal Protection Clause in this fashion but with the acknowledgment that the First Amendment underlies its analysis. *See Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), where an ordinance prohibiting only non-labor picketing was held violative of the Equal Protection Clause, because there was no "appropriate governmental interest" supporting the distinction, inasmuch as "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

164 R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992).

165 Renton v. Playtime Theatres, Inc. 475 U.S. 41, 47–48 (1986). There "the Court distinguished the inquiry into whether such a zoning ordinance is content neutral from the inquiry into whether it is designed to serve a substantial government interest and does not unreasonably limit alternative avenues of communication. The former requires courts to verify that the predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech].' . . . The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects." *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440–41 (2002) (plurality opinion), *discussing* Renton, *supra*, at 47, 50–52.

The emotive impact of speech on its audience is not a "secondary effect." As the Court noted in *Boos v. Barry*, 485 U.S. 312, 321 (1988), "[l]isteners' reactions to speech are not the type of 'secondary effects' . . . referred to in *Renton*."

166 City of Los Angeles v. Alameda Books, Inc., 535 U.S 425, 447, 449 (2002). *See also* para. I149, note 342.

acterized the ordinance as "*content correlated*" and would also apply a more relaxed standard of review than strict scrutiny.[167]

2. Particular Categories of Content-Based Regulations[168]

a. Advocacy of the Use of Force or of Law Violation

i. The World War I Cases

[I48] No important case involving free speech was decided by the Court prior to *Schenck*. That case involved a conviction under the Criminal Espionage Act, which prohibited conspiracies and attempts to obstruct the recruiting or enlistment service. The objectionable document denounced conscription, and its most inciting sentence was "[y]ou must do your share to maintain, support and uphold the rights of the people of this country." Fifteen thousand copies were printed, and some were circulated. The First Amendment was tendered as a defense. Writing for a unanimous Court, Justice Holmes stated that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[169] When "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service," and "the defendant had the specific intent to do so in his mind," conviction in wartime is not prohibited by the Constitution.[170] Schenck's insubstantial gesture toward insubordination in 1917 during World War I was held to be a clear and present danger of bringing about the evil of military insubordination.[171]

[I49] In several later cases involving convictions under the Criminal Espionage Act, the nub of the evidence the Court held sufficient to meet the "clear and present danger" test enunciated in *Schenck* was as follows: publication of 12 newspaper articles attacking the war;[172] one speech attacking U.S. participation in the war;[173] circulation of copies of two different socialist circulars attacking the war and calling for a general strike in protest;[174] publication of a German language newspaper with false articles, which had the tendency to weaken zeal and patriotism, and thus hamper the United States in raising armies and conducting the war;[175] circulation of copies of a four-page pamphlet written by a clergyman, which belittled Allied war aims and criticized conscription in strong terms.[176] Justice Holmes and Justice Brandeis dissented in the last three cases. The basis of these dissents was that the evidence in each case was insufficient to show that the defendants had created the requisite danger under *Schenck*. The dissenters noted that "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where pri-

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167 *See, in extenso*, para. I149, note 342.

168 *See also* para. I12 (*threat to national security*).

169 Schenck v. United States, 249 U.S. 47, 52 (1919) (emphasis added).

170 Debs v. United States, 249 U.S. 211, 216 (1919).

171 Schenck v. United States, 249 U.S. 47, 51–53 (1919).

172 Frohwerk v. United States, 249 U.S. 204 (1919).

173 Debs v. United States, 249 U.S. 211 (1919).

174 Abrams v. United States, 250 U.S. 616 (1919).

175 Schaefer v. United States, 251 U.S. 466 (1920).

176 Pierce v. United States, 252 U.S. 239 (1920).

vate rights are not concerned. . . . Congress certainly cannot forbid all effort to change the mind of the country. . . . [N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." Justices Holmes and Brandeis thought that the "poor and puny anonymities" at issue were impotent to produce the evil against which the Criminal Espionage Act aimed and that, from them, the specific intent required by the statute could not reasonably be inferred.[177]

ii. State Sedition Laws—Anti-Communist Legislation[178]

[I50] In *Gitlow*, New York had made it a crime to advocate "the necessity or propriety of overthrowing . . . organized government by force." The evidence showed that the defendant was an official of the Left Wing Section of the Socialist Party, and that he was responsible for publication of a Left Wing Manifesto. This document repudiated "moderate Socialism," and urged the necessity of a militant "revolutionary Socialism," based on class struggle and revolutionary mass action. No evidence of the effect of the Manifesto was introduced, but the jury were instructed that they could not convict unless they found that the document advocated employing unlawful acts for the purpose of overthrowing organized government. The conviction was affirmed. The question, the Court held, was entirely different from that involved in *Schenck*, where the statute prohibited certain acts involving the danger of substantive evil, without any reference to language itself, and the issue was merely one of sufficiency of evidence under an admittedly constitutional statute. By contrast, in *Gitlow*, "the legislative body ha[d] determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve[d] such danger of substantive evil that they [might] be punished. The statute was a reasonable exercise of legislative judgment, and hence "the question whether any specific utterance coming within the prohibited class [wa]s likely, in and of itself, to bring about the substantive evil [wa]s not open to consideration."[179]

[I51] This principle was also applied in *Whitney*, to sustain a conviction under a state criminal syndicalism statute. That statute made it a felony to assist in organizing a group assembled to advocate the commission of crime, sabotage, or unlawful acts of violence as a means of effecting political or industrial change. The defendant was found to have assisted in organizing the Communist Labor Party of California, an organization found to have the specified character. It was held that the legislature was not unreasonable in believing organization of such a party involved such danger to the public peace and the security of the state that these acts should be penalized in the exercise of its police power.[180]

[I52] In neither of these cases did Mr. Justice Holmes and Mr. Justice Brandeis accept the reasoning of the Court. They insisted that, wherever speech was the evidence of the violation, it was necessary to show that the speech created the "clear and present dan-

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177 *See* Abrams v. United States, 250 U.S. 616, 628–29 (1919).

178 *See also* para. H8 *(compelled disclosure of political beliefs)*; para. H73 *(void for vagueness doctrine)*; paras. H74–H75 *(loyalty oaths)*; para. I413 *(guilt by association)*; paras. I419 *et seq. (compulsory disclosure of associational ties)*; para. D22 *(passport revocation)*.

179 Gitlow v. New York, 268 U.S. 652, 670–71 (1925).

180 Whitney v. California, 274 U.S. 357, 371 (1927). *Whitney* was expressly overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) *(per curiam)*.

ger" of the substantive evil that the legislature had the right to prevent. Thus, they made no distinction between a federal statute that made certain acts unlawful, the evidence to support the conviction being speech, and a statute that made speech itself the crime. Since the manifesto circulated by *Gitlow* had no chance of starting a present conflagration, they dissented from the affirmance of his conviction.[181] And in *Whitney*, they repeated that, even though the legislature had designated certain speech as criminal, this could not prevent the defendant from showing that there was no danger that the substantive evil would be brought about. There they concurred in the result reached by the Court, but only because the record contained some evidence that organization of the Communist Labor Party might further a conspiracy to commit immediate serious crimes, and the credibility of the evidence was not put in question by the defendant.[182]

[I53] Subsequent opinions discredited *Whitney* and distorted the "clear and present danger" test. In *Dennis*, leaders of the Communist Party, were indicted in a federal district court, under the Smith Act, for willfully and knowingly conspiring to advocate and teach the duty and necessity of overthrowing and destroying the government of the United States by force and violence. The trial judge instructed the jury that they could not convict unless they found that the defendants intended to overthrow the government as speedily as circumstances would permit. The Court sustained convictions under that charge, construing it to mean a determination of "whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[183]

[I54] In *Yates*, the Court made it clear that a distinction had to be drawn between advocacy of abstract doctrine and advocacy directed at promoting unlawful action. There the government sought to use the Communist Party, or at least the California branch of the Party, as the conspiratorial nexus between various individuals charged, among other things, with a conspiracy to engage in illegal advocacy. The Court stated that the government's "Party conspiratorial nexus" theory was unavailing, because the evidence fell short of establishing that the Party's advocacy constituted "a call to forcible action" for the accomplishment of immediate *or future* overthrow, in contrast to the teaching of mere "abstract doctrine" favoring that end.[184]

iii. The Modern "Incitement" Test

[I55] In *Brandenburg*, a Ku Klux Klan leader threatened "revengeance" if the "suppression" of the white race continued. Subsequently he was convicted for advocating unlawfulness as a means of political reform. The Court reversed the conviction, relying

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[181] Gitlow v. New York, 268 U.S. 652, 672–73 (1925).

[182] Whitney v. California, 274 U.S. 357, 373–79 (1927). In *Herndon v. Lowry*, 301 U.S. 242, 258–61 (1937), the defendant had solicited members for the Communist Party, but there was no proof that he had urged or even approved those of the Party's aims that were unlawful. The Court reversed a conviction obtained under a statute prohibiting an attempt to incite to insurrection by violence on the ground that the Fourteenth Amendment prohibited conviction where, on the evidence, a jury could not reasonably infer that the defendant had violated the statute the state sought to apply.

[183] Dennis v. United States, 341 U.S. 494, 510 (1951) (plurality opinion).

[184] Yates v. United States, 354 U.S. 298, 329 (1957). *See also Noto v. United States*, 367 U.S. 290, 297–98 (1961), where the Court stated that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."

on "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."[185] When a speaker incites an immediate lawless reaction, one cannot rely on public debate to eliminate such potentially harmful speech. *Brandenburg* is consistent with the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."[186] It does not seem to apply outside this context.

[I56] The principle announced in *Brandenburg* requires "careful consideration of the actual circumstances surrounding" the expression at issue.[187] In *Hess*, the appellant, was arrested during an anti-war demonstration on a college campus for loudly stating, "We'll take the f___ street later (or again)," and was subsequently convicted for violating the Indiana disorderly conduct statute. Hess' statement was not directed to any person or group of persons. Moreover, his statement amounted, at worst, to nothing more than advocacy of illegal action at some indefinite future time. For these reasons, Hess' words could not be punished by the state on the ground that they had a tendency to lead to violence.[188]

[I57] In *NAACP v. Claiborne*, a local chapter of the NAACP, rebuffed by public officials of Port Gibson and Claiborne County in its request for redress of various forms of racial discrimination, began a boycott of local businesses. During the boycott, a young black man was shot and killed in an encounter with Port Gibson police, and sporadic acts of violence ensued. The following day, boycott leader Charles Evers told a group that boycott violators would be disciplined by their own people, and warned that the Sheriff "could not sleep with boycott violators at night." He stated at a second gathering that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." "Store watchers" were posted outside boycotted stores to identify those who traded, and their names were read aloud at meetings of the Claiborne County NAACP and published in a mimeographed paper. Those persons were branded traitors,

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185 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) *(per curiam)* (emphasis added). There, appellant was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform and for voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions refined the statute's definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

In the incitement context, a state may not apply to a legislator a First Amendment standard stricter than that applicable to a private citizen. *See* Bond v. Floyd, 385 U.S. 116, 132–36 (1966).

In the context of the special characteristics of the *school environment*, the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature; "[a]lso prohibitable are actions which materially and substantially disrupt the work and discipline of the school." *See* Healy v. James, 408 U.S. 169, 189 (1972). Likewise, in the *military context*, the government may prohibit the distribution of literature that constitutes "a clear danger to military loyalty, discipline, or morale." *See* Greer v. Spock, 424 U.S. 828, 840 (1976).

186 *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

187 Texas v. Johnson, 491 U.S. 397, 409 (1989).

188 Hess v. Indiana, 414 U.S. 105, 108–09 (1973).

called demeaning names, and socially ostracized. Some had shots fired at their houses, a brick was thrown through a windshield, and a garden damaged. Other evidence showed that persons refusing to observe the boycott were beaten, robbed, and publicly humiliated (by spanking). The merchants brought suit against, *inter alios*, Evers. The Court first noted that, while many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it could not be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline. Nevertheless, the Court held that the emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. As the Court noted, "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." If Evers' language had been followed by acts of violence, a substantial question would be presented whether he could be held liable for the consequences of that unlawful conduct. In the specific case, however, acts of violence occurred weeks or months after Evers' speeches. For these reasons, the Court concluded that Evers could not be held liable for the unlawful conduct of others.[189]

b. Injury to Reputation or Privacy

i. Defamation

[I58] *Basic Principles.* The Court has emphasized that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open' debate on public issues. . . . They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' . . . Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. [The Court's] decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. . . . 'Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.' The First Amendment requires that some falsehood be protected in order to protect speech that matters. The need to avoid self-censorship by the news media is, however, not the only societal value

[189] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982).

at issue. . . . The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. . . . [T]he individual's right to the protection of his own good name 'reflects no more than the basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by the Court as a basic of [the American] constitutional system.' . . . Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . [S]ome antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.' . . . In [its] continuing effort to define the proper accommodation between these competing concerns, [the Court has] been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise. . . . To that end, th[e] Court has extended a measure of strategic protection to defamatory falsehood."[190] One can discern in the Court's decisions two forces that have reshaped the state law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern.[191]

[I59] "Until *New York Times v. Sullivan*, the law of defamation was almost exclusively the business of state courts and legislatures. Under the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt, or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that, 'in many cases, the effect of defamatory statements [wa]s so subtle and indirect that it [wa]s impossible directly to trace the effects thereof in loss to the person defamed.' . . . The defendant was permitted to show that there was no reputational injury; but . . . the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable *per se*. This rule performed 'a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false.' . . . Similar rules applied to slanderous statements that were actionable *per se*."[192]

[I60] In *New York Times v. Sullivan*, the Court determined for the first time the extent to which the constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct. The state's trial court in that case believed the statements tended to injure the plaintiff's reputation or bring him into public contempt and were therefore libelous *per se*. The trial court, therefore, instructed the jury that it could presume falsity, malice, and some damage to reputation, as long as it found that the defendant had published

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190 Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–42 (1974).

191 *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

192 *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749, 765 (1985) (White, J., concurring).

the statements, and that the statements concerned the plaintiff. The trial court also instructed the jury that an award of punitive damages required "malice" or "actual malice." The jury found for the plaintiff and made an award of damages that did not distinguish between compensatory and punitive damages. The Alabama supreme court upheld the judgment of the trial court in all respects. The Court reversed, holding that "libel can claim no talismanic immunity from constitutional limitations." Relying on "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks,"[193] the Court noted that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.' Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[194] The Court therefore held that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[195]

[I61] Three years later, in *Curtis*, a majority of the Court determined that the *New York Times* test should apply to criticism of "public figures" as well as "public officials." The Court extended the constitutional privilege announced in that case to protect defamatory criticism of non-public persons "who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[196] As Chief Justice Warren noted, the "citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'"[197]

[I62] The next step in this constitutional evolution was the Court's consideration of a private individual's defamation actions involving statements of public concern. Although the issue was initially in doubt,[198] the Court concluded, in *Gertz*, that the *New York Times* malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest. As the Court explained, "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater. More important, . . . [public officials and public figures] must accept certain

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

194 *Id.* at 279.

195 *Id.* at 279–80.

196 Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162–65 (1967) (Warren, C.J., concurring in result); *id.* at 170 (opinion of Justices Black and Douglas); *id.* at 172 (opinion of Justices Brennan and White). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 163–69 (1979); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666 (1989).

197 Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967).

198 *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

necessary consequences of their involvement in public affairs. [They] ru[n] the risk of closer public scrutiny than might otherwise be the case. . . . [And] the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. . . . Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[199] In light of the above, the Court held that the Constitution "allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*."[200] Nonetheless, the Court believed that certain significant constitutional protections are warranted in this area. First, the states cannot impose liability without requiring some showing of fault, at least negligence.[201] Second, the states may not permit recovery of presumed or punitive damages[202] on less than a showing of *New York Times* malice. "Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication and juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion, rather than to compensate individuals for injury sustained by the publication of a false fact. . . . Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions, [since] [t]hey are not compensation for injury . . . [but] private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[203]

[I63] In sharp contrast to *New York Times, Dun & Bradstreet* involved not only a private-figure plaintiff but also speech of purely private concern. Five members of the Court found that, in a case with such a configuration of speech and plaintiff, the showing of actual malice, needed to recover presumed or punitive damages under either *New York Times* or *Gertz*, is unnecessary. As the plurality noted, in light of the reduced constitutional value of speech involving no matters of public concern, the state interest in preserving private reputation adequately supports awards of presumed and punitive damages, even absent a showing of actual malice.[204] In the same case, at least five Justices agreed that, in the context of defamation law, "the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities."[205]

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[199] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974).

[200] *Id.* at 348.

[201] *Id.* at 347–48.

[202] *Actual* injury is not limited to out-of-pocket loss but also includes impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.

[203] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974).

[204] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (opinion of Powell, J., joined by Rehnquist and O'Connor, JJ.); *id.* at 764 (Burger, C.J., concurring in judgment): *id.* at 774 (White, J., concurring in judgment).

[205] *Id.* at 784 (Brennan, J., dissenting, joined by Marshall, Blackmun and Stevens. JJ.); *id.* at 773 (opinion of White, J.).

[I64] *False Statements of Fact.* The Court has recognized constitutional limits on the *type* of speech that may be the subject of state defamation actions. In *Greenbelt*, a real estate developer had engaged in negotiations with a local city council for a zoning variance on certain of his land, while simultaneously negotiating with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as "blackmail," and the developer sued for libel. Rejecting a contention that liability could be premised on the notion that the word "blackmail" implied the developer had committed the actual crime of blackmail, the Court held that the imposition of liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word "blackmail" in these circumstances was not slander when spoken, and not libel when reported in the *Greenbelt News Review*. Noting that the published reports "were accurate and full," the Court reasoned that "even the most careless reader should have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those considering [the developer's] negotiating position extremely unreasonable."[206]

[I65] In *Milkovich*, the Court refused to create a wholesale defamation exemption for anything that might be labeled "opinion." In doing so, the Court stressed that "expressions of 'opinion' may often imply an assertion of objective fact." For example if a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts that lead to the conclusion that Jones told an untruth. And such a statement can cause as much damage to reputation as the statement, "Jones is a liar." Indeed, "it would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words I think.'" Subsequently, the Court allowed the defamation action to go forward in that case, holding that a reasonable trier of fact could find that the so-called expressions of opinion could be interpreted as including false assertions as to factual matters.[207]

[I66] The Court also has considered the concept of falsity. In *Time v. Pape*, the Court reversed a libel judgment that arose out of a magazine article summarizing a report by the U.S. Commission on Civil Rights discussing police civil rights abuses. The article quoted the Commission's summary of the facts surrounding an incident of police brutality, but it failed to include the Commission's qualification that these were allegations taken from a civil complaint. The Court noted that the attitude of the Commission toward the factual verity of the episodes recounted was anything but straightforward and distinguished between a "direct account of events that speak for themselves" and an article descriptive of what the Commission had reported. In taking into account the difficult choices that confront an author who departs from direct quotation and offers his own interpretation of an ambiguous source, the Court found that the defendant had not published a falsification sufficient to sustain a finding of actual malice.[208]

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[206] Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 13–14 (1970). *See also* Letter Carriers v. Austin, 418 U.S. 264, 284–86 (1974) (use of the word "traitor" in literary definition of a union "scab" not basis for a defamation action under federal labor law, since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody that could not reasonably have been interpreted as stating actual facts about the public figure involved).

[207] Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–20 (1990).

[208] Time, Inc. v. Pape, 401 U.S. 279, 285–92 (1971), *discussed in* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 518 (1991).

[I67] In *Bose*, a *Consumer Reports* reviewer had attempted to describe in words the experience of listening to music through a pair of loudspeakers, and the Court concluded that the result was not an assessment of "events that speak for themselves," but "one of a number of possible rational interpretations of an event that bristled with ambiguities and descriptive challenges for the writer." Hence, the Court refused to permit recovery for choice of language that, though perhaps reflecting a misconception, represented "the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies."[209]

[I68] "The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources. Where, however, a writer uses a quotation, and where a reasonable reader would conclude that the quotation purports to be a verbatim repetition of a statement by the speaker, the quotation marks indicate that the author is not involved in an interpretation of the speaker's ambiguous statement, but attempting to convey what the speaker said. This orthodox use of a quotation is the quintessential 'direct account of events that speak for themselves.' . . . More accurately, the quotation allows the subject to speak for himself. . . . In some sense, any alteration of a verbatim quotation is false. But writers and reporters, by necessity, alter what people say, at the very least to eliminate grammatical and syntactical infelicities. . . . [And] [a]n interviewer who writes from notes often will engage in the task of attempting a reconstruction of the speaker's statement. . . . Even if a journalist has tape-recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances. The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy. The use or absence of punctuation may distort a speaker's meaning, for example, where that meaning turns upon a speaker's emphasis of a particular word. In other cases, if a speaker makes an obvious misstatement, for example by unconscious substitution of one name for another, a journalist might alter the speaker's words but preserve his intended meaning. And conversely, an exact quotation out of context can distort meaning, although the speaker did use each reported word. . . . If every alteration constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change, one inconsistent with . . . First Amendment principles."[210] For these reasons, "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times* and *Gertz*, unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case."[211]

[I69] *Actual Malice.* The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.[212] The

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[209] Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512–13 (1984), *discussed in* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 519 (1991).

[210] Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 514–15, 519 (1991).

[211] *Id.* at 517. In that case, the Court found that five of the six published passages in question differed materially in meaning from the tape recorded statements so as to create an issue of fact for a jury as to falsity. *Id.* at 521–25.

[212] Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685 (1989).

"actual malice" standard is not satisfied merely through a showing of ill-will or "malice" in the ordinary sense of the term.[213] Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice.[214] Although the mental element of "knowing or reckless disregard" required under the *New York Times* test is not readily captured in one infallible definition, the Court has made clear that the defendant "must have entertained serious doubts as to the truth of his publication."[215] The standard is a subjective one: there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of probable falsity."[216] "As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."[217] In a case involving the reporting of a third party's allegations, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."[218]

[I70] *Public Officials or Figures.* The "public official" designation, under *New York Times*, applies, "at the very least, to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply. . . . The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."[219]

[I71] In *Gertz*, the Court identified two ways in which a person may become a "public figure" for purposes of the First Amendment. "For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[220]

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[213] *See* Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) *(per curiam)*; Henry v. Collins, 380 U.S. 356 (1965) *(per curiam)*.

[214] Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989).

[215] St. Amant v. Thompson, 390 U.S. 727, 730–31 (1968).

[216] Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

[217] Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989). In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), a four-Justice plurality suggested that a public figure need only make a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. *Id.* at 155. This proposed standard, however, was emphatically rejected by a majority of the Court in favor of the stricter *New York Times* actual malice rule. *See id.* at 162 (opinion of Warren, C.J.); *id.* at 170 (opinion of Justices Black and Douglas); *id.* at 172 (opinion of Justices Brennan and White). Today, there is no question that public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule, which never commanded a majority of the Court. *See Harte-Hanks Communications, supra*, at 666.

[218] St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

[219] Rosenblatt v. Baer, 383 U.S. 75, 85–86, n.13 (1966). Whether a person is a "public official," within *New York Times*, is not determined under state law standards. *Id.* at 84.

[220] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). "Clearly, those charged with

[I72] "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."[221] *Gertz* held that an attorney was not a public figure even though he voluntarily associated himself with a case that was certain to receive extensive media exposure. Gertz had served as an officer of local civic groups and of various professional organizations and had published several books and articles on legal subjects. Although he was consequently well known in some circles, he had achieved no general fame or notoriety in the community. As the Court emphasized, "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. [A court must focus on] the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[222] In *Gertz*, the attorney took no part in the criminal prosecution, never discussed the litigation with the press, and limited his participation in the civil litigation solely to his representation of a private client. "He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." Hence, he could not be properly characterized as a "public figure."[223]

[I73] *Firestone* involved a *Time* report of the factual and legal basis for the divorce of a wealthy person. The Court noted that dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor had respondent freely chosen to publicize issues as to the propriety of her married life. Hence, she was not a "public figure."[224]

[I74] The Court has rejected the proposition that "any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction."[225] In *Wolston*, petitioner failed to respond to a grand jury subpoena, concerning a major investigation into the activities of Soviet intelligence agents in the United States, and then pleaded guilty to a contempt charge. However, neither the mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that this might be attended by publicity, the citation for contempt, nor the simple fact that his failure to appear and the contempt citation attracted media attention, rendered him such a public figure. His failure to appear was in no way calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue but rather appeared simply to have been the result of his poor health. And there was no evidence that his failure to appear was intended to have, or in fact had, any effect on any issue of public concern.[226]

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defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." Regular and continuing access to the media is one of the accouterments of having become a public figure. But the fact that some media reported one's response to an alleged libel does not demonstrate that this individual was a public figure prior to the controversy. *See* Hutchinson v. Proxmire, 443 U.S. 111, 135–36 (1979).

221 Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167 (1979).

222 Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).

223 *Id.* at 352.

224 Time, Inc. v. Firestone, 424 U.S. 448, 454–55 (1976).

225 Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 168 (1979).

226 *Id.* at 165–68.

[I75] Concern about general public expenditures is shared by most, and it relates to most public expenditures. Therefore, it is not sufficient to make everyone receiving or benefiting from the myriad public grants for research a public figure.[227]

[I76] *Matters of Public Concern.* "Public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[228] Whether speech addresses a matter of public concern must be determined by the expression's "content, form, and context."[229]

[I77] The Court has held that the public's interest extends to "anything which might touch on an official's fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character. . . . [Hence,] [t]he *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed."[230] The same is true with respect to candidates for public office. A charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always relevant to his fitness for office.[231]

[I78] In *Dun & Bradstreet*, a credit-reporting agency had sent a report to five subscribers indicating that a construction contractor had filed a voluntary petition for bankruptcy. Five members of the Court found that the credit report concerned no public issue.[232] Justice Powell, speaking for a three-member plurality, relied primarily on the fact that the speech at issue was solely in the individual interest of the speaker and its specific business audience and also appeared to rely in part on the fact that communication was limited and confidential.[233]

[I79] *Standard and Burden of Proof.* The Court has determined that, both for public officials and public figures, a showing of *New York Times* malice is subject to a "clear and convincing" standard of proof.[234] Moreover, the Court has held that "the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." The Court, thus, has fashioned "a constitutional requirement that the plaintiff bear the burden of showing

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227 Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979).

228 City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) *(per curiam).*

229 Connick v. Myers, 461 U.S. 138, 147 (1983).

230 Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

231 Monitor Patriot Co. v. Roy, 401 U.S. 265, 274, 277 (1971). As the Court noted, "[g]iven the realities of [the] political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks." *Id.* at 275.

232 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) (opinion of Powell, J., joined by Rehnquist and O'Connor, JJ.); *id.* at 774 (White, J., concurring in judgment); *id.* at 764 (concurring opinion of C.J. Burger, who said that the expression in question there "related to a matter of essentially private concern").

233 *Id.* at 762. The four dissenters noted that credit reports constitute "commercial speech," are part of the fabric of national commercial communication, and facilitate, through the price system, the improvement of human welfare. Further, the assertion that the limited and confidential circulation might make the expression less a matter of public concern was dubious on its own terms and flatly inconsistent with *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). *Id.* at 791–95, n.18.

234 Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974); Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991).

falsity, as well as fault, before recovering damages." Although "requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so," this result is justified on the grounds that "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result."[235] But "according an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized, or presaged by [the Court's] cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times*" and its progeny.[236]

[I80] *Appellate Review.* In determining whether the *New York Times* standard has been satisfied, "the reviewing court must consider the factual record in full," in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. "Although credibility determinations are reviewed under the clearly erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses, . . . the reviewing court must 'examine [for itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'"[237] The requirement of independent appellate review "reflects a deeply held conviction that judges—and particularly Members of th[e] Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."[238]

[I81] *Group Libel.* In *Beauharnais*, a case decided by the narrowest of margins, the Court upheld a criminal group libel law, as applied to a publication held to be defamatory of a racial group, because of the "social interest in order and morality."[239] More specifically, *Beauharnais* sustained the conviction of a man who had circulated a petition calling on the Mayor and City Council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro" with the statement added that "if persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions, rapes, robberies, knives, guns and marijuana of the negro, surely will." In doing so, the Court noted that, in the face of a long history of extreme racial and religious propaganda, Illinois could conclude that "willful purveyors of falsehood concerning racial and religious groups promote[d] strife and tend[ed] powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community."[240]

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[235] Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776–78 (1986).

[236] Herbert v. Lando, 441 U.S. 153, 169 (1979).

[237] Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989), *quoting* New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

[238] Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 510–11 (1984).

[239] Beauharnais v. Illinois, 343 U.S. 250, 257 (1952).

[240] *Id.* at 259. In *Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978), *cert. denied*, Smith v. Collin 439 U.S. 916 (1978), the Seventh Circuit observed that it might be questioned, after cases such as *Cohen v. California, Gooding v. Wilson*, and *Brandenburg v. Ohio*, whether the tendency to induce violence approach sanctioned implicitly in *Beauharnais* would still pass constitutional muster.

[I82] *Libel on Government.* "[A]n otherwise impersonal attack on governmental operations cannot be utilized to establish a libel of those administering the operations, . . . in the absence of sufficient evidence that the attack focused on the plaintiff." The plaintiff in *New York Times* was one of the three elected Commissioners of the City of Montgomery, Alabama. His duties included the supervision of the police department. The statements in the advertisement upon which he principally relied as referring to him were that "truckloads of police ringed the Alabama State College Campus" after a demonstration on the State Capitol steps, and that Dr. Martin Luther King had been "arrested seven times." These statements were false in that, although the police had been "deployed near the campus," they had not actually "ringed" it, and had not gone there in connection with a State Capitol demonstration, and in that Dr. King had been arrested only four times. The Court held that evidence that Sullivan, as Police Commissioner, was the supervisory head of the Police Department was constitutionally insufficient to show that the statements about police activity were "of and concerning" him. In reaching this conclusion, the Court rejected as inconsistent with the First and Fourteenth Amendments the proposition followed by the Alabama supreme court in the case that, "[i]n measuring the performance or deficiencies of . . . groups, praise or criticism is usually attached to the official in complete control of the body." "To allow the jury to connect the statements with Sullivan on that presumption alone was . . . to invite the spectre of prosecutions for libel on government, which the Constitution does not tolerate in any form."[241]

[I83] *Intentional Infliction of Emotional Distress. In Hustler*, the Court considered whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him and gross and repugnant in the eyes of most. The cartoon in question portrayed respondent—a nationally known minister and commentator on politics and public affairs—as having engaged in a drunken incestuous rendezvous with his mother in an outhouse. The parody suggested that respondent was a hypocrite who preached only when he was drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody—not to be taken seriously." The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." The Court stressed that "the State's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved." Further, it rejected respondent's argument that the caricature at issue was "outrageous." As the Court pointed out, "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. [Such a standard would be inconsistent with the Court's] longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience." The Court concluded that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one there at issue without showing, in addition, that the publication contains a

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[241] *See* Rosenblatt v. Baer, 383 U.S. 75, 81 (1966), *discussing* New York Times Co. v. Sullivan, 376 U.S. 254, 273–76, 290–92 (1964).

false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true."[242]

[I84] *The Petition Clause.* The First Amendment right to petition does not "include an unqualified right to express damaging falsehoods in exercise of that right." Although the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Petition Clause provides absolute immunity from damages for libel.[243]

[I85] *The Speech or Debate Clause. Hutchinson* held that a member of Congress is not protected by the Speech or Debate Clause of the Constitution (Article I, Section 6) against suits for allegedly defamatory statements made by the member in press releases and newsletters. Literal reading of the Clause would, of course, confine its protection narrowly to a "Speech or Debate in either House." But the Court has given the Clause a practical, rather than a strictly literal, reading that would limit the protection to utterances made within the four walls of either Chamber. "Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[244] Thus, committee hearings are protected, even if held outside the Chambers, and committee reports are also protected.[245] The gloss going beyond a strictly literal reading of the Clause has not, however, departed from the objective of protecting only legislative activities. "Whatever imprecision there may be in the term 'legislative activities,' it is clear that nothing in history or in the explicit language of the Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber."[246] Neither newsletters nor press releases issued by members of Congress are part of the legislative process nor an essential part of that deliberative process by which members participate in committee and House proceedings. Moreover, they are not privileged as part of the "informing function" of members of Congress to tell the public about their activities. In contrast to voting and preparing committee reports, which are part of Congress' function to inform itself, newsletters and press releases are primarily means of informing those outside the legislative forum and represent the views and will of a single member.[247]

[I86] *Official Immunity Doctrine.* The official immunity doctrine, which has, in large part, been of judicial making, confers immunity on government officials of suitable rank for the reason that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the

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[242] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 55–56 (1988).

[243] McDonald v. Smith, 472 U.S. 479, 484–85 (1985).

[244] Gravel v. United States, 408 U.S. 606, 625 (1972). The shield does not extend beyond what is necessary to preserve the integrity of the legislative process. *See* United States v. Brewster, 408 U.S. 501, 517 (1972).

[245] *See* Doe v. McMillan, 412 U.S. 306 (1973).

[246] Hutchinson v. Proxmire, 443 U.S. 111, 127 (1979).

[247] *Id.* at 130–33.

fearless, vigorous, and effective administration of policies of government."[248] *Barr* determined that the scope of immunity from defamation suits should be determined by the relation of the publication complained of to the duties entrusted to the officer. In that case, the Court immunized the acting director of the Office of Rent Stabilization from liability for an alleged libel contained in a press release announcing the director's intention to suspend subordinate officials of the same Office because of the part they had played in formulating a plan for the utilization of certain agency funds. In doing so, the Court noted that "a publicly expressed statement of the position of the agency head, announcing personnel action which he planned to take in reference to the charges . . . widely disseminated to the public, was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively," and found that the fact that the action there taken was "within the outer perimeter" of Barr's line of duty was enough to render the privilege applicable.[249]

ii. Information Privacy

[I87] *"False Light" Invasion of Privacy.* Publicity that places the plaintiff in a false light in the public eye is generally recognized as one of the several distinct kinds of invasions actionable under the privacy rubric. "The interest protected in permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation, with the same overtones of mental distress as in defamation.'"[250] *Time v. Hill* involved a claim under the New York "Right of Privacy" statute that *Life Magazine*, in the course of reviewing a new play, had connected the play with a long-past incident involving petitioner and his family and had falsely described their experience and conduct at that time. The complaint sought damages for humiliation and suffering flowing from these non-defamatory falsehoods that allegedly invaded Hill's privacy. The Court found, however, that the opening of a new play linked to an actual incident was a matter of public interest. Further, the Court, guided by its decision in *New York Times v. Sullivan*, held that the constitutional protections for speech and press precluded the application of the New York statute to allow recovery for false reports of matters of public interest in the absence of proof that the defendant had published the report with knowledge of its falsity or in reckless disregard of the truth.[251]

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[248] Barr v. Matteo, 360 U.S. 564, 571 (1959).

[249] *Id.* at 573–75 (plurality opinion). *See also id.* at 576–78 (concurring opinion of Black, J.).

[250] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 572 (1977).

[251] Time, Inc. v. Hill, 385 U.S. 374, 388–89 (1967). Although the jury could have reasonably concluded from the evidence in the Hill case that *Life* had engaged in knowing falsehood or had recklessly disregarded the truth in stating in the article that "the story re-enacted" the Hill family's experience, the Court concluded that the trial judge's instructions had not confined the jury to such a finding as a predicate for liability as required by the Constitution. *Id.* at 394. *See also* Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974).

The Court's holding in *Time v. Hill* was not an extension of *New York Times*, but rather a parallel line of reasoning applying that standard to this discrete context. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 336, n.6 (1974).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 498, n.2 (1975), Justice Powell noted that the *Gertz* Court's "abandonment of the 'matter of general or public interest' standard as the determinative factor for deciding whether to apply the *New York Times* malice standard to defamation litigation brought by private individuals . . . calls into question the conceptual basis of *Time v. Hill*. In neither *Gertz* nor . . . *Cantrell* . . . [did the Court consider] whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false

[I88] *Publication of Truthful Information—Generally.* The Court's decisions establish that, "absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech."[252] Under *Daily Mail*, "if a newspaper lawfully obtains truthful information about a matter of public significance," such as the commission, and investigation, of a violent crime that had been reported to authorities, or the name of an alleged criminal, "then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order."[253]

[I89] In *Florida Star*, a newspaper had been found civilly liable for publishing the name of a rape victim that it had obtained from a publicly released police report. The Court decided that this result did not comport with the First Amendment. Although the interests in protecting the privacy and safety of sexual assault victims and in encouraging them to report offenses without fear of exposure are highly significant, imposing liability on the *Star* in that case was too precipitous a means of advancing those interests to convince the Court that there was a "need," within the meaning of the *Daily Mail* formulation for Florida to take this extreme step. As the Court noted, "[w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts. . . . The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. . . . [In addition,] punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." And that *Star* had gained access to the information in question through a government news release made it "especially likely that, if liability were to be imposed, self-censorship would result. Reliance on a news release 'is a paradigmatically routine newspaper reporting technique.' . . . The government's issuance of such a release, without qualification, could only convey to recipients that the government considered dissemination lawful, and indeed expected the recipients to disseminate the information further." A second problem was that liability followed automatically from publication. This was so regardless of whether the identity of the victim was already known throughout the community; whether the victim had voluntarily called public attention to the offense; or whether the identity of the victim had otherwise become a reasonable subject of public concern—because, perhaps, questions had arisen whether the victim fabricated an assault by a particular person.

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statements injurious to a private individual under a false light theory of invasion of privacy," or whether the constitutional standard announced in *Time v. Hill* applies to all false light cases. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974); Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 250–51 (1974).

[252] Butterworth v. Smith, 494 U.S. 624, 634 (1990).

[253] Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979). *See also* Florida Star v. B.J.F., 491 U.S. 524, 534 (1989). In the latter case, the Court pointed out the "timidity and self-censorship" that may result from allowing the media to be punished for publishing certain truthful information. For example, a rule "depriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper's sole object is to reproduce, with no substantial change, the government's rendition of the event in question." *Id.* at 535–36.

Nor was there a scienter requirement of any kind under state law, engendering the perverse result that truthful publications challenged pursuant to this cause of action were less protected by the First Amendment than even the least protected defamatory falsehoods involving purely private figures, where liability is evaluated under a standard of ordinary negligence, under *Gertz*. Finally the facial underinclusiveness of Florida's statute—which prohibited publication only by an "instrument of mass communication" and did not prohibit the spread of victims' names by other means—raised serious doubts about whether Florida was in fact serving the interests invoked in support of the imposition of liability on the *Star*. Indeed, "[w]hen a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the small-time disseminator as well as the media giant."[254]

[I90] In *Bartnicki*, the Court considered what degree of protection, if any, the First Amendment provides to speech that discloses the contents of an illegally intercepted communication. A federal criminal statute, aimed to protect effectively the privacy of wire and oral communications, applied, *inter alios*, to any person who "willfully intercepts . . . any wire or oral communication" or "willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection." The case involved the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue, more specifically about collective bargaining negotiations between a teachers' union and a school board. The radio commentator who made the disclosures did not participate in the interception, but he did know—or at least had reason to know—that the interception was unlawful. The Court began its analysis by stressing that the statutory prohibition of interception of oral communications was a content-neutral provision of general applicability. On the other hand, the naked prohibition against disclosures was a regulation of pure speech. The government identified two interests served by the prohibition of disclosures. First it invoked the interest in removing an incentive for parties to intercept private conversations. However, as the Court noted, "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. . . . I[t] would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party. Although there are some rare occasions in which a law suppressing one party's speech may be justified by an interest in deterring criminal conduct by another" (see, e.g., *New York v. Ferber*, regarding a ban of distribution of child pornography), this was not such a case.[255] There was no evidence that Congress viewed the prohibition against disclosures as a response to the difficulty of identifying persons making improper use of scanners and other surveillance devices and accordingly of deterring such conduct, and there was no empirical evidence to support the assumption that the prohibition against disclosures would reduce the number of illegal interceptions. Accordingly, the government's first suggested justification for applying the challenged prohibition to an otherwise innocent disclosure of public information was plainly insufficient. The government's second asserted interest—minimizing the harm to persons whose conversations had been ille-

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254 Florida Star v. B.J.F., 491 U.S. 524, 534–35, 539–40 (1989).

255 Bartnicki v. Vopper, 532 U.S. 514, 530 (2001).

gally intercepted—was considerably stronger. "Privacy of communication is an important interest," and the statute's restrictions were intended to protect that interest, thereby "encouraging the uninhibited exchange of ideas and information among private parties. . . . Moreover, the fear of public disclosure of private conversations might well have a chilling effect on private speech."[256] Hence, the case presented "a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech."[257] In considering that balance, the Court acknowledged that "some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself. As a result, there is a valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message, even if that prohibition does not play a significant role in preventing such interceptions from occurring in the first place."[258] Nevertheless, the Court did not have to decide whether that interest was strong enough to justify the application of the provision at issue to disclosures of trade secrets or domestic gossip or other information of purely private concern. The enforcement of the provision in that case implicated "the core purposes of the First Amendment because it impose[d] sanctions on the publication of truthful information of public concern. In this case, privacy concerns gave way when balanced against the interest in publishing matters of public importance, . . . [since] [o]ne of the costs associated with participation in public affairs is an attendant loss of privacy."[259] The profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open had supported the Court's holding, in *New York Times Co. v. Sullivan*, that factual error and defamatory content do not suffice to remove the First Amendment shield from criticism of official conduct. The Court concluded that parallel reasoning required the holding that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[260]

[I91] *Privacy Interests in Judicial Proceedings.*[261] In the criminal trial context, when a state attempts "to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[262] The compelling state interest in safeguarding the physical and psychological well-being of minors cannot justify a statute mandating exclusion of the press and public during the testimony of a minor victim in a sex-offense trial. It is "clear that the circumstances of the particular case may affect the significance of that interest," which can be served just as well by requiring the trial court to determine on a case-by-case basis whether the state's legitimate concern for the well-being of the minor victim necessitates closure. "Among the factors to be weighed are the minor victim's

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256 *Id.* at 532–33.

257 *Id.* at 518.

258 *Id.* at 533.

259 *Id.* at 533–34.

260 *Id.* at 535.

261 *See also* para. I259 *(grand jury proceedings).*

262 Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 606–07 (1982).

age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives."[263]

[I92] "By placing . . . information in the public domain on official court records, the State must be presumed to have concluded that the public interest is thereby being served. Public records, by their very nature, are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. . . . [Hence,] the First and Fourteenth Amendments [do] not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information."[264] Under these considerations, *Cox Broadcasting* found unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim, which the station had obtained from courthouse records.

[I93] "Those who see and hear what transpired [in the courtroom] can report it with impunity."[265] In *Oklahoma Publishing*, the Court struck down a state court's pre-trial order enjoining the media from publishing the name or photograph of an 11-year-old boy who was being tried before a juvenile court. The juvenile court judge had permitted reporters and other members of the public to attend a hearing in the case notwithstanding a state statute closing such trials to the public. The court then attempted to halt publication of the information obtained from that hearing. But since the name and picture of the juvenile had been publicly revealed in connection with the prosecution of the crime, the state court's order abridged the freedom of the press in violation of the Constitution.[266]

[I94] In *Smith v. Daily Mail*, the Court found unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender. The papers had learned about a shooting by monitoring a police band radio frequency, and had obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor. The sole interest advanced by the state to justify its criminal statute was to protect the anonymity of the juvenile offender. The Court held that the magnitude of the state's interest in this statute was not sufficient to justify application of a criminal penalty to respondents. Moreover, the statute did not restrict the electronic media or any form of publication, except "newspapers," from printing the names of youths charged in a juvenile proceeding. Thus, even assuming the statute served a state interest of the highest order, it did not accomplish its stated purpose. In addition, there was no evidence to demonstrate that the imposition of criminal penalties was necessary to protect the confidentiality of juvenile proceedings.[267]

[I95] "The jury selection process may, in some circumstances, give rise to legitimate privacy interests of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain." For

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263 *Id.* at 607–08.

264 Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495–96 (1975).

265 Craig v. Harney, 331 U.S. 367, 374 (1947).

266 Oklahoma Publ'g Co. v. District Court, 430 U.S. 308, 311–12 (1977) *(per curiam)*.

267 Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103–05 (1979).

example, a prospective juror in a rape case may have been raped or declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode. The privacy interests of such a prospective juror must be balanced against the need for openness of the *voir dire* process. "To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection, and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record. By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure. The exercise of sound discretion by the court may lead to excusing such a person from jury service. When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment."[268]

[I96] "[P]retrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. . . . There is an opportunity . . . for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but, if publicly released, could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes." In light of these considerations, the Court held in *Seattle Times* that a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery.[269]

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[268] Press-Enter. Co. v. Superior Court of California, 464 U.S. 501, 511–12 (1984). In *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306–307 (1983), Justice Brennan granted a stay of a trial court judge's order prohibiting publication of the names or addresses of jurors who served in a homicide trial. The order, entered after the jurors had been selected in open *voir dire* proceedings at which their names were not kept confidential, was not restricted to the time during which the trial was conducted, but, on its face, it permanently prohibited publishing the jurors' names or addresses. The jury ultimately returned a guilty verdict and was discharged. As Brennan noted, "the State's interest . . . in shielding jurors from pressure during the course of the trial, so as to ensure the defendant a fair trial, . . . becomes attenuated after the jury brings in its verdict and is discharged. . . . As for the State's concern for the jurors' privacy, [the Court does not permit] restrictions on the publication of information that would have been available to any member of the public who attended an open proceeding. In an extraordinary case, such a restriction might be justified, but the justifications must be adduced on a case-by-case basis, with all interested parties given the opportunity to participate, and less restrictive alternatives must be adopted if feasible." However, the order at issue had been entered without a hearing and without findings of fact that would justify it.

[269] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34–35 (1984).

[I97] *Appropriation of a Right of Publicity—Copyright.* The "actual malice" standard does not apply to the tort of "appropriation of a right of publicity." In *Zacchini*, a performer sued a news organization for appropriation of his right to the publicity value of his performance, after it broadcast the entirety of his act on local television. The Court held that the First Amendment did not bar such a suit for damages. The state's decision to protect petitioner's right of publicity "rest[ed] on more than a desire to compensate the performer for the time and effort invested in his act; the protection provide[d] an economic incentive for him to make the investment required to produce a performance of interest to the public." This same consideration underlies the patent and copyright laws long enforced by the Court. Nor did the Court think that a state law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of *Gertz*. Respondent knew that petitioner objected to televising his act but, nevertheless, displayed the entire film. However, at the same time, the Court made clear that its holding did not extend to the reporting of information about an event of public interest. As the Court noted, "if . . . respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, [it would be] a very different case." The Court concluded that, although the state might, as a matter of its own law, privilege the press in the circumstances of this case, the First and Fourteenth Amendments did not require it to do so.[270]

[I98] The Copyright Clause (U. S. Constitution, Article I, Section 8, Clause 8) provides that "Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings." The Copyright Clause and First Amendment were adopted close in time. "This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression."[271] As *Harper & Row* observed, "the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[272]

[I99] "In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations."[273] First, the Copyright Act distinguishes between ideas and expression and makes only the latter eligible for copyright protection: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." This "idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."[274] Second,

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[270] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 569, 576–79 (1977).

[271] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[272] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[273] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[274] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985). Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication. *See* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991).

under the federal legislation, "[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." Hence, "the 'fair use' defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances;"[275] it affords considerable "latitude for scholarship and comment"[276] "and even for parody."[277] "In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use," the Court has seen "no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright."[278]

[I100] *Eldred* emphasized that, "when speakers assert the right to make other people's speeches," the foregoing statutory free speech safeguards are generally adequate to address First Amendment concerns. Copyrights are not "categorically immune from challenges under the First Amendment," but when "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[279]

c. Unwelcome and Offensive Speech[280]

i. In General

[I101] A principal "function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with

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[275] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[276] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

[277] Eldred v. Ashcroft, 537 U.S. 186, 220 (2003), *citing* Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994) (rap group's musical parody of Roy Orbison's "Oh, Pretty Woman" may be fair use).

The 1998 Copyright Term Extension Act supplemented these traditional First Amendment safeguards. First, it allowed libraries, archives, and similar institutions to "reproduce" and "distribute, display, or perform in facsimile or digital form" copies of certain published works "during the last 20 years of any term of copyright . . . for purposes of preservation, scholarship, or research" if the work was not already being exploited commercially and further copies were unavailable at a reasonable price. Second, it exempted small businesses, restaurants, and like entities from having to pay performance royalties on music played from licensed radio, television, and similar facilities.

[278] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985). The Court concluded that "[w]hether verbatim copying from a public figure's manuscript in a given case is or is not fair must be judged according to the traditional equities of fair use." *Id.* at 560. In that case, the Court found that a weekly magazine of political commentary had infringed former President Ford's copyright in the unpublished manuscript of his memoirs by verbatim excerpting of some 300 words from the work. The Court rejected the argument that the excerpting constituted fair use, noting the significance of the quotations, which amounted to "the heart of the book," the part most likely to be newsworthy and important in licensing serialization. The Court also pointed out that President Ford could not prevent others from copying bare historical facts from his autobiography, but that he could prevent others from copying his "subjective descriptions and portraits of public figures."

[279] Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

[280] *See also* paras. I58 *et seq. (defamation)*; paras. I123 *et seq. (sexually explicit speech)*; paras. I213, I214 *(offensive speech in public schools).*

conditions as they are, or even stirs people to anger."[281] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[282] And the state "has no legitimate interest in protecting any or all religions from views distasteful to them."[283] "Thus, the First Amendment ordinarily denies a State the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence."[284]

ii. Breach of Peace—"Fighting" Words[285]

[I102] The Court has "not permitted the government to assume that every expression of [an offensive or] a provocative idea will disturb the peace, but ha[s] instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'"[286] Under *Chaplinsky*, a state may punish those words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[287] Indeed, the Court has held that "'fighting words,' those personally abusive epithets that, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," are generally proscribable under the First Amendment.[288] However, the Court's "fighting words" cases have made clear that "[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected;"[289] "[a]s a general matter, [the Court has] indicated that in public debate citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[290] The reason why fighting words are categorically excluded from the protection of the First Amendment is that "their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey."[291] Similarly, words that create an immediate panic are not entitled to constitutional protection.[292]

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281 Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

282 Texas v. Johnson, 491 U.S. 317, 414 (1989).

283 Joseph Burstyn v. Wilson, 343 U.S. 495, 505 (1952). As the Court emphasized, "it is not the business of government . . . to suppress real or imagined attacks upon a particular religious doctrine." *See also* Cantwell v. Connecticut, 310 U.S. 296, 308–11 (1940).

284 Virginia v. Black, 538 U.S. 343, 358 (2003).

285 *See also* paras. E68–E69 *(void for vagueness doctrine).*

286 Texas v. Johnson, 491 U.S. 317, 409 (1989), *quoting* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

287 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

288 Cohen v. California, 403 U.S. 15, 20 (1971). A statement that is not directed to any person or group in particular does not fall within the category of "fighting words." *See* Hess v. Indiana, 414 U.S. 105, 107 (1973).

289 R.A.V. v. St. Paul, 505 U.S. 377, 414 (1992) (White, J., concurring), *citing* United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 409, 414 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55–56 (1988); Hess v. Indiana, 414 U.S. 105, 107–08 (1973); Cohen v. California, 403 U.S. 15, 20 (1971); Street v. New York, 394 U.S. 576, 592 (1969).

290 Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 383 (1997).

291 R.A.V. v. St. Paul, 505 U.S. 377, 386, 393 (1992).

292 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982), *citing* Schenck v. United States, 249 U.S. 47, 52 (1919) ("the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic").

[I103] In *Chaplinsky*, the Court sustained a conviction under a state statute that provided: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name." Chaplinsky was convicted for addressing to a local marshal on a public sidewalk the words, "You are a God damned racketeer," and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." Long before the words for which Chaplinsky was convicted, the state supreme court had sharply limited the statutory language "offensive, derisive or annoying word" to words that had a direct tendency to cause acts of violence by the person to whom, individually, the remark was addressed. In view of that authoritative construction, the Court held that the statute was sufficiently definite and specific to comply with the requirements of due process of law, and, as applied to Chaplinsky's utterances, did not unduly impair liberty of expression.[293]

[I104] Since *Chaplinsky*, the Court has consistently construed the "fighting words" exception narrowly. In *Gooding*, the defendant was convicted under a Georgia statute, which provided that any person "who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." The Court found the proscription of the use of "opprobrious or abusive language," embraced words "conveying or intended to convey disgrace," and included "harsh insulting language." Georgia appellate decisions had construed the statute to apply to utterances that, although within these definitions, were not words, "which by their very utterance tend to incite an immediate breach of the peace." For example, a conviction under the statute had been sustained for awakening ten women scout leaders on a camp-out by shouting "Boys, this is where we are going to spend the night. Get the God damn bed rolls out." Accordingly, the Court held that the statute was impermissibly overbroad and vague.[294]

[I105] *Lewis* and *Hill* made clear that the First Amendment "protects a significant amount of verbal criticism and challenge directed at police officers."[295] In *Lewis*, the appellant was found to have yelled obscenities and threats at an officer who had asked appellant's husband to produce his driver's license. Appellant was convicted under a municipal ordinance that made it a crime "for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." The Court vacated the conviction and invalidated the ordinance as facially overbroad. Critical to the Court's decision was the fact that the ordinance punished only "spoken words," and was not limited in scope to fighting words that "by their very utterance, inflict injury or tend to incite an immediate breach of the peace."[296] Moreover, in a concurring opinion in *Lewis*, Justice Powell suggested that the "fighting words" exception may require a narrower application in cases involving words addressed to a police officer, because "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"[297] The Houston ordinance at issue in *Hill* was much more sweeping than the municipal ordinance struck down in *Lewis*. It was not limited to fighting words nor even to obscene or opprobrious language, and was not narrowly tailored to ban only disor-

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293 Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942).

294 Gooding v. Wilson, 405 U.S. 518, 520–21 (1972)

295 City of Houston v. Hill, 482 U.S. 451, 461(1987).

296 Lewis v. City of New Orleans, 415 U.S. 130, 133–34 (1974).

297 *Id.* at 135.

derly conduct but prohibited speech that "in any manner . . . interrupt[ed]" a police officer during an investigation. In invalidating the ordinance as substantially overbroad, the Court emphasized that "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[298]

[I106] In *Cohen*, a sharply divided Court upheld the right to express an anti-draft viewpoint in a public place, albeit in terms highly offensive to most citizens. That case arose when Paul Cohen entered a Los Angeles courthouse wearing a jacket emblazoned with the words "F__ the Draft." After entering the courtroom, he took the jacket off and folded it. That portion of the statute upon which Cohen's conviction rested indiscriminately swept within its prohibitions all "offensive conduct" disturbing the peace of "any neighborhood or person." In holding that criminal sanctions could not be imposed on Cohen for his political statement in a public place, the Court rejected the argument that his speech would offend unwilling viewers. As the Court noted, while "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, . . . [people are] often 'captives' outside the sanctuary of the home and subject to objectionable speech. . . . The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections. In this regard, persons confronted with Cohen's jacket were in a quite different posture than those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[299] Moreover, there was no evidence that persons powerless to avoid appellant's conduct did, in fact, object to it. In light of these considerations, the Court concluded that the fact that some unwilling "listeners" in the courthouse might have been briefly exposed to Cohen's message couldn't serve to justify this breach of the peace conviction.

[I107] In *Rosenfeld*, appellant appeared and spoke at a public school board meeting that was held in an auditorium and was attended by more than 150 men, women, and children of mixed ethnic and racial backgrounds. It was estimated that there were approximately 40 children and 25 women present at the meeting. During his speech, appellant used the adjective "M__ f__" on four different occasions while concluding his remarks. Testimony varied as to what particular nouns were joined with this adjective, but they were said to include teachers, the community, the school system, the schoolboard, the country, the county, and the town. Rosenfeld was convicted under a New Jersey statute that provided: "Any person who utters loud and offensive or profane or indecent language in any public street or other public place, public conveyance or place to which the public is invited . . . is a disorderly person." The New Jersey Supreme Court,

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[298] City of Houston v. Hill, 482 U.S. 451, 462–63 (1987). At the same time, the Court admitted that a municipality constitutionally may punish, under a properly tailored statute, an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection. *See id.* at 462, n.11.

[299] Cohen v. California, 403 U.S. 15, 21 (1971).

had placed the following limiting construction on the New Jersey statute: "[T]he words must be spoken loudly, in a public place and must be of such a nature as to be likely to incite the hearer to an immediate breach of the peace or to be likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer. The words must be spoken with the intent to have the above effect or with a reckless disregard of the probability of the above consequences." The Court summarily vacated and remanded the case for reconsideration in the light of *Cohen v. California* and *Gooding v. Wilson*.[300]

[I108] In *Street*, the defendant had been convicted for shouting "we don't need no damned flag." The Court reversed the conviction, noting, *inter alia*, that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, and that Street's remarks "were not so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'"[301] Similarly, in *Johnson*, the Court held that that Texas' interest in maintaining order did not justify respondent's conviction for flag desecration, since this interest was not implicated on the facts and circumstances of the case, under which no disturbance of the peace had actually occurred or threatened to occur because of Johnson's generalized expression of dissatisfaction with the policies of the federal government.[302]

iii. Hostile Audiences

[I109] *Terminiello* grew out of an address petitioner delivered in an auditorium in Chicago under the auspices of the Christian Veterans of America. The meeting commanded considerable public attention. The auditorium was filled to capacity, with over 800 persons present. Others were turned away. Outside of the auditorium, a crowd of about 1,000 persons gathered to protest against the meeting. A cordon of policemen was assigned to the meeting to maintain order, but they were not able to prevent several disturbances. The crowd outside was angry and turbulent. Petitioner, in his speech, condemned the conduct of the crowd outside and vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare. Subsequently, Terminiello was convicted under a city ordinance that, as construed by the state court, punished an utterance as a breach of the peace "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." The Court set aside the conviction, saying: "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[303] The Chicago ordinance, as construed by the trial court, seriously invaded this province.

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[300] Rosenfeld v. New Jersey, 408 U.S. 901 (1972). The dissenters noted that the exception to First Amendment protection recognized in *Chaplinsky* extends to "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience" and that "a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription." *Id.* at 905–06.

[301] Street v. New York, 394 U.S. 576, 592 (1969).

[302] Texas v. Johnson, 491 U.S. 317, 408–10 (1989).

[303] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[I110] In *Feiner*, petitioner made an inflammatory speech to a mixed crowd of 80 black and white people on a city street. He made derogatory remarks about President Truman, the American Legion, and local political officials, endeavored to arouse the blacks against the whites, and urged that African-Americans rise up in arms and fight for equal rights. The crowd, which blocked the sidewalk and overflowed into the street, became restless; its feelings for and against the speaker were rising, there was some pushing, shoving, and milling around, and there was at least one threat of violence. After observing the situation for some time without interference, police officers, in order to prevent a fight, thrice requested petitioner to get off the box and stop speaking. After his third refusal, and after he had been speaking over 30 minutes, they arrested him, and he was convicted of disorderly conduct. The Court acknowledged that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker." Nevertheless, it sustained the conviction, stressing that "when the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, [the police are not] powerless to prevent a breach of the peace."[304]

[I111] *Forsyth County* involved an assembly and parade ordinance that authorized a county official to exercise discretion in setting the amount of the permit fee. In order to assess accurately the cost of security for parade participants, the administrator should "necessarily examine the content of the message . . . conveyed, . . . estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed [would] depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content." The Court invalidated this content-based ordinance, stressing, *inter alia*, that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[305]

iv. Captive Audiences[306]

[I112] "In our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' . . . Much that we encounter offends our esthetic, political or moral sensibilities."[307] The unwilling listener's interest in avoiding unwanted communication is an aspect of the broader "right to be let alone."[308] But the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, the burden normally falls upon the individual simply to avoid unwelcome speech.[309] "The First Amendment permits the government to prohibit offensive speech as intrusive only when the 'captive' audience cannot avoid the objectionable speech;"[310] "[a] less stringent analysis would permit the government to slight the First Amendment's role 'in affording the public access to discussion, debate, and the dissemination of information and ideas.'"[311]

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304 Feiner v. New York, 340 U.S. 315, 320–21 (1951).

305 Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992).

306 *See also* paras. I347 *et seq. (anti-noise regulations).*

307 Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975).

308 Hill v. Colorado, 530 U.S. 703, 716 (2000).

309 Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975).

310 Frisby v. Schultz, 487 U.S. 474, 487 (1988), *citing* Consol. Edison Co. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 542 (1980).

311 Consol. Edison Co. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 541 (1980), *quoting* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

[I113] The Court has held that the government may make every householder "the final judge of what will cross his threshold" and may permit him "to exercise control over unwanted mail."[312] Nevertheless, the Court has "never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended."[313] The occupants of a household receiving mailings are not a captive audience. All the recipient of objectionable mailings need do is to take "the short, though regular, journey from mail box to trash can. . . . [This] is an acceptable burden at least so far as the Constitution is concerned."[314]

[I114] In public locations, unwilling viewers may avert their eyes in order to avoid a visual message. Even in a public forum, one of the reasons the Court tolerates a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can "effectively avoid further bombardment of their sensibilities simply by averting their eyes."[315] Similarly, a court may not enjoin the pickets of an abortion clinic from using images observable by patients inside the clinic, because even if the patients find the expression contained in such images disagreeable, it is easy for the clinic "to pull its curtains."[316]

[I115] "The right to avoid unwelcome speech has special force in the privacy of the home, . . . and its immediate surroundings."[317] The target of a focused residential picketing is a "captive." "The resident is figuratively, and perhaps literally, trapped within the home, and, because of the unique and subtle impact of such picketing, is left with no ready means of avoiding the unwanted speech."[318] Thus, the government may prohibit picketing focused on, and taking place in front of, a particular residence.[319]

[I116] "[B]roadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children, even those too young to read.'"[320] Hence, patently offensive radio broadcasts may be prohibited.[321]

[I117] The right to avoid unwanted communication can also be protected in confrontational settings. A speaker does not have "an unqualified constitutional right to follow and harass an unwilling listener, especially one on his way to work or to receive

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312 Rowan v. Post Office Dep't, 397 U.S. 728, 736 (1970).

313 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983).

314 *Id.* at 72. There the Court found that the government may not ban potentially "offensive" and "intrusive" direct mail advertisements for contraceptives. *See also* Consol. Edison Co. v. Pub. Serv. Comm'n of New York, 447 U.S. 530 (1980), where the Court invalidated an order that prohibited the inclusion by a public utility company in monthly bills of inserts *discussing* controversial issues of public policy.

315 Cohen v. California, 403 U.S. 15, 21–22 (1971). *See also* Erznoznik v. Jacksonville, 422 U.S. 205, 210–11, n.6 (1975), where the Court invalidated a prohibition on the showing of films containing nudity on screens visible from the street.

316 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773 (1994).

317 Hill v. Colorado, 530 U.S. 703, 717 (2000).

318 Frisby v. Schultz, 487 U.S. 474, 487 (1988).

319 *Id.* at 487–88.

320 Sable Communications of California v. Fed. Communications Comm'n, 492 U.S. 115, 127 (1989), *quoting* Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

321 Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 750–51 (1978).

medical services."[322] Thus, the Court has held that a state may make it unlawful for any person within 100 feet of a health care facility's entrance to knowingly approach within eight feet of another person, without that person's consent, in order to pass a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling with that person.[323]

[I118] Bus and streetcar passengers constitute a captive audience; they are "there as a matter of necessity, not of choice."[324] Visual messages in municipal streetcars are "constantly before the eyes of [commuters] to be seen without the exercise of choice or volition on their part."[325] Hence, under *Lehman*, a city is not required to accept or permit any political advertising in its vehicles.[326] However, *Pollak* explicitly rejected a claim that the broadcasting of radio programs in streetcars violated the First and Fifth Amendment rights of passengers who did not wish to listen to those programs. In so holding, the Court noted, *inter alia*, that the radio programs had not been used for objectionable propaganda but consisted generally of 90 percent music, 5 percent commercial advertising, and 5 percent announcements explanatory and commendatory of streetcar services, and that the broadcasts did not interfere with the general public convenience, comfort, and safety.[327]

v. Threats of Violence—Hate Speech[328]

[I119] The First Amendment permits a state to ban true threats of violence. "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[329] Hence, a "political hyperbole" is not a true threat. In *Watts*, the petitioner had been convicted of violating a 1917 statute prohibiting any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States." During a public rally at the Washington Monument, petitioner stated in a small discussion group: "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." The Court found that the statute under which petitioner had been convicted was constitutional on its face, for it furthered the overwhelming government interest in protecting the safety of the Chief Executive and in allowing him to perform his duties without interference from threats of physical violence. Nevertheless, a statute such as that one, which made criminal a form of pure speech, should be interpreted with the commands of the First Amendment clearly in mind. Subsequently, the Court held that petitioner's statement, even if willfully and knowingly made, did not fit within the statutory term of "threat," since it was not a "true threat," but merely "a kind of very crude offensive method of stating a political opposition to the President."[330]

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[322] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 781 (1994) (Stevens, J., concurring and dissenting).

[323] Hill v. Colorado, 530 U.S. 703, 717–18 (2000).

[324] Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (plurality opinion).

[325] *Id.* at 307–08 (Douglas, J., concurring).

[326] *Id.* at 302–04 (plurality opinion); *id.* at 305–08 (Douglas, J., concurring).

[327] Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 463–66 (1952).

[328] *See also* para. I81 *(criminal group libel statute).*

[329] Virginia v. Black, 538 U.S. 343, 359 (2003).

[330] Watts v. United States, 394 U.S. 705, 707–08 (1969) *(per curiam). Cf.* Rankin v. McPherson, 483 U.S. 378, 387 (1987) (*see* para. I204).

[I120] "[A] prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur;' [hence,] [t]he speaker need not actually intend to carry out the threat [of violence.] . . . Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[331] Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan. The Klan has often used cross burnings as a tool of intimidation and a threat of impending violence, although such burnings have also remained potent symbols of shared group identity and ideology, serving as a central feature of Klan gatherings. "To this day, regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a 'symbol of hate.' . . . [W]hile cross burning does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful."[332] Under these considerations, *Virginia v. Black* upheld a Virginia statute making it a felony "for any person, with the intent of intimidating any person or group, to burn a cross on the property of another, a highway or other public place," noting that, "[i]nstead of prohibiting all intimidating messages, [a state] may choose to regulate this subset of intimidating activities, in light of cross burning's long and pernicious history as a signal of impending violence."[333]

[I121] Unlike the statute at issue in *Virginia v. Black*, the provision invalidated in *R.A.V.* singled out for opprobrium only hate speech directed toward one of the statutorily specified disfavored topics. More specifically *R.A.V.* involved a local ordinance, which pro-

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[331] Virginia v. Black, 538 U.S. 343, 360 (2003), *quoting* R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992).

[332] Virginia v. Black, 538 U.S. 343, 357 (2003).

[333] *Id.* at 363. The Virginia statute at issue also provided that "[a]ny such burning shall be *prima facie* evidence of an intent to intimidate a person or group." The state court had instructed the jury that the provision meant: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." A four-Justice plurality held that the foregoing provision, as interpreted by the state court, would create an unacceptable risk of the suppression of ideas and, therefore, was unconstitutional on its face, mainly because it permitted the state to arrest, prosecute, and convict a person based solely on the fact of cross burning itself, regardless of the particular facts of the case. As the plurality noted, "[t]he act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation, or it may mean only that the person is engaged in core political speech. . . . As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. . . . [O]ccasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as Mississippi Burning. . . . The *prima facie* provision makes no effort to distinguish among these different types of cross burnings." *Id.* at 365–66.

In *Collin v. Smith*, 578 F.2d 1197, 1202–03 (7th Cir. 1978), *cert. denied*, Smith v. Collin, 439 U.S. 916 (1978), the Seventh Circuit held that the asserted falseness of Nazi dogma, and, indeed, its general repudiation, do not justify its suppression, and that an ordinance prohibiting the dissemination of materials that would *promote hatred against people of Jewish faith or Jewish origin* could not constitutionally be applied to criminalize the *display of swastikas and Nazi uniforms* during a proposed demonstration by members of the National Socialist Party in a predominately Jewish village.

hibited the use of symbols (including but not limited to a burning cross) that amounted to "fighting words," but applied only when the symbol was provocative "on the basis of race, color, creed, religion or gender." The Court held that the ordinance did not pass constitutional muster, because it discriminated on the basis of content by targeting only those individuals who provoked violence on a basis specified in the law. The ordinance did not cover "[t]hose who wish[ed] to use fighting words in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality." Selectivity of this sort allowed the city "to impose special prohibitions on those speakers who express[ed] views on disfavored subjects, and hence was presumptively unconstitutional."[334] Although the city asserted that the ordinance helped to ensure the basic human rights of members of groups that had historically been subjected to discrimination, including the right of such group members to live in peace where they wished, the Court stressed that the danger of censorship presented by a facially content-based statute, requires that this weapon be employed only where it is *necessary* to serve the asserted compelling interest. The existence of adequate content-neutral alternatives thus undercuts significantly any defense of such a statute. In the specific case, "[a]n ordinance not limited to the favored topics . . . would have precisely the same beneficial effect. In fact, the only interest distinctively served by the content limitation [wa]s that of displaying the city council's special hostility towards the particular biases thus singled out. . . . [The city was] entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree[d]."[335]

[I122] Whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression, the statute at issue in *Wisconsin v. Mitchell* was aimed at conduct unprotected by the First Amendment and provided for an increase in a convicted defendant's punishment if the defendant intentionally selected the victim of the crime because of that victim's race. In a unanimous decision upholding the statute, the Court observed that the defendant's motive is a factor traditionally considered by sentencing judges, and that a state may consider "bias-motivated crimes as more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." Moreover, the Court rejected the argument that the statute impermissibly chilled free expression with respect to racial matters by those concerned about the possibility of enhanced sentences if they should, in the future, commit a criminal offense covered by the statute, reasoning that the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of those beliefs would be introduced against him at trial, if he committed a serious offense against person or property, was too speculative a hypothesis to support this overbreadth claim, and that the First Amendment permits the admission of a defendant's previous declarations or statements to establish the elements of a crime or to prove motive or intent, subject to evidentiary rules dealing with relevancy, reliability, and the like.[336]

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334 R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992).

335 *Id.* at 396.

336 Wisconsin v. Mitchell, 508 U.S. 476, 488–89 (1993).

d. Sexually Explicit Expression

i. Obscenity[337]

[I123] *Generally.* "Sexual expression which is indecent but not obscene is protected by the First Amendment."[338] By contrast, "obscenity is not within the area of constitutionally protected speech or press; . . . 'lewd and obscene' [utterances] . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[339] In this context, the Court has often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults.[340] But these are not the only legitimate state interests permitting regulation of obscene material. "[T]here are also legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. . . . These include the interest in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[341] "A State [can] reasonably regard [obscene material] as capable of encouraging or causing antisocial behavior, especially in its impact on young people. States need not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment or by a constitutional right to privacy."[342]

[I124] "[D]eterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws. [The Court has] recognized the practical reality that any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene. . . . [However,] the mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional." Moreover a state is not required to fire "warning shots," in the form of misdemeanor prosecutions, before it may bring felony charges for distributing obscene materials.[343]

[I125] Under *Stanley*, a state cannot criminalize the mere private possession of obscene material—with the exception of child pornography.[344] Although the states retain broad

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[337] *See also* paras. E71 *(void for vagueness doctrine)*, G130–G131 *(seizure of allegedly obscene materials)*, I 24, I 25 *(prior restraints)*.

[338] Sable Communications of California v. Fed. Communications Comm'n, 492 U.S. 115, 126 (1989).

[339] Roth v. United States, 354 U.S. 476, 485 (1957), *quoting* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). In *Roth*, the Court recognized that "rejection of obscenity as utterly without redeeming social importance" was implicit in the history of the First Amendment, since the original states provided for the prosecution of libel, blasphemy, and profanity. Moreover, the Court noted that the universal judgment that obscenity should be restrained was reflected in the international "Agreement for the Suppression of the Circulation of Obscene Publications," in the obscenity laws of all of the states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956. *See id.* at 484–85.

[340] *See, e.g.*, Redrup v. New York, 386 U.S. 767, 769 (1967); Stanley v. Georgia, 394 U.S. 557, 567 (1969); Miller v. California, 413 U.S. 15, 18–19 (1973).

[341] Paris Adult Theatre v. Slaton, 413 U.S. 49, 57–58 (1973).

[342] Kaplan v. California, 413 U.S. 115, 120 (1973).

[343] Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60–61 (1989).

[344] Osborne v. Ohio, 495 U.S. 103, 111 (1990).

power to regulate obscenity, that power simply does not reach into the privacy of one's own home. "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[345] Nevertheless, the Court has negated the idea "that some zone of constitutionally protected privacy follows obscene material when it is moved outside the home area protected by *Stanley*."[346] In *Reidel*, the Court expressly held that the government may constitutionally prohibit the distribution of obscene materials through the mails, even to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in the *Stanley* case, does not carry with it the right to sell and deliver such material.[347]

[I126] The legitimate state interest in preventing the dissemination of material deemed harmful to children "does not justify a total suppression of such material, the effect of which would be 'to reduce the adult population . . . to reading only what is fit for children.'"[348] Hence, a statute that makes it a misdemeanor to sell or make available to the general reading public any book containing obscene language "tending to the corruption of the moral of youth" is unconstitutional.[349]

[I127] *The Standards for Assessing Obscenity.* Obscenity can "manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct."[350] Sex and obscenity are not synonymous. The Court defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[351] Nine years later, in *Memoirs*, the Court veered sharply away from the

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[345] Stanley v. Georgia, 394 U.S. 557, 565 (1969). The Court noted, *inter alia*, that, "[I]f a State is concerned about printed or filmed materials inducing antisocial conduct, in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law.' . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." *Id.* at 566–67. Moreover, the Court rejected the argument that prohibition of possession of obscene materials was a necessary incident to statutory schemes prohibiting distribution. That argument was based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. The Court was not convinced that such difficulties existed. In any event, the Court stressed, "[an individual's] right to read or observe what he pleases [in the privacy of his home], . . . is so fundamental to our scheme of individual liberty, [that] its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws." *Id.* at 568.

[346] United States v. Orito, 413 U.S. 139, 141–42 (1973).

[347] United States v. Reidel, 402 U.S. 351, 354–56 (1971).

[348] Jacobellis v. Ohio, 378 U.S. 184, 195 (1964), *quoting* Butler v. Michigan, 352 U.S. 380, 383 (1957).

[349] Butler v. Michigan, 352 U.S. 380, 383–84 (1957).

[350] Kaplan v. California, 413 U.S. 115, 119 (1973) (obscene material in book form is not entitled to First Amendment protection merely because it has no pictorial content).

[351] Roth v. United States, 354 U.S. 476, 485 (1957). *Roth* recognized that "rejection of obscenity as utterly without redeeming social importance" was implicit in the history of the First Amendment, since the original states provided for the prosecution of libel, blasphemy, and profanity. *Id.* at 484–85.

Roth concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that, under the *Roth* definition, as elaborated in subsequent cases, "three elements must coalesce: it must be established that (a) the dominant theme of the material, taken as a whole, appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."[352] "While *Roth* presumed 'obscenity' to be 'utterly without redeeming social importance,' *Memoirs* required that to prove obscenity it must be affirmatively established that the material is '*utterly* without redeeming social value.' Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was '*utterly* without redeeming social value'—a burden virtually impossible to discharge under the criminal standards of proof."[353] In light of these considerations, the *Miller* Court reformulated the test for the determination of obscenity. The *Miller* test asks "(a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest; . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[354]

[I128] The Court has defined "material which deals with sex in a manner appealing to prurient interest" as "material having a tendency to excite lustful thoughts;"[355] the words "lustful thoughts" refer to "sexual responses over and beyond those that would be characterized as normal."[356] The Court "adjust[s] the prurient appeal requirement to social realities by permitting the appeal of allegedly obscene material to be assessed in terms of the sexual interests of its intended and probable recipient group. . . . [Hence,] [w]here the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient appeal requirement . . . is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."[357] The kinds of conduct that may be labeled as "patently offensive" are "the 'hard core' types of conduct suggested by the examples given in *Miller*:"[358] "(a) [p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) [p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[359] The first and second prongs of the *Miller*

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[352] Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

[353] Miller v. California, 413 U.S. 15, 21–22 (1973).

[354] *Id.* at 24. Hence, the third test announced in *Miller*—whether the work "lacks serious literary, artistic, political, or scientific value"—expanded criminal liability under *Memoirs*. *See* Marks v. United States, 430 U.S. 188, 193–95 (1977).

In *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 129–30 (1973), a federal obscenity case decided with *Miller*, the Court held that the *Miller* standards, including the "contemporary community standards" formulation, apply equally to federal legislation.

[355] Roth v. United States, 354 U.S. 476, 487, n.20 (1957).

[356] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498–99 (1985).

[357] Mishkin v. New York, 383 U.S. 502, 508–09 (1966).

[358] Smith v. United States, 431 U.S. 291, 301, n.8 (1977).

[359] Miller v. California, 413 U.S. 15, 25 (1973).

In *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), the Court noted that, while the subject matter of the film at issue in that case was, in a broader sense, sex, and there were scenes in which

test—appeal to prurient interest and patent offensiveness—are "issues of fact for the jury to determine applying contemporary community standards."[360]

[I129] "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that should be fixed uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' . . . It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. . . . [And] in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes."[361] "The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity."[362] "[T]he 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message."[363] This proposition, however, has raised serious First Amendment concerns.[364]

[I130] While the Court has rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, the Court has not required "as a constitutional matter the substitution of some smaller geographical area into the same sort of formula."[365] Thus, it is "constitutionally permissible to permit juries to rely on the understanding of the community from which they come as to 'contemporary community standards.' . . . A State may choose to define an obscenity offense in terms of contemporary community standards as defined in *Miller* without further specification, . . . or it may choose to define the standards in more precise geographic terms."[366] For example it can proscribe obscenity in terms of a "state-wide" standard.[367] However, a state law regulating distribution of obscene material cannot define contemporary community standards.[368] "A juror is entitled to draw on his own knowledge of the views of the average person in the

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sexual conduct including "ultimate sexual acts" were to be understood to be taking place, the camera did not focus on the bodies of the actors at such times, and there was no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. Hence, the picture was not the "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" and could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way.

360 Pope v. Illinois, 481 U.S. 497, 500 (1987).

361 Miller v. California, 413 U.S. 15, 24, 30–33, n.13 (1973).

362 Sable Communications of California v. Fed. Communications Comm'n, 492 U.S. 115, 125 (1989), *quoting* Hamling v. United States, 418 U.S. 87, 106 (1974).

363 Reno v. Am. Civil Liberties Union, 521 U.S. 844, 877–78 (1997).

364 *See* para. I158.

365 Hamling v. United States, 418 U.S. 87, 104 (1974).

366 Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

367 *See* Miller v. California, 413 U.S. 15, 24, 30–34 (1973).

368 Smith v. United States, 431 U.S. 291, 302–04 (1977).

community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law."[369] But "juries must be instructed properly, so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority."[370] "[T]he primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards"' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or indeed a totally insensitive one."[371] This does not mean "that 'sensitive' and 'insensitive' persons, however defined, are to be excluded from the community as a whole for the purpose of deciding if materials are obscene."[372] The Court also has held that children are not to be included as part of the "community," as that term relates to the "obscene materials" proscribed by a statute declaring that such materials are non-mailable, at least when children are not the intended recipients of the materials. In so holding, the Court has pointed out that "a jury conscientiously striving to define such community, the 'average person,' . . . by whose standards obscenity is to be judged, might very well reach a much lower 'average' when children are part of the equation than it would if it restricted its consideration to the effect of allegedly obscene materials on adults."[373]

[I131] By contrast, "the value of an allegedly obscene work is [not] to be determined by reference to community standards. '[T]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.'"[374] "Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. . . . [Hence,] [t]he proper inquiry [with respect to the third prong of the *Miller* test] is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole. . . . Of course, the mere fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met."[375] This determination is particularly amenable to appellate review.[376]

[I132] "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."[377] With respect to that requirement, "[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the

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369 Hamling v. United States, 418 U.S 87, 104–05 (1974).

370 Smith v. United States, 431 U.S. 291, 305 (1977).

371 Miller v. California, 413 U.S. 15, 24, 33 (1973).

372 Pinkus v. United States, 436 U.S. 293, 300 (1978).

373 *Id.* at 298.

374 Pope v. Illinois, 481 U.S. 497, 500 (1987), *quoting* Miller v. California, 413 U.S. 15, 24, 34 (1973).

375 Pope v. Illinois, 481 U.S. 497, 500–501, n.3 (1987).

376 Smith v. United States, 431 U.S. 291, 305 (1977).

377 Mishkin v. New York, 383 U.S. 502, 511 (1966).

contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is . . . [not] required by the Constitution."[378]

[I133] Pandering is "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of the customers."[379] "[A]s a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene. . . . This is so mainly because the fact that the accused made such an appeal has a bearing on the ultimate constitutional tests for obscenity: 'The deliberate representation of certain publications as erotically arousing, for example, stimulates the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes.'"[380]

[I134] Expert testimony as to obscenity is not necessary when the materials at issue are themselves placed in evidence.[381] And "the mere fact that materials similar to the ones at issue are for sale and purchased at stores around the country does not make them witnesses of virtue. . . . Mere availability of similar material, by itself, means nothing more than that other persons are engaged in similar activities."[382] Moreover, it is always appropriate for the appellate court to review the sufficiency of the evidence.[383]

[I135] *Obscenity as to Minors.* The Court has rejected the proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor. *Ginsberg* upheld a New York statute that made it unlawful "knowingly to sell to a minor under 17 (a) any picture . . . which depicts nudity . . . and which is harmful to minors, and (b) any . . . magazine . . . which contains [such pictures] and which, taken as a whole, is harmful to minors;" hence, the statute prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. The Court emphasized that a state may "adjust[t] the definition of obscenity

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[378] Hamling v. United States, 418 U.S. 87, 123–24 (1974).

[379] Ginzburg v. United States, 383 U.S. 463, 467 (1966).

[380] Splawn v. California, 431 U.S. 595, 598–99 (1977), *quoting* Ginzburg v. United States, 383 U.S. 463, 470 (1966).

[381] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973).

[382] Hamling v. United States, 418 U.S. 87, 126 (1974).

[383] Smith v. United States, 431 U.S. 291, 306 (1977). The Court has never required the "beyond a reasonable doubt" standard to be applied in a civil case. Thus, while a state may require proof beyond reasonable doubt in a civil obscenity case, that choice is solely a matter of state law. The First and Fourteenth Amendments do not require such a standard. *See* California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93–94 (1981) *(per curiam).*

'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests' of . . . minors." That the state has power to make that adjustment is clear, for, "even where there is an invasion of protected freedoms, 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.' . . . 'While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a State to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.'" In this context, state power to exclude material statutorily defined as obscenity is sustained "if it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." This was the case with the New York statute.[384] "It is clear, however, that, under any test of obscenity as to minors not all nudity may be proscribed. Rather, to be obscene, 'such expression must be, in some significant way, erotic.'"[385]

ii. Child Pornography

[I136] "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. . . . The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. . . . Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. . . . Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. While the production of pornographic materials is a low profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious, if not the only practical, method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."[386] "There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. . . . [T]he nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age.

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[384] Ginsberg v. New York, 390 U.S. 629, 638, 640–41 (1968).

[385] Erznoznik v. City of Jacksonville, 422 U.S. 205, 213, n.10 (1975), *quoting* Cohen v. California, 403 U.S. 15, 20 (1971). "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *See* Erznoznik, *supra*, at 213–14.

A statute prohibiting the sale of "magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes" is unconstitutionally vague. *See* Rabeck v. New York, 391 U.S. 462 (1968) *(per curiam)*.

[386] New York v. Ferber, 458 U.S. 747, 757–60, n.10 (1982).

The category of 'sexual conduct' proscribed must also be suitably limited and described. . . . [And] [a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."[387] In light of these considerations, *Ferber* upheld a state prohibition on the distribution and sale of child pornography, as well as its production. In so doing, the Court emphasized that the test for child pornography is separate from the obscenity standard enunciated in *Miller*[388] and adjusted the *Miller* formulation in the following respects: "a trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."[389]

[I137] In *Osborne*, the Court ruled that the interests identified in *Ferber* justify a ban on the possession or viewing of pornography produced by using children. Given the fact that much of the child pornography market has been driven underground, and therefore it is difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution, a state "may attempt to stamp out this vice at all levels in the distribution chain. . . . It is surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand. . . . [Moreover, a] State's ban on possession and viewing encourages the possessors of such materials to destroy them. . . . [E]ncouraging the destruction of these materials is also desirable because pedophiles use child pornography to seduce other children into sexual activity."[390]

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[387] *Id.* at 754–65.

[388] *See* para. I127.

[389] *Id.* at 364. The New York law at issue in that case criminalized the use of a child in a "sexual performance," defined as "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age." "Sexual conduct" was in turn defined as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals." The Court decided that, although it might be necessary to employ children to engage in conduct clearly within the reach of the statute in order to produce educational, medical, or artistic works, these arguably impermissible applications of the statute did not amount to more than a tiny fraction of the materials within the statute's reach. The Court therefore found that the statute was not substantially overbroad, and it could be constitutionally applied to a bookstore proprietor who sold films depicting young boys masturbating. *Id.* at 773–74.

[390] Osborne v. Ohio, 495 U.S. 103, 109–11 (1990). The state statute at issue in that case prohibited any person from possessing or viewing any material or performance showing a minor who was not his child or ward in a state of nudity unless (1) the material or performance was presented for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by or to a person having a proper interest therein, or (2) the possessor knew that the minor's parents or guardian had consented in writing to such photographing or use of the minor. Although, on its face, the statute purported to prohibit constitutionally protected depictions of nudity, it was not found to be substantially overbroad, in light of the statutory exemptions and "proper purposes" provisions. In any event, the statute, as construed by the Ohio supreme court, plainly survived overbreadth scrutiny. By limiting the statute's operation to nudity that constituted lewd exhibition or focused on genitals, that court had avoided penalizing persons for viewing or possessing innocuous photographs of naked children and thereby had rendered the "nudity" language permissible. Moreover, the statute's failure, on its face, to provide a *mens rea* requirement was cured by the state court's conclusion that the state should establish scienter under the Ohio default statute specifying that recklessness applied absent a statutory intent provision. *Id.* at 112–15.

[I138] By contrast, "virtual child pornography" is constitutionally protected. *Free Speech Coalition* invalidated the Child Pornography Prevention Act of 1996 (CPPA), which expanded the federal prohibition on child pornography to include not only pornographic images made using actual children, but also "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct," and any sexually explicit image that "is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression 'it depicts' a minor engaging in sexually explicit conduct." Thus, the statute banned a range of sexually explicit images, which appeared to depict minors but had been produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology. The Court, first, found that the CPPA was inconsistent with *Miller*. Materials needed not appeal to the prurient interest under the CPPA, which proscribed any depiction of sexually explicit activity, no matter how it was presented. It was not necessary, moreover, that the image be patently offensive. "Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards."[391] Under the CPPA, images were prohibited so long as the persons appeared to be under 18 years of age. This was higher than the legal age for marriage in many states, as well as the age at which persons might consent to sexual relations. The CPPA prohibited speech despite its serious literary, artistic, political, or scientific value. The statute proscribed "the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages."[392] Under the CPPA, if movies contained a single graphic depiction of sexual activity within the statutory definition, their possessor would be subject to severe punishment without inquiry into the literary value of the work. This would be "inconsistent with the essential First Amendment rule that a work's redeeming value does not depend on the presence of a single explicit scene, . . . [but is] judged by considering the work as a whole."[393] Moreover, the CPPA found no support in *Ferber*. In contrast to the speech in *Ferber*, speech that itself was the record of sexual abuse, the CPPA prohibited speech that "record[ed] no crime and create[d] no victims by its production. Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*."[394] While the government asserted that the images could lead to actual instances of child abuse, the Court found that the causal link was contingent and indirect: "[t]he harm [did] not necessarily follow from the speech, but depend[ed] upon some unquantified potential for subsequent criminal acts."[395] Relatedly, the Court rejected the argument that the CPPA was necessary, because pedophiles might use virtual child pornography to seduce children. As the Court noted, "[t]here are many things innocent in themselves, such as cartoons, video games, and candy, that might be used for immoral purposes, yet such things may not be prohibited because they can be misused. . . . [S]peech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. . . . The evil in question depend[ed] upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishe[d] that the speech ban

391 Ashcroft v. Free Speech Coal., 535 U.S. 234, 246 (2002).

392 *Id.*

393 *Id.* at 248.

394 *Id.* at 250.

395 *Id.*

[wa]s not narrowly drawn."[396] The argument that virtual child pornography whetted pedophiles' appetites and encouraged them to engage in illegal conduct was also unavailing, since "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time."[397] Moreover, the argument that eliminating the market for pornography produced using real children necessitated a prohibition on virtual images as well was somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes; few pornographers would risk prosecution by abusing real children, if fictional, computerized images would suffice.[398] Finally, the Court held that the statutory provision banning depictions of sexually explicit conduct that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct" was substantially overbroad. The *"conveys the impression"* provision required little judgment about the work's content. Even if a film contained no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers conveyed the impression that such scenes would be found in the movie. "The determination turn[ed] on how the speech [wa]s presented, not on what [wa]s depicted."[399] Furthermore, proscribed material was tainted and unlawful in the hands of all who received it, though they bore no responsibility for how it was marketed, sold, or described. The provision criminalized possession of material pandered as child pornography by someone earlier in the distribution chain, as well as a sexually explicit film that contained no youthful actors but had been packaged to suggest a prohibited movie. Possession was a crime even when the possessor knew the movie had been mislabeled. The Court concluded that the First Amendment required a more precise restriction.[400]

iii. Pornography and Sexism

[I139] In *American Booksellers*, the Court of Appeals for the Seventh Circuit invalidated a city ordinance prohibiting pornography that portrayed women submissively or in a degrading manner.[401] The ordinance did not refer to the prurient interest, to offensiveness, or to the standards of the community. It demanded attention to particular depictions, not to the work judged as a whole. And it was irrelevant under the ordinance whether the work had literary, artistic, political, or scientific value. The city pointed to

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396 *Id.* at 251–52.

397 *Id.* at 253.

398 *Id.* at 254.

399 *Id.* at 257.

400 *Id.* at 258.

401 "Pornography" under the ordinance was "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) Women are presented as being penetrated by objects or animals; or (5) Women are presented in scenarios of degradation, injury abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display."

these omissions as virtues. It maintained that pornography influenced attitudes, and the statute was a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness. It argued that the ordinance would play an important role in reducing the tendency of men to view women as sexual objects, a tendency that led to both unacceptable attitudes and discrimination in the workplace and violence away from it. The court rejected this argument. Under the ordinance, graphic, sexually explicit speech was "pornography" or not depending on the perspective the author adopted. Speech that "subordinated" women and also, for example, presented women as enjoying pain, or even simply presented women in "positions of servility or submission or display," was forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrayed women in positions of equality was lawful, no matter how graphic the sexual content. This was thought control. It established an "approved" view of women, of how they might react to sexual encounters, of how the sexes might relate to each other. Of course "[d]epictions of subordination tend to perpetuate subordination. . . . [And] [p]ornography may be a systematic practice of exploitation and subordination based on sex which differentially harms women. . . . Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. . . . If pornography is what pornography does, so is other speech. . . . Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument. Television scripts contain unarticulated assumptions. People may be conditioned in subtle ways." As the court emphasized, "[i]f the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech."[402]

iv. Public Nudity Bans

[I140] "Clearly all nudity cannot be deemed obscene, even as to minors."[403] "Nudity alone does not place otherwise protected material outside the mantle of the First Amendment. . . . [A]n entertainment program [may not] be prohibited solely because it displays the nude human figure."[404]

[I141] In *Erznoznik*, an ordinance purporting to prevent a nuisance, prohibited the showing of films containing nudity by drive-in theaters when the screens were visible from a public street or place. The governmental interests advanced as justifying the ordinance were three: (1) to protect citizens from unwilling exposure to possibly offensive materials; (2) to protect children from such materials; and (3) to prevent the slowing of passing traffic and the likelihood of resulting accidents. The Court found the ordinance, on its face, either overbroad or underinclusive with respect to each of these asserted purposes. As to the first purpose, the ordinance was overbroad because it pro-

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[402] Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325–30 (7th Cir. 1985); *aff'd without opinion*, 475 U.S. 1001 (1986).

[403] Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975).

[404] Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981).

scribed the showing of any nudity "however innocent or educational." Moreover, potential viewers who deemed particular nudity to be offensive were not captives; they had only to look elsewhere. As to minors, the Jacksonville ordinance was overbroad because it was "not directed against sexually explicit nudity nor [wa]s it otherwise limited. Rather, it sweepingly forb[ade] display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness." Thus, it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity was indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit, as well as shots of bathers on a beach. Finally, the ordinance was not rationally tailored to support its asserted purpose as a traffic regulation. By proscribing even the most fleeting and innocent glimpses of nudity, it was strikingly underinclusive, since it omitted a wide variety of other scenes "in the customary screen diet" that would be no less distracting to the passing motorist. In sum, the ordinance was a misconceived attempt directly to regulate content of expression.[405]

[I142] Nude dancing is not without its First Amendment protections from official regulation. *Schad* struck down a zoning ordinance that did not permit "live entertainment," including non-obscene nude dancing, in the Borough of Mount Ephraim. By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibited a wide range of expression that was within the protections of the First and Fourteenth Amendments. Moreover, Mount Ephraim had not adequately justified its substantial restriction of protected activity. Its asserted justification that permitting live entertainment would conflict with its plan to create a commercial area catering only to the residents' "immediate needs" was patently insufficient, since no evidence had been introduced to support this assertion, and it was difficult to reconcile this characterization of the Borough's commercial zones with the provisions of the ordinance, which purposed to provide areas for local and regional commercial operations. As to its asserted justification that live entertainment might be selectively excluded from the permitted commercial uses to avoid problems associated with live entertainment, such as parking, trash, police protection, and medical facilities, the Borough had presented no evidence, and it was not immediately apparent as a matter of experience, that live entertainment posed problems of this nature more significant than those associated with various permitted uses; nor did it appear that the Borough's zoning authority had arrived at a defensible conclusion that unusual problems were presented by live entertainment. Further, the ordinance was not narrowly drawn to respond to what might be the distinctive problems arising from certain types of live entertainment, and it was not clear that a more selective approach would fail to address those unique problems if any there were. Finally, as to the claimed justification that the ordinance in question was a reasonable "time, place, and manner" restriction, the Borough did not identify its interests, making it reasonable to exclude all live entertainment but to allow a variety of other commercial uses, and had presented no evidence that live entertainment was incompatible with the permitted uses. Besides, the ordinance did not leave open adequate alternative channels of communication, since it totally excluded all live entertainment, including non-obscene nude dancing.[406]

[I143] In *Erie*, the Court upheld a city ordinance banning public nudity, including totally nude erotic dancing performed by women at adult entertainment establishments.

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405 Erznoznik v. City of Jacksonville, 422 U.S. 205, 211–15 (1975).

406 Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65, 72–76 (1981).

To comply with the ordinance, these dancers should wear at a minimum, "pasties" and a "G-string." Five Justices held that Erie's ordinance was a content-neutral regulation of expressive conduct that should be considered under the test set forth in *United States v. O'Brien*. Speaking for a four-member plurality, Justice O'Connor reasoned as follows. "Being 'in a state of nudity' is not an inherently expressive condition. [However,] nude dancing of the type at issue in that case is expressive conduct, [though] fall[ing] only within the outer ambit of the First Amendment's protection." Government restrictions on public nudity, such as the ordinance at issue there, should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech. The challenged ordinance was, on its face, a general prohibition on public nudity. "By its terms, the ordinance regulate[d] conduct alone. It [did] not target nudity that contain[ed] an erotic message; rather, it ban[ned] all public nudity, regardless of whether that nudity [wa]s accompanied by expressive activity. . . . [T]he ordinance [wa]s aimed at combating crime and other negative *secondary effects* caused by the presence of adult entertainment establishments, . . . not at suppressing the erotic message conveyed by this type of nude dancing. Put another way, the ordinance [did] not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which . . . [we]re caused by the presence of even one such establishment. . . . Even if Erie's public nudity ban ha[d] some minimal effect on the erotic message by muting that portion of the expression occurring when the last stitch [wa]s dropped, the dancers . . . [we]re free to perform wearing pasties and G-strings. Any effect on the overall expression was *de minimis*. . . . If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression, such as those at issue [t]here, cannot be sufficient to render the ordinance content-based."[407] Justice Souter agreed with the analytical approach that the plurality employed in deciding this case. He recognized that Erie's stated interest in combating the secondary effects associated with nude dancing establishments was an interest unrelated to the suppression of expression under *O'Brien*, and that the city's regulation was thus properly considered under the *O'Brien* standards.[408]

[I144] Further, the same plurality found that Erie's ordinance was justified under *O'Brien*. First, the ordinance was within Erie's constitutional power to enact, because the city's efforts to protect public health and safety were clearly within its police powers. Second, the ordinance furthered the important government interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing. In terms of demonstrating that such secondary effects posed a threat, the city did not need to conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence relied on was reasonably believed to be relevant to the problem addressed. Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *Young v. American Mini Theatres*,[409] to the effect that secondary effects were caused by the presence of even one adult entertainment establishment in a given neighborhood. In any event, the ordinance's preamble also relied on the city council's express findings that certain lewd, immoral

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[407] Erie v. Pap's A.M., 529 U.S. 277, 289–91, 294 (2000) (opinion of O'Connor, J., joined by Rehnquist, C.J., Kennedy and Breyer, JJ.) (emphasis added).

[408] *Id.* at 310.

[409] *See* paras. I147, I148.

activities, carried on in public places for profit, were highly detrimental to the public health, safety, and welfare. The council members, familiar with commercial downtown Erie, were the individuals who would likely have had first-hand knowledge of what took place at and around nude dancing establishments there and could make particularized expert judgments about the resulting harmful secondary effects. Moreover, although requiring dancers to wear pasties and G-strings might not greatly reduce these secondary effects, *O'Brien* required only that the regulation further the interest in combating such effects. The ordinance also satisfied *O'Brien*'s third factor, since the government interest was unrelated to the suppression of free expression, as discussed above. The fourth *O'Brien* factor—that the restriction is no greater than is essential to the furtherance of the government interest—was satisfied as well. The ordinance regulated conduct, and any incidental impact on the expressive element of nude dancing was *de minimis*. The pasties and G-string requirement was a minimal restriction in furtherance of the asserted government interests, and the restriction left ample capacity to convey the dancer's erotic message. Finally the plurality rejected the argument that zoning was an alternative means of addressing this problem, noting that it was far from clear that zoning would impose less of a burden on expression than the minimal requirement implemented there, and that, in any event, since this was a content-neutral restriction, least restrictive means analysis was not required.[410] Two other members of the Court held that the statute was constitutional not because it survived some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it was not subject to First Amendment scrutiny at all.[411]

[I145] In *LaRue*, five members of the Court relied on the Twenty-first Amendment to buttress the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in premises licensed to serve alcoholic beverages. Specifically, the opinion stated that the Twenty-first Amendment required that the prohibition be given an "added presumption in favor of [its] validity."[412] The cases following *LaRue* similarly approved the regulation of nude dancing in establishments licensed to serve alcohol.[413] But *Liquormart* disavowed *LaRue*'s reasoning insofar as it relied on the Twenty-first Amendment. As the Court explained, "although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution.'"[414] Accordingly, the Court held that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."[415]

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[410] Erie v. Pap's A.M., 529 U.S. 277, 296–302 (2000) (opinion of O'Connor, J., joined by Rehnquist, C.J., Kennedy, and Breyer, JJ.). Justice Souter concluded that the record before the Court did not permit the conclusion that Erie's ordinance was reasonably designed to mitigate real harms. *Id.* at 317.

[411] *Id.* at 307–10 (opinion of Scalia, J., joined by Thomas, J.). These Justices concluded that "[t]he traditional power of government to foster good morals, . . . and the acceptability of the traditional judgment . . . that nude public dancing *itself* is immoral, have not been repealed by the First Amendment." *Id.* at 310.

[412] California v. LaRue, 409 U.S. 109, 118–19 (1972).

[413] New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) *(per curiam)*; Newport v. Iacobucci, 479 U.S. 92 (1986) *(per curiam)*.

[414] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996), *quoting* Capital Cities Cable v. Crisp, 467 U.S. 691, 712 (1984).

[415] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996).

v. Zoning Legislation Dealing with Adult Entertainment Uses[416]

[I146] "The power of local governments to zone and control land use is undoubtedly broad, and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits.' . . . [W]hen a zoning law infringes upon freedom of speech, it must be narrowly drawn and must further a sufficiently substantial government interest."[417]

[I147] In *Young v. American Mini Theatres*, the Court held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses," or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. Essential to the plurality's holding was the fact that the ordinance was "nothing more than a limitation on the place where adult films [might] be exhibited." There were myriad locations in the city of Detroit that should be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights was slight. The city's determination had been that a concentration of "adult" movie theaters caused the area to deteriorate and become a focus of crime, effects that were not attributable to theaters showing other types of films. It was this secondary effect that the zoning ordinance attempted to avoid, not the dissemination of "offensive" speech. The city's interest "in the present and future character of its neighborhoods" adequately justified its classification of motion pictures. And the record disclosed a factual basis for the city's conclusion that this kind of restriction would have the desired effect; the ordinance, which was designed to disperse adult theaters throughout the city, was supported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several adult entertainment establishments in the same neighborhood.[418]

[I148] In *Renton*, the Court considered the validity of a municipal ordinance that prohibited any adult movie theater from locating within 1,000 feet of any residential zone, family dwelling, church, park, or school. The Court's analysis of the ordinance proceeded in three steps. First, the Court found that the ordinance did not ban adult theaters altogether, but it merely required that they be distanced from certain sensitive locations. The ordinance was properly analyzed, therefore, as a time, place, and manner regulation. The Court next considered whether the ordinance was content-neutral or content-based. If the regulation were content based, it would be considered presumptively invalid and subject to strict scrutiny. The Court held, however, that the *Renton* ordinance was aimed not at the content of the films shown at adult theaters but rather at the *secondary effects* of such theaters on the surrounding community, namely at crime rates, property values, and the quality of the city's neighborhoods. Since the "predom-

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416 *See also* para. I142.

417 Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981).

418 Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 55, 63, n.18, 70–73 (1976) (plurality opinion). Similarly, Justice Powell, in his concurring opinion, emphasized that, at most, the impact of the ordinance on the First Amendment interests was incidental and minimal. Further he examined the city's justification for the restriction before he concluded that the ordinance was valid. *Id.* at 78–82. The plurality held that non-obscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression, because "society's interest in protecting this type of expression is of a wholly different, and *lesser*, magnitude than the interest in untrammeled political [or philosophical] debate." *Id.* at 70. Justice Powell was not inclined to agree with that position. *Id.* at 73, n.1.

inate concerns" motivating the ordinance were with the secondary effects of adult speech, and not with the content of the speech, the ordinance was deemed content-neutral. Finally, given this finding, the Court stated that the ordinance would be upheld so long as the city of Renton showed that its ordinance was "designed to serve a substantial government interest" and that "reasonable alternative avenues of communication" remained available.[419] Renton met this burden. The ordinance was designed to serve the city's interest in attempting to preserve the quality of urban life; this interest was vital and should be accorded high respect. Although the ordinance had been enacted without the benefit of studies specifically relating to Renton's particular problems, Renton was entitled to rely on the experiences of, and studies produced by, the nearby city of Seattle and other cities. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."[420] That was the case there. The Court also found no constitutional defect in the method chosen by Renton to further its substantial interests. As the Court pointed out, "[c]ities may regulate adult theaters by dispersing them, . . . or by effectively concentrating them," as in Renton.[421] Moreover, the ordinance was not underinclusive for failing to regulate other kinds of adult businesses, since there was no evidence that any other adult business were located in, or were contemplating moving into, Renton. In addition, the ordinance allowed for reasonable alternative avenues of communication, since it left some 520 acres, or more than 5 percent of the entire land area of Renton, open to use as adult theater sites. Although respondents argued that, in general, there were no "commercially viable" adult theater sites within the limited area of land left open for such theaters by the ordinance, the fact that respondents should fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, did not give rise to a violation of the First Amendment, which does not compel the government "to ensure that adult theaters, or any other kinds of speech-related businesses, will be able to obtain sites at bargain prices. . . . [T]he First Amendment require[d] only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city," and the challenged ordinance easily met this requirement.[422]

[I149] *Alameda Books* addressed a Los Angeles ordinance, enacted in 1978, which prohibited not only adult entertainment enterprises within 1,000 feet of each other or within 500 feet of a religious institution, but also "more than one adult entertainment business in the same building." Hence, under the ordinance, an adult bookstore and an adult video arcade could not operate in the same building. The ordinance was based on a study conducted by the City of Los Angeles in 1977. The 1977 study's central component was a Los Angeles Police Department report indicating that, from 1965 to 1975, crime rates for, e.g., robbery and prostitution had grown much faster in Hollywood, which had the city's largest concentration of adult establishments, than in the city as a whole. Relying on the *Renton* analysis, a four-Justice plurality found that the city could reasonably rely on the police department's conclusions regarding crime patterns to over-

419 Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986).
420 *Id.* at 51–52.
421 *Id.* at 52.
422 *Id.* at 54.

come summary judgment. As the plurality noted, "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest. . . . [But] [t]his is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support its rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."[423] While the 1977 study revealed that areas with high concentrations of adult establishments were associated with high crime rates, such areas were also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the 1977 study's findings and thus reasonable for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, would reduce crime rates.[424]

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[423] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438–39 (2002) (plurality opinion of Justice O'Connor, joined by Rehnquist, C.J., Scalia, and Thomas, JJ.).

[424] Justice Scalia joined the plurality opinion because it represented a correct application of the Court's jurisprudence concerning regulation of the "secondary effects" of pornographic speech. However, he stressed that, in a case such as this, the First Amendment made "secondary effects" analysis quite unnecessary. In his view, "the Constitution does not prevent a community that wishes to do so from regulating, or indeed entirely suppressing, the business of pandering sex." *Id.* at 443–44. Justice Kennedy concurred in the judgment. Although he characterized the ordinance as content-based he said that the central holding of *Renton* was sound: "a zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." He reasoned that "zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a *prima facie* legitimate purpose: to limit the negative externalities of land use." Further he noted that "the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like [the one at issue] may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects. . . . The premise . . . must be that businesses—even those that have always been under one roof—will for the most part disperse rather than shut down." *Id.* at 448–51. Kennedy concluded that in that case the above proposition was adequately supported by the 1977 study and common experience.

The dissenters noted, *inter alia:* "It would make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it *content correlated*, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses. The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship. Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove. This risk of viewpoint discrimination is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be

vi. Sexually Explicit Expression on Communications Media

[I150] *Sexually Explicit Speech on the Radio or Television.* In *Pacifica*, the Court considered a governmental ban of a radio broadcast of "indecent" materials, defined in part to include "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." The Court found this ban constitutionally permissible, for two reasons. "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. . . . Second, broadcasting is uniquely accessible to children, even those too young to read."[425] And children were likely listeners to the program there at issue—an afternoon radio broadcast entitled "Filthy Words.[426]

[I151] *Sexually Explicit Material on Cable Television. Playboy* presented a challenge to Section 505 of the Telecommunications Act of 1996, which required cable television operators who provided channels "primarily dedicated to sexually oriented programming" either to "fully scramble or otherwise fully block" those channels or to limit their transmission to hours when children were unlikely to be viewing, set by administrative regulation as the time between ten p.m. and six a.m.. Even before enactment of the statute, signal scrambling was already in use. Cable operators used scrambling in the regular course of business, so that only paying customers had access to certain programs. Scrambling could be imprecise, however; and either or both audio and visual portions of the scrambled programs might be heard or seen, a phenomenon known as "signal bleed." The purpose of Section 505 was to shield children from hearing or seeing images resulting from signal bleed. To comply with the statute, the majority of cable operators

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expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself. This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary-effects zoning as akin to time, place, or manner regulations. . . . In this case, however, the government has not shown that bookstores containing viewing booths, isolated from other adult establishments, increase crime or produce other negative secondary effects in surrounding neighborhoods, and we are thus left without substantial justification for viewing the city's First Amendment restriction as content correlated but not simply content based. By the same token, the city has failed to show any causal relationship between the breakup policy and elimination or regulation of secondary effects." *Id.* at 457–60 (emphasis added).

425 Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748–49 (1978). The Court also noted that adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear similar performances. *Id.* at 750, n.28.

426 In conclusion, the Court emphasized the narrowness of its holding, by saying, *inter alia:* "The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant." *Id.* at 750.

adopted the second, or "time channeling," approach. The effect of the widespread adoption of time channeling was to eliminate altogether the transmission of the targeted programming outside the safe harbor period in affected cable service areas. In other words, for two-thirds of the day, no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so. The Court began its analysis by making two remarks. First, it assumed that many adults themselves would find the material "highly offensive;" and since the material came unwanted into homes where children might see or hear it against parental wishes or consent, there were "legitimate reasons for regulating it." Second *Playboy's* programming had First Amendment protection. "It [wa]s not alleged to be obscene; adults ha[d] a constitutional right to view it; the Government disclaim[ed] any interest in preventing children from seeing or hearing it with the consent of their parents; and Playboy ha[d] concomitant rights under the First Amendment to transmit it." The Court next pointed out that the speech in question was defined by its content; and the statute that sought to restrict it was content-based. Besides, the effect of the statute on the protected speech was substantial, since 30 to 50 percent of all adult programming was viewed by households prior to ten p.m.. This content-based burden could stand only if it satisfied strict scrutiny. Hence, it should be "narrowly tailored to promote a compelling Government interest. . . . If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." Section 504 of the Act required a cable operator "upon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block" any channel the subscriber did not wish to receive. Cable systems had the capacity to block unwanted channels on a household-by-household basis. The corollary, of course, was that targeted blocking enabled the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners. Simply put, targeted blocking was less restrictive than banning, and the government could not ban speech if targeted blocking were a feasible and effective means of furthering its compelling interests. Since a plausible, less restrictive alternative was offered to this content-based speech restriction, it was the government's obligation to prove that the alternative would be ineffective to achieve its goals. But the government failed to meet that burden. In support of its position, the government cited empirical evidence showing that Section 504 had generated few requests for household-by-household blocking. The district court had explored three explanations for the lack of individual blocking requests: (1) individual blocking might not be an effective alternative, due to technological or other limitations; (2) although an adequately advertised blocking provision might have been effective, Section 504, as written, did not require sufficient notice to make it so; (3) the actual signal bleed problem might be far less of a concern than the government at first had supposed. To sustain its statute, the government should have shown that the first was the right answer. According to the district court, however, the first and third possibilities were "equally consistent" with the record before it. As for the second, the record was "not clear" as to whether enough notice had been issued to give Section 504 a fighting chance. The case, then, was at best a draw. Since the district court's findings were not clearly erroneous, "the tie [went] to free expression." With regard to signal bleed itself, there was little hard evidence of how widespread or how serious the problem was. Indeed, there was no proof as to how likely any child was to view a discernible explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound. Under Section 505, sanctionable signal bleed could include instances as fleeting as an image appearing on a screen for just a few seconds. "The First Amendment requires a more careful assessment and charac-

terization of an evil in order to justify a regulation as sweeping as this." The government failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban. The government also failed to prove Section 504, with adequate notice, would be ineffective. There was no evidence that a well-promoted voluntary blocking provision would not be capable at least of informing parents about signal bleed (if they were not yet aware of it) and about their rights to have the bleed blocked (if they considered it a problem and had not yet controlled it themselves). Correlatively, the court noted that it was no response that voluntary blocking required a consumer to take action, or might be inconvenient, or might not go perfectly every time. "A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, [would] fail to act." Moreover, the Court rejected the argument that society's independent interests would be unserved if parents failed to act on that information. Even upon the assumption that the government had an interest in substituting itself for informed and empowered parents, its interest was not sufficiently compelling to justify this widespread restriction on speech. The government's argument stemmed from the idea that parents did not know their children were viewing the material on a scale or frequency to cause concern, or if so, that parents did not want to take affirmative steps to block it, and their decisions were to be superseded. These assumptions had not been established; and, in any event, the assumptions applied only in a regime where the option of blocking had not been explained. The whole point of a publicized Section 504 would be to advise parents that indecent material might be shown and to afford them an opportunity to block it at all times, even when they were not at home and even after ten p.m.. Time channeling did not offer this assistance. The regulatory alternative of a publicized Section 504, which had the real possibility of promoting more open disclosure and the choice of an effective blocking system, would provide parents the information needed to engage in active supervision. The government did not show that this alternative, a regime of added communication and support, would be insufficient to secure its objective, or that any overriding harm justified its intervention.[427]

[I152] *Telecommunications Consortium* presented First Amendment challenges to three provisions of the Cable Television Consumer Protection and Competition Act of 1992, which sought to regulate the broadcasting of "patently offensive" sex-related material on cable television. Section 10(a) of the Act *permitted* cable system operators to prohibit "patently offensive" (or "indecent") programming transmitted over *"leased access channels"* reserved under federal law for commercial lease by parties unaffiliated with the cable television system operator. This provision was declared constitutional. "The importance of the interest at stake there—protecting children from exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in *Pacifica*;[428] and the flexibility inherent in an approach that *permits* private cable operators to make editorial decisions," led four Justices to conclude that Section 10(a) was "a sufficiently tailored response to an extraordinarily important problem."[429] Three other members of

[427] United States v. Playboy Entm't Group, 529 U.S. 803, 811–26 (2000).

[428] *See* para. I150.

[429] Denver Area Educ. Telecomms. Consortium, v. Fed. Communications Comm'n, 518 U.S. 727, 743 (1996) (opinion of Breyer, J., joined by Stevens, O'Connor and Souter, JJ.).

the Court noted that "cable operators are generally entitled to much the same First Amendment protection as the print media" and that, therefore, the cable operator's editorial rights have "general primacy" under the First Amendment over the rights of programmers to transmit and of viewers to watch.[430]

[I153] Section 10(c) of the Act *permitted* a cable operator to prevent transmission of "patently offensive" programming on *public access channels*. This provision was invalidated. Three Justices found that Section 10(c), was different from Section 10(a) for four reasons. First, cable operators had not historically exercised editorial control over public access channels; hence, the government had no interest in restoring a cable operator's First Amendment right of editorial discretion. Second, programming on those channels was normally subject to complex supervisory systems composed of both public and private elements, and Section 10(c) was therefore likely less necessary to protect children. Third, the existence of a system that encouraged and secured programming, which the community considered valuable, strongly suggested that a "cable operator's veto" was more likely to erroneously exclude borderline programs, which should be broadcast, than to achieve the statute's basic objective of protecting children. Finally, the examination of the legislative history and the record of the case was consistent with what common sense suggested, namely that the public/non-profit programming control systems in place would normally avoid, minimize, or eliminate any child-related problems concerning "patently offensive" programming; the government had not shown that there was a significant enough problem of patently offensive broadcasts to children, over public access channels, which justified the restriction imposed by Section 10(c). Consequently, the plurality concluded that the government could not sustain its burden of showing that Section 10(c) was necessary to protect children or that it was appropriately tailored to secure that end.[431] Two other Justices concurred in this judgment. They held that, because the public access channels regulated by Section 10(c) were required by local cable franchise authorities, those channels were "designated public fora." Section 10(c) vested the cable operator with a power under federal law, defined by reference to the content of speech, to undercut the public forum. The provision was not narrowly tailored to serve the compelling government interest in protecting children from indecent speech, mainly because, to the extent some operators might allow indecent programming, children in localities those operators served would be left unprotected. "Partial service of a compelling interest is not narrow tailoring. . . . Put another way, the interest in protecting children from indecency only at the caprice of the cable operator is not compelling."[432]

[I154] Section 10(b) of the Act *required* cable system operators to place "patently offensive" *leased channel* programming on a separate channel; to block that channel; to unblock the channel within 30 days of a subscriber's written request for access; and to reblock the channel within 30 days of a subscriber's request for reblocking. Also, leased channel programmers should notify cable operators of an intended "patently offensive" broadcast up to 30 days before its scheduled broadcast date. These requirements had obvious restrictive effects. The several up-to-30-day delays, along with single channel segregation, meant that a subscriber could not decide to watch a single program without considerable advance planning and without letting the "patently offensive" channel in

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430 *Id.* at 815, 817 (opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia, J.).

431 *Id.* at 760–66 (plurality opinion of Breyer, J., joined by Stevens and Souter, JJ.).

432 *Id.* at 781–83, 791–94, 806–07 (opinion of Kennedy, J., joined by Ginsburg, J.).

its entirety invade his household for days, perhaps weeks at a time. These restrictions would prevent programmers from broadcasting to viewers who would like to select programs day by day (or, through "surfing," minute by minute); to viewers who would like occasionally to watch a few, but not many, of the programs on the "patently offensive" channel; and to viewers who simply tended to judge a program's value through channel reputation. The "written notice" requirement would further restrict viewing by subscribers who feared for their reputations in case the operator, advertently or inadvertently, disclosed the list of those who wished to watch the "patently offensive" channel. In addition, the added costs and burdens that these requirements imposed upon a cable system operator might encourage that operator to ban programming that the operator would otherwise permit to run, even if only late at night. Moreover, the "segregate and block" restrictions on speech were not a narrowly, or reasonably, tailored effort to protect children. Under federal law, cable operators should scramble or block sexually explicit material on any unleased channel "primarily dedicated to sexually oriented programming;" they had to honor a subscriber's request to block any, or all, programs on any channel to which he or she did not wish to subscribe; and they were required to provide upon the request of a subscriber, a device by which the subscriber could prohibit viewing of a particular cable service during periods selected by the subscriber. These provisions were significantly less restrictive than Section 10(b). And the record of the case did not explain why blocking alone—without written access requests—adequately protected children from exposure to regular sex-dedicated channels, but could not adequately protect those children from programming on similarly sex-dedicated channels that were leased. Section 10(b) was, thus, "overly restrictive, sacrificing important First Amendment interests for too speculative a gain."[433]

[I155] *Obscene or Indecent Telephone Messages.* In *Sable*, a company engaged in the business of offering sexually oriented prerecorded telephone messages (popularly known as "dial-a-porn") challenged the constitutionality of a federal statute that imposed a blanket prohibition on indecent as well as obscene inter-state commercial telephone messages. The Court held that the statute, which did not establish a "national standard" of obscenity, was constitutional insofar as it applied to obscene messages. In so holding, the Court emphasized that "[t]here is no constitutional barrier . . . to prohibiting communications that are obscene in some communities under local standards, even though they are not obscene in others. . . . Sable [wa]s free to tailor its messages, on a selective basis, if it so [chose], to the communities it [chose] to serve. While Sable [might] be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there [wa]s no constitutional impediment to enacting a law which [might] impose such costs on a medium electing to provide these messages. . . . If Sable's audience [wa]s comprised of different communities with different local standards, Sable ultimately [bore] the burden of complying with the prohibition on obscene messages."[434]

[I156] In attempting to justify the complete ban and criminalization of indecent commercial telephone messages, the government relied on *Pacifica*,[435] arguing that the ban was necessary to prevent children from gaining access to such messages. The *Sable* Court agreed that there was a compelling interest in protecting the physical and psychologi-

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[433] *Id.* at 753–60.

[434] Sable Communications of California v. Fed. Communications Comm'n, 492 U.S. 115, 125–26 (1989).

[435] *See* para. I150.

cal well-being of minors, which extended to shielding them from indecent messages that are not obscene by adult standards. The challenged ban, however, "was not only a total governmentally imposed ban on a category of communications, but also involved a communications medium, telephone service, that was significantly less likely to expose children to the banned material, was less intrusive, and allowed for significantly more control over what comes into the home than broadcasting."[436] As the Court explained, "the dial-it medium requires the listener to take affirmative steps to receive the communication; . . . callers will generally not be unwilling listeners. . . . Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it."[437] Further, the Court set aside the ban on indecent dial-a-porn messages mainly because the FCC had previously imposed certain default rules—credit card payment, access code use, or message scrambling and use of a descrambler, the sale of which would be limited to adults—intended to prevent access by minors, and there was no evidence that those rules were ineffective. Since the record of the case showed that "the FCC's technological approach to restricting dial-a-porn messages to adults who [sought] them would be extremely effective, and that only a few of the most enterprising and disobedient young people would manage to secure access to such messages," the Court concluded that the provision was not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.[438]

[I157] *Obscene or Indecent Material on the Internet.* "The Web contains a wide array of sexually explicit material, including hardcore pornography. . . . Because navigating the Web is relatively straightforward, . . . and access to the Internet is widely available in homes, schools, and libraries across the country, . . . children may discover this pornographic material either by deliberately accessing pornographic Web sites or by stumbling upon them."[439] Congress first attempted to protect children from exposure to pornographic material on the Internet by enacting the Communications Decency Act of 1996 (CDA). The CDA prohibited the knowing transmission over the Internet of "obscene or indecent" messages to any recipient under 18 years of age. It also forbade any individual from knowingly sending over or displaying on the Internet certain "patently offensive" material in a manner available to persons under 18 years of age. The prohibition specifically extended to "any comment, request, suggestion, proposal, image, or other communication that, in context, depict[ed] or describ[ed], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." The CDA provided two affirmative defenses to those prosecuted under the statute. The first protected individuals who took "good faith, reasonable, effective, and appropriate actions" to restrict minors from accessing obscene, indecent, and patently offensive material over the Internet. The second shielded those who restricted minors from accessing such material by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number. Notwithstanding these affirmative defenses, in *Reno v. American Civil Liberties Union*, the

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436 *See* Area Educ. Telecomms. Consortium, v. Fed. Communications Comm'n, 518 U.S. 727, 748 (1996) (plurality opinion), *discussing Sable.*

437 Sable Communications of California v. Fed. Communications Comm'n, 492 U.S. 115, 127–28 (1989).

438 *Id.* at 130–31.

439 Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 566–67 (2002).

Court held that the CDA's regulation of indecent transmissions, and the display of patently offensive material, ran afoul of the First Amendment. The Court concluded that the CDA lacked the precision that the First Amendment requires when a statute regulates the content of speech because, "[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppress[ed] a large amount of speech that adults ha[d] a constitutional right to receive and to address to one another."[440] This holding was based on three crucial considerations. First, "existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults. . . . Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender [should] be charged with knowing that one or more minors [would] likely view it. Knowledge that, for instance, one or more members of a 100-person chat group [would] be minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults. . . . [And] [a]s a practical matter, . . . it would be prohibitively expensive for noncommercial—as well as some commercial—speakers who ha[d] Web sites to verify that their users [we]re adults. . . . These limitations [would] inevitably curtail a significant amount of adult communication on the Internet."[441] Second, "[t]he breadth of the CDA's coverage [wa]s wholly unprecedented. . . . [T]he scope of the CDA [wa]s not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace[d] all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms 'indecent' and 'patently offensive' cover[ed] large amounts of nonpornographic material with serious educational or other value. Moreover, the 'community standards criterion as applied to the Internet mean[t] that any communication available to a nationwide audience [would] be judged by the standards of the community most likely to be offended by the message. [As a result, regulated subject matter under the CDA extended] to discussions about prison rape or safe sexual practices and artistic images that included nude subjects."[442] Third, the government failed to explain why a less restrictive provision would not be as effective as the CDA. The arguments in the Court referred to possible alternatives "such as requiring that indecent material be 'tagged' in a way that facilitate[d] parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial Web sites—differently than others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, [the Court was] persuaded that the CDA [wa]s not narrowly tailored."[443] Relatedly the Court found that neither affirmative defense set forth in the CDA constituted the sort of narrow tailoring that would save an otherwise patently invalid unconstitutional provision. The government's argument that transmitters might take protective "good faith action" by "tagging" their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software, was illusory, given the requirement that such action be "effective:" the proposed screening software did not then-currently exist, but, even if it did, there would be no way of

[440] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997).

[441] *Id.* at 876–77.

[442] *Id.* at 877–78.

[443] *Id.* at 879.

knowing whether a potential recipient would actually block the encoded material. And as to the defense covering those who restricted access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code, the Court noted that, such verification, though actually being used by some commercial providers of sexually explicit material, was not economically feasible for most non-commercial speakers.[444] Consequently, only the CDA's ban on the knowing transmission of obscene messages survived scrutiny.[445]

[I158] After *Reno v. American Civil Liberties Union*, Congress passed the Child Online Protection Act (COPA). COPA prohibited any person from "knowingly and with knowledge of the character of the material, in inter-state or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." "Apparently responding to [the Court's] objections to the breadth of the CDA's coverage, Congress limited the scope of COPA's coverage in at least three ways. First, while the CDA applied to communications over the Internet as a whole, including, for example, e-mail messages, COPA applie[d] only to material displayed on the World Wide Web. Second, unlike the CDA, COPA cover[ed] only communications made 'for commercial purposes.' . . . And third, while the CDA prohibited 'indecent' and 'patently offensive' communications, COPA restrict[ed] only the narrower category of material that was 'harmful to minors.'"[446] Drawing on the three-part test for obscenity set forth in *Miller*, COPA defined "material that is harmful to minors" as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." Like the CDA, COPA also provided affirmative defenses to those subject to prosecution under the statute. An individual might qualify for a defense if he, "in good faith, has restricted access by minors to material that is harmful to minors—(A) by requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology." Persons violating COPA were subject to both civil and criminal sanctions. The Court of Appeals for the Third Circuit found that COPA's use of "contemporary community standards" to identify material that was harmful to minors rendered the statute substantially overbroad. Because Web publishers were without any means to limit access to their sites based on the geographic location of particular Internet users, the court of appeals reasoned that COPA would require any material that might be deemed harmful by the most puritan of communities in any state to be placed behind an age or credit card verification system. Hypothesizing that this step would require Web publishers to shield vast amounts of material, the court of appeals was persuaded that this aspect of COPA leaded inexorably

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444 *Id.* at 881–82.

445 *Id.* at 883.

446 Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 569–70 (2002) *(Ashcroft I).*

to a holding of a likelihood of unconstitutionality of the entire COPA statute. The Court disagreed. In *Ashcroft I*, the Court held that COPA's reliance on community standards to identify "material that is harmful to minors" did not *by itself* render the statute substantially overbroad for purposes of the First Amendment.[447] Justice Thomas, in his opinion joined by Rehnquist, C.J., and Scalia, J., noted that "community standards need not be defined by reference to a precise geographic area" and found that the Internet's unique characteristics do not justify adopting a different approach than that set forth in *Hamling* and *Sable*.[448] While the *Reno* Court had stressed that the "community standards" criterion, as applied to the Internet, meant that any communication available to a nationwide audience would be judged by the standards of the community most likely to be offended by the message, the CDA's use of community standards to identify patently offensive material was particularly problematic in light of that statute's unprecedented breadth and vagueness. COPA, by contrast, did not appear to suffer from the same flaw, because it applied to significantly less material than did the CDA and defined the harmful-to-minors material restricted by the statute in a manner parallel to the *Miller* definition of obscenity. In that respect, COPA's exclusion of material with serious value for minors was of great importance. This was because, unlike the "patently offensive" and "prurient interest" criteria, the "serious value" requirement is not judged by contemporary community standards, for "the value of [a] work [does not] vary from community to community based on the degree of local acceptance it has won."[449] Thus, the serious value requirement allowed courts "to impose some limitations and regularity on the definition by setting, *as a matter of law*, a national floor for socially redeeming value."[450] Justice O'Connor agreed with the plurality that, "even under local community standards, the variation between the most and least restrictive communities [wa]s not so great with respect to the narrow category of speech covered by COPA as to, alone, render the statute substantially overbroad, . . . given respondents' failure to provide examples of materials that lacked literary, artistic, political, and scientific value for minors, which would nonetheless result in variation among communities judging the other elements of the test." At the same time, O'Connor pointed out that respondents' failure to prove substantial overbreadth on a facial challenge in that case still left open the possibility that the use of local community standards would cause problems for regulation of obscenity on the Internet, for adults as well as children, in future cases. In an as-applied challenge, for instance, individual litigants might still dispute that the standards of a community more restrictive than theirs should apply to them. And in future facial challenges to regulation of obscenity on the Internet, litigants could make a more convincing case for substantial overbreadth. Moreover, "given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech, . . . [might] be entirely too much to ask, and would potentially suppress an inordinate amount of expression." For these reasons, O'Connor held that "adoption of a national standard is necessary for any reasonable regulation of Internet obscenity."[451] Justice Breyer found that, in light of COPA's

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[447] *Id.* at 585. The Court did not express any view as to whether COPA suffered from substantial overbreadth for other reasons, whether the statute was unconstitutionally vague, or whether the statute likely would not survive strict scrutiny analysis.

[448] *See* para. I155.

[449] *See* para. I131.

[450] Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 578–79 (2002) (plurality opinion), *quoting* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 873 (1997).

[451] Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 586–87 (2002).

legislative history, the statutory word "community" referred to the nation's adult community taken as a whole, not to geographically separate local areas; this view of the statute avoided the need to examine the serious First Amendment problem that would otherwise exist.[452] Justices Kennedy, Souter, and Ginsburg recognized that the national variation in community standards constitutes a particular burden on Internet speech. They would not assume that the Act was narrow enough to render the national variation in community standards unproblematic. Further, they would have remanded the case, because, in order to discern whether the variation created substantial overbreadth, it was necessary to clarify what speech COPA regulated and what community standards it invoked.[453] Justice Stevens dissented, noting, *inter alia*, that, "within the subset of images deemed to have no serious value for minors, the decision whether minors and adults throughout the country [would] have access to that speech [would] still be made by the most restrictive community. . . . [And] [b]ecause communities differ widely in their attitudes toward sex, particularly when minors are concerned, . . . applying community standards to the Internet [would] restrict a substantial amount of protected speech that would not be considered harmful to minors in many communities."[454]

[I159] *Ashcroft I* decided that the community-standards language did not, standing alone, make COPA unconstitutionally overbroad. The Court emphasized, however, that its decision was limited to that narrow issue. In *Ashcroft II*, the Court held that the lower courts had been correct in enjoining the enforcement of COPA, because the statute *likely* violated the First Amendment.[455] Respondents had proposed that blocking and filtering software was a less restrictive alternative available for the government to serve the interest of preventing minors from using the Internet to gain access to materials harmful to them, and the government had not shown it would be likely to disprove that contention at trial. The Court stressed that filters were less restrictive than COPA. They imposed "selective restrictions on speech at the receiving end, not universal restrictions at the source." Under a filtering regime, adults without children might gain access to speech they had a right to see without having to identify themselves or provide their credit card information. Even adults with children could obtain access to the same speech on the same terms simply by turning off the filter on their home computers. "Above all, promoting filter use [would] not condemn as criminal any category of speech, and so the potential chilling effect [would be] eliminated, or at least much diminished." Filters, moreover, might well be more effective than COPA. First, the record demonstrated that a filter could prevent minors from seeing all pornography, not just pornography posted to the Web from America. That COPA did not prevent minors from accessing foreign harmful materials "alone ma[de] it possible that filtering software might be more effective in serving Congress' goals." COPA's effectiveness was "likely to diminish even further if COPA [we]re upheld, because providers of the materials covered by the statute simply could move their operations overseas." In addition, the district court had found that verification systems might be subject to evasion and circumvention, e.g., by minors having their own credit cards. Finally, filters also might be more effective because they could be applied to all forms of Internet communica-

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[452] *Id.* at 590.

[453] *Id.* at 597–602.

[454] *Id.* at 609, 611.

[455] The Court applies the "abuse of discretion" standard on the review of a preliminary injunction. "If the underlying constitutional question is close, therefore, [the Court] should uphold the injunction and remand for trial on the merits." *See* Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 664–65 (2004) *(Ashcroft II).*

tion, including e-mail, not just the World Wide Web. Although filtering software would not be a perfect solution because it might block some materials not harmful to minors and fail to catch some that were, the government had not satisfied its burden to introduce specific evidence proving that filters were less effective. The argument that filtering software was not an available alternative, because Congress could not require its use, carried "little weight," since Congress might "act to encourage the use of filters" by giving "strong incentives" to schools and libraries, and by promoting the development of filters by industry and their use by parents.[456]

[I160] In *American Library Association*, the Court upheld on its face a provision of the Children's Internet Protection Act, which forbade public libraries from receiving federal financial assistance for Internet access unless they installed software to block obscene or pornographic images and to prevent minors from accessing material harmful to them. A four-member plurality found that, because public libraries' use of Internet filtering software did not violate their patrons' First Amendment rights, the statute did not induce libraries to violate the Constitution and was a valid exercise of Congress' spending power. As the plurality noted, "the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public. . . . [And] public libraries must have broad discretion to decide what material to provide to their patrons," in order to fulfill their traditional missions of facilitating learning and cultural enrichment. Further, "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum. . . . A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access not to 'encourage a diversity of views from private speakers,' . . . but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." The fact that a library reviews and affirmatively chooses to acquire every book in its collection but does not review every Web site that it makes available, is not a constitutionally relevant distinction. "Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. [The Court does]

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456 Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 667–70 (2004). "Important practical reasons" also supported letting the injunction stand pending a full trial on the merits. "First, the potential harms from reversal outweigh[ed] those of leaving the injunction in place by mistake. Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech. . . . The harm done from letting the injunction stand pending a trial on the merits, in contrast, [would] not be extensive. No prosecutions ha[d] yet been undertaken under the statute, . . . [and the Government could] enforce obscenity laws already on the books. Second, there [we]re substantial factual disputes remaining in the case, [including] a serious gap in the evidence as to the filtering software's effectiveness. . . . By allowing the preliminary injunction to stand and remanding for trial, [the Court] require[d] the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so. Third, . . . [the Court] allow[ed] the parties to update and supplement the factual record to reflect current technological realities. [Finally the district court could also] take account of the changed legal landscape, . . . [since, during the intervening time,] Congress ha[d] passed at least two further statutes that might qualify as less restrictive alternatives to COPA—a prohibition on misleading domain names, and a statute creating a minors-safe 'dot Kids' domain." *Id.* at 670–72.

not subject these decisions to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently when these judgments are made for just the same reason. Moreover, because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not. While a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review. Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality." Finally, concerns over filtering software's tendency to erroneously "overblock" were dispelled by the ease with which patrons might have the filtering software disabled.[457] Two other Justices concurred in the judgment, finding that the provision served the compelling government interest in protecting young library users from material inappropriate for minors and imposed only a small burden upon library patrons seeking legitimate Internet materials, since it allowed libraries to unblock filtered material or disable the Internet software filter on an adult user's request or for *bona fide* research purposes.[458]

e. Commercial Speech[459]

i. Generally

[I161] Commercial speech is "usually defined as 'speech which does no more than propose a commercial transaction.'"[460] Speech is not rendered commercial by the mere fact that it is labeled as an "advertisement," such as a paid political advertisement; it is carried in a form that is "sold" for profit, like books and motion pictures; the speaker's interest is a primarily economic one (e.g., speech of labor disputants); it involves a solicitation to purchase (e.g., religious literature) or otherwise pay or contribute money (e.g., to a campaign committee); it refers to a specific product.[461] The combination of all these characteristics, however, may provide support for the conclusion that certain types of expression are properly characterized as commercial speech.[462] A company's monopoly position does not alter the First Amendment's protection for its commercial speech.[463] On the other hand, "advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech. . . . A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions."[464]

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457 United States v. Am. Library Ass'n, 539 U.S. 194, 204, 206–09 (2003) (plurality opinion).

458 *Id.* at 214–15 (opinion of Justice Kennedy); *id.* at 215–20 (opinion of Justice Breyer).

459 *See also* paras. I241, I242 *(government compulsion to finance objectionable advertising).*

460 United States v. United Foods, 533 U.S. 405, 409 (2001), *quoting* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

461 *See* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976), in conjunction with Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983).

462 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983).

463 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 567–68 (1980).

464 *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983), *citing* Cent. Hudson

[I162] Constitutional protection for commercial speech is of recent vintage. Until the mid-1970s, the Court adhered to the broad rule laid out in *Chrestensen*, that, while the First Amendment guards against government restriction of speech in most contexts, "the Constitution imposes no such restraint on government as respects purely commercial advertising."[465] In 1976, the Court changed course. In *Virginia Pharmacy Board*, the Court reviewed a state statute barring pharmacists from advertising prescription drug prices. Striking the ban as unconstitutional, the Court rejected the argument that such speech is so removed from "any exposition of ideas" and from "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government" that it lacks all protection. As the Court stressed, a "particular consumer's interest in the free flow of commercial information may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely 'commercial,' may be of general public interest: [e.g.,] advertisements stating that referral services for legal abortions are available; . . . that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals; . . . or that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs. . . . It is a matter of public interest that [economic] decisions, in the

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Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563, n.5 (1980). *See also* Bd. of Trs. of State Univ. of New York v. Fox, 492 U.S. 469, 474–75 (1989).

Riley involved a state law requirement that, in conducting fundraising for charitable organizations (which is fully protected speech) professional fundraisers must insert in their presentations a statement setting forth the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charities (instead of retained as commissions). In response to the state's contention that the statement was merely compelled commercial speech, the Court said that, if so, it was *"inextricably intertwined with otherwise fully protected speech,"* and that the level of First Amendment scrutiny must depend upon "the nature of the speech taken as a whole and the effect of the compelled statement thereon." Therefore, the Court applied the test for fully protected expression. *See* Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 796 (1988) (emphasis added). In *Riley*, the commercial speech (if it was that) was "inextricably intertwined" because "the state law *required* it to be included." By contrast, there was nothing whatever "inextricable" about the non-commercial aspects of the presentations at issue in *Fox*, where the Court noted that "no law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares." *See* Bd. of Trs. of State Univ. of New York v. Fox, 492 U.S. 469, 474 (1989).

[465] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). That construction of the First Amendment was severely cut back in *Bigelow v. Virginia*, 421 U.S. 809 (1975). There, the Court reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor. The defendant had published in his newspaper the availability of abortions in New York. The advertisement in question, in addition to announcing that abortions were legal in New York, offered the services of a referral agency in that state. The Court rejected the contention that the publication was unprotected, because it was commercial. *Chrestensen*'s continued validity was questioned, and its holding was described as "distinctly a limited one" that merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed." The Court concluded that the Virginia courts had erred in their assumptions that advertising, as such, was entitled to no First Amendment protection, and observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Id.* at 819, 825–26.

aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."[466] Indeed, "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented."[467] In applying the First Amendment to this area, the Court has rejected the highly paternalistic approach that what people may hear is generally suspect, noting that "people will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication, rather than to close them."[468] "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all."[469] Nevertheless, there are "common sense" differences between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. These differences "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."[470] "Because it relates to a particular product or service, commercial speech is more objective, hence more verifiable, than other varieties of speech. Commercial speech, because of its importance to business profits, and because it is carefully calculated, is also less likely than other forms of speech to be inhibited by proper regulation."[471] Attributes such as these "may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. . . . They may also make inapplicable the prohibition against prior restraints."[472] "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[473]

[I163] "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[474] In *Central Hudson*, the Court articulated a test for determining whether a particular commercial speech regulation is constitutionally permissible. Under that test,

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[466] Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761–65 (1976).

[467] Edenfield v. Fane, 507 U.S. 761, 767 (1993).

[468] Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[469] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 562 (1980), *citing* Bates v. State Bar of Arizona, 433 U.S. 350, 374 (1977).

[470] Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772, n.24 (1976).

[471] Friedman v. Rogers, 440 U.S. 1, 10 (1979).

[472] Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772, n.24 (1976).

[473] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 562 (1980), *citing* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456–57 (1978). Since there is a constitutional right to advertise, "there is a reciprocal right to receive the advertising." *See* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976).

[474] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563 (1980).

the courts ask, as a threshold matter, whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, the courts next ask "whether the asserted governmental interest is substantial." If it is, then it must be determined "whether the regulation directly advances the governmental interest asserted," and, finally, "whether it is not more extensive than is necessary to serve that interest."[475] Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.[476] "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it."[477] Relatedly, the Court also has held that the power to prohibit a particular commercial activity does not necessarily include the power to prohibit advertising about such lawful activity.[478]

[I164] The third step of *Central Hudson* concerns the relationship between the harm that underlies the state's interest and the means identified by the state to advance that interest. It requires that the speech restriction directly advance the asserted governmental interest. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[479] The Court does not, however, require "empirical data, . . . accompanied by a surfeit of background information;" litigants may justify speech restrictions "by reference to studies and anecdotes pertaining to different locales altogether, . . . or even, . . . based solely on history, consensus, and simple common sense."[480]

[I165] The last step of the *Central Hudson* analysis "complements" the third step, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. What the Court requires "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends . . .—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is 'in proportion to the interest served;' . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objec-

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475 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980). Several members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501, 510–14 (1996) (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment). Nevertheless, *Central Hudson* remains good law. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554–55 (2001) and Thompson v. W. States Med. Ctr., 535 U.S. 357, 367–68 (2002).

476 *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002). The Court "review[s] with special care regulations that entirely suppress commercial speech in order to pursue a non-speech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy." *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566, n.9 (1980).

477 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71, n.20 (1983). When the possibility of deception is self-evident, the Court does not require the state to conduct a survey of the public before it may determine that an advertisement has a tendency to mislead. *See* Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 652–53 (1985).

478 *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 193 (1999).

479 Edenfield v. Fane, 507 U.S. 761, 770–771 (1993).

480 Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995).

tive."[481] On the whole, then, the challenged regulation should indicate that its proponent "carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition."[482] The validity of the restriction is judged "by the relation it bears to the general problem the government seeks to correct, not by the extent to which it furthers the Government's interest in an individual case."[483]

[I166] There are "material differences between disclosure requirements and outright prohibitions on advertising. . . . Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . [one's] constitutionally protected interest in not providing any particular factual information in his advertising is minimal. . . . [Certainly,] unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But . . . an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[484]

ii. Specific Types of Advertising

[I167] *Advertising of Legal or Other Professional Services.*[485] "In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions."[486] "The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling. . . . Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading, or when experience has proved that, in fact, such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception. Even when a communi-

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[481] Bd. of Trs. of State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989). The Court observed that, since the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context, it would be incompatible with the subordinate position of commercial speech in the scale of First Amendment values to apply a more rigid standard to commercial speech than is applied to fully protected speech. *Id.* at 477–78.

[482] Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993).

[483] United States v. Edge Broadcasting Co., 509 U.S. 418, 430–31 (1993). The Court has emphasized "[t]here is no *de minimis* exception for a commercial speech restriction that lacks sufficient tailoring or justification." *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 567 (2001).

[484] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 650–51 (1985).

[485] *See also* para. I430.

[486] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978).

cation is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. . . . Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest."[487]

[I168] *Bates* held that lawyer advertising is a form of commercial speech, protected by the First Amendment, and that advertising by attorneys may not be subjected to blanket suppression. More specifically, the *Bates* Court held that lawyers must be permitted to advertise not only their name, address, telephone number, office hours, and the like, but also the fees they charge for certain "routine" legal services, such as uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name. The Court recognized, of course, "the spirit of public service with which the profession of law is practiced and to which it is dedicated," but also noted "the real-life fact that attorneys earn their livelihood at the bar." Considering that "the belief that lawyers are somehow 'above' trade has become an anachronism," the Court rejected the claim that price advertising would undermine the professionalism of attorneys. Moreover, the Court stressed that advertising legal services is not inherently misleading. "Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type. The only services that lend themselves to advertising are the routine ones. Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price. . . . [And] [a]lthough the client may not know the detail involved in performing a specific task, he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself. . . . [Though] [a]dvertising does not provide a complete foundation on which to select an attorney, . . . it would be peculiar to deny the consumer at least some of the relevant information needed for an informed decision on the ground that the information is incomplete. . . . [In addition,] [a]dvertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although advertising might increase the use of the judicial machinery, . . . it is [not] always better for a person to suffer a wrong silently than to redress it by legal action. . . . A rule allowing restrained advertising would be in accord with the bar's obligation to 'facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.'" Moreover, advertising is more likely to reduce, not advance, the cost of legal services to the consumer, and it may well aid new attorneys in entering the market. Besides, an attorney who is inclined to cut quality will do so regardless of the rule on advertising, the restraints on which are an ineffective way of deterring shoddy work. In holding that advertising by attorneys may not be subjected to blanket prohibition, the Court was careful to point out that, "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction."[488]

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[487] *In re* R.M.J., 455 U.S. 191, 202–03 (1982). In *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 108 (1990), a four-Justice plurality held that whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which the Court should exercise *de novo* review.

[488] Bates v. State Bar of Arizona, 433 U.S. 350, 368–78, 383–84 (1977). In that case, the

[I169] In *In re R.M.J.*, an attorney had been disciplined by the state bar (1) for advertising the areas of his practice in language other than that specified in a state rule; (2) for advertising that he was licensed to practice in both Illinois and Missouri and before the United States Supreme Court, in violation of a state rule; and (3) for mailing announcement cards to persons other than those permitted by a state rule, under which a lawyer could send professional cards announcing a change of address or firm name, or similar matters, only to lawyers, clients, former clients, personal friends, and relatives. The Court decided that none of these three restrictions upon appellant's First Amendment rights could be sustained in the circumstances of that case. Because the listing of areas of practice published by appellant—e.g., "real estate" instead of "property law" as specified by the state rule, and "contracts" and "securities," which were not included in the rule's listing—had not been shown to be misleading, and the state suggested no substantial interest promoted by the restriction, the portion of the state rule specifying the areas of practice that might be listed was held to be an invalid restriction upon speech, as applied to appellant's advertisements. Nor did the state identify any substantial interest in prohibiting a lawyer from identifying the jurisdictions in which he was licensed to practice. Such information was not misleading on its face. Appellant was licensed to practice in both Illinois and Missouri. This was factual and highly relevant information, particularly in light of the geography of the region in which appellant practiced. Somewhat more troubling was appellant's listing, in large capital letters, that he was a member of the Bar of the Supreme Court of the United States. The Court found that the emphasis of this relatively uninformative fact was at least bad taste. Indeed, such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of the Court. Yet there was nothing in the record to indicate that the inclusion of this information was misleading. Nor did the state rule specifically identify this information as potentially misleading or, for example, place a limitation on type size or require a statement explaining the nature of the Supreme Court Bar. Finally, though mailings and handbills might be more difficult to supervise than newspapers, there was no indication that an inability to supervise was the reason the state restricted the potential audience of announcement cards. Nor was it clear that an absolute prohibition was the only solution; for example, by requiring a filing of a copy of all general mailings, the state might be able to exercise reasonable supervision over such mailings.[489]

[I170] "Much like a trademark, the strength of a certification is measured by the quality of the organization for which it stands. . . . [I]f the certification has been issued by an organization that has made no inquiry into a lawyer's fitness, or by one that issues certificates indiscriminately for a price, . . . statement[s] [made in such certifications,] even if true, could be misleading."[490] *Peel* involved a state rule that permitted a lawyer to designate any area or field of law in which he concentrated, but prohibited any lawyer from holding himself out as "certified" or a "specialist." There, the Court held that an

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Court found that the term "legal clinic," included in the advertisement at issue, would be understood to refer to an operation like appellants' that was "geared to provide standardized and multiple services." Moreover, appellants' failure to disclose that a name change might be accomplished by the client without an attorney's aid was not misleading, since most legal services may be performed legally by the citizen for himself. *Id.* at 381–82.

[489] *In re* R.M.J., 455 U.S. 191, 205–06 (1982).

[490] Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91, 102 (1990) (plurality opinion).

attorney's use of the designation "Certified Civil Trial Specialist by the National Board of Trial Advocacy" (NBTA) was protected by the First Amendment. NBTA had developed a set of standards and procedures for periodic certification of lawyers with experience and competence in trial work. Those standards, which had been approved by a board of judges, scholars, and practitioners, were objective and demanding. They required specified experience as lead counsel in both jury and non-jury trials, participation in approved programs of continuing legal education, a demonstration of writing skills, and the successful completion of a day-long examination. Certification expired in five years unless the lawyer again demonstrated his or her continuing qualification. The plurality, first, underlined "the distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality. A lawyer's certification by NBTA is a verifiable fact, as are the predicate requirements for that certification. Measures of trial experience and hours of continuing education, like information about what schools the lawyer attended or his or her bar activities, are facts about a lawyer's training and practice. A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, . . . but is simply a fact, albeit one with multiple predicates from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice." Moreover, as the plurality noted, "the public understands that licenses . . . are issued by governmental authorities and that a host of certificates . . . are issued by private organizations," and it seemed "unlikely that petitioner's statement about his certification as a 'specialist' by an identified national organization necessarily would be confused with formal state recognition." Hence, the advertisement in question was neither actually nor inherently misleading.[491] Further, the Court found that the state's interest in avoiding any potential that such advertisements may mislead is insufficient to justify a categorical ban on their use. To the extent that such statements can confuse consumers, the state may, for example, require a disclaimer about the certifying organization or the standards of a specialty.[492]

[I171] *Zauderer* involved three separate forms of regulation Ohio imposed on advertising by its attorneys: prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on

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[491] *Id.* at 101, 103–05, 110 (plurality opinion); *id.* at 111 (Marshall, J. concurring).

[492] *Id.* at 110 (plurality opinion) ("[a] State may not . . . completely ban statements that are not actually or inherently misleading"); *id.* at 111 (Marshall, J. concurring) (a state "may enact regulations other than a total ban to ensure that the public is not misled by [potentially misleading] representations").

See also Ibanez v. Florida Dep't of Bus. and Prof'l Regulation, 512 U.S. 136, 142–49 (1994). There, a member of the Florida Bar, who was also a Certified Public Accountant (CPA) licensed by the Florida Board of Accountancy (Board), and was authorized by the Certified Financial Planner Board of Standards (CFPBS), a private organization, to use the designation "Certified Financial Planner" (CFP), referred to these credentials in her advertising and other communication with the public concerning her law practice, placing CPA and CFP next to her name in her yellow pages listing and on her business cards and law offices stationery. Notwithstanding the apparent truthfulness of the communication, the Board reprimanded Ibanez for engaging in deceptive and misleading advertising. However, the Board did not demonstrate with sufficient specificity that any member of the public could have been misled by Ibanez's constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes. The Court therefore held that the Board's decision censuring Ibanez was incompatible with First Amendment restraints on official action.

the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingent fees. In that case, an attorney practicing law in Ohio ran a newspaper advertisement advising readers that his firm would represent defendants in drunken driving cases, and that his clients' full legal fee would be refunded if they were convicted of drunk driving. Later, appellant ran another newspaper advertisement publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive known as the Dalkon Shield Intrauterine Device. The advertisement featured an accurate line drawing of the device and stated, *inter alia*, that cases were handled on a contingent fee basis and that, if there was no recovery, no legal fees would be owed by the clients. The Court held that the reprimand of Zauderer violated his First Amendment rights, to the extent that it was based on appellant's use of an illustration in his advertisement and his offer of legal advice. The state's interest in preserving the dignity of the legal profession was insufficient to justify the categorical ban on illustrations in advertising. Nor could the rule be sustained on unsupported assertions that the use of illustrations in attorney advertising created unacceptable risks that the public would be misled, manipulated, or confused, or that, because illustrations could produce their effects by operating on a subconscious level, it would be difficult for the state to point to any particular illustration and prove that it was misleading or manipulative. Moreover, acceptance of such contentions "would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative." The Court was "not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations."[493] Furthermore, the Court held that "[a]n attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients."[494] Print advertising "poses no substantial risk of overreaching or undue influence. [It] may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney."[495] In this context, the Court found unpersuasive the state's contention that a prophylactic rule was necessary because the regulatory problems in distinguishing deceptive and non-deceptive legal advertising were different in kind from the problems presented by the advertising of other types of goods and services.[496] By

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[493] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 649 (1985) (plurality opinion); *id.* at 656 (Brennan, J., concurring); *cf. id.* at 673 (O'Connor, J., concurring).

[494] *Id.* at 647 (plurality opinion); *id.* at 656 (Brennan, J., concurring); *id.* at 673 (O'Connor, J., concurring).

[495] *Id.* at 642.

[496] *Id.* at 644–46 ("assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity; nor is assessing the accu-

contrast, the state's decision to discipline Zauderer for his failure to include in the Dalkon Shield advertisement the information that clients might be liable for litigation costs even if their lawsuits were unsuccessful did not violate the First Amendment. "[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers" and the above-mentioned requirement did not seem "intrinsically burdensome" or "unreasonable, as applied to" Zauderer. Appellant's advertisement made no mention of the distinction between "legal fees" and "costs," and, to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. "The State's position that it is deceptive to employ advertising that refers to contingent fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed."[497]

[I172] Under *Shapero*, a state may not, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems. A particular potential client may feel equally overwhelmed by his legal troubles, and he may have the same impaired capacity for good judgment regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement or instead mails a targeted letter. "The relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the *mode of communication* poses a serious danger that lawyers will exploit any such susceptibility."[498] Like print advertising, targeted, direct-mail solicitation generally "'poses much less risk of overreaching or undue influence' than does in-person solicitation. Neither mode of written communication involves 'the coercive force of the personal presence of a trained advocate' or the 'pressure on the potential client for an immediate yes-or-no answer to the offer of representation.' . . . Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and 'the reader of an advertisement . . . can effectively avoid further bombardment of his sensibilities simply by averting his eyes.' . . . A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. . . . Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery. Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case, or could implicitly suggest that the recipient's legal problem is more dire than it really is. . . . Similarly, an inaccurately targeted letter could lead the recipient to believe [he or] she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice. . . . But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. . . . The State can regulate such

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racy or capacity to deceive of other forms of advertising the simple process the State makes it out to be").

497 *Id.* at 651–53, n.15 (plurality opinion); *id.* at 673 (O'Connor, J., concurring).

498 Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 474 (1988).

abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, . . . giving the State ample opportunity to supervise mailings and penalize actual abuses. . . . [S]crutiny of targeted solicitation letters will [not] be appreciably more burdensome or less reliable than scrutiny of advertisements. As a general matter, evaluating a targeted advertisement does not require specific information about the recipient's identity and legal problems, any more than evaluating a newspaper advertisement requires like information about all readers. If the targeted letter specifies facts that relate to particular recipients, . . . the reviewing agency has innumerable options to minimize mistakes. It might, for example, require the lawyer to prove the truth of the fact stated (by supplying copies of the court documents or material that led the lawyer to the fact); it could require the lawyer to explain briefly how he discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement, . . . or directing the recipient how to report inaccurate or misleading letters. To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But . . . 'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'"[499]

[I173] In *Went For It*, the Court upheld a state rule prohibiting personal injury lawyers from sending targeted direct mail solicitations to victims and their relatives for 30 days following an accident or disaster. The principal purpose of the ban was to protect the personal privacy and tranquility of Florida's citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma. This substantial state interest obviously factored into the Florida Bar's paramount objective of curbing activities that negatively affected the administration of justice. The fact that the harms targeted by the ban were quite real was demonstrated by a Bar study, which contained extensive statistical and anecdotal data suggesting that the Florida public viewed direct mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflected poorly upon the profession. These harms could not be eliminated by "a brief journey to the trash can," since "[t]he purpose of the 30-day targeted direct mail ban [wa]s to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents ha[d] engendered." Further, the Bar's rule was reasonably well tailored to its stated objective. The Court found no constitutional deficiency in the ban's failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief. "Rather than drawing difficult lines on the basis that some injuries [we]re 'severe' and some situations appropriate for grief, anger, or emotion," the Florida Bar had crafted a ban applicable to all post-accident or disaster solicitations for a brief 30-day period. There were no obvious less burdensome

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[499] *Id.* at 475–78. This case involved a letter that would be sent "to potential clients who have had a foreclosure suit filed against them" and would, *inter alia*, advise the client that "you may be about to lose your home," that "federal law may allow you to . . . ORDER your creditor to STOP," that "you may call my office for FREE information," and that "it may surprise you what I may be able to do for you." A four-member plurality found that, although the letter's liberal use of underscored, uppercase letters and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type, the letter presented no risk of overreaching comparable to that of a lawyer engaged in face-to-face solicitation. *Id.* at 479.

alternatives to Florida's short temporal ban. Besides, Florida lawyers could advertise on prime-time television and radio as well as in newspapers and in the Yellow Pages of Florida telephone directories; they could rent space on billboards; and they might send untargeted letters to the general population, or to discrete segments thereof. These alternative channels for communicating necessary information about the availability of legal representation during the 30-day period following accidents were sufficient.[500]

[I174] *Ohralik* held that a state may categorically ban all in-person solicitation by lawyers. This decision turned on two factors. First, in-person solicitation by a lawyer is "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud."[501] "[T]he potential for overreaching is great when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. . . . [T]he very plight a victim of misfortune not only makes him more vulnerable to influence but also may make advice all the more intrusive. . . . [And] the target of the solicitation may have difficulty avoiding being importuned and distressed even if the lawyer seeking employment is entirely well meaning. . . . Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes. Under such circumstances, it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited."[502] Second, in-person solicitation presents unique regulatory difficulties, because it is "not visible or otherwise open to public scrutiny. Often there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place. This would be especially true if the lay person were so distressed at the time of the solicitation that he could not recall specific details at a later date."[503] These unique features of in-person solicitation by lawyers, along with "the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner," justify a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain.[504]

[I175] *Ohralik* did not hold that all personal solicitation is without First Amendment protection. In *Edenfield*, the Court invalidated a Florida ban on in-person solicitation by certified public accountants (CPAs). Although the state's asserted interests—protecting consumers from fraud or overreaching by CPAs and maintaining CPA independence and ensuring against conflicts of interest—were substantial, the state presented no studies suggesting personal solicitation of prospective business clients by CPAs created the dangers of fraud, overreaching, or compromised independence that the state claimed to fear. And the record did not disclose any anecdotal evidence that validated the state's suppositions. Moreover, the ban could not be justified as a prophylactic rule, because

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[500] Florida Bar v. Went For It, Inc., 515 U.S. 618, 624–34 (1995).

[501] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 641 (1985).

[502] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465–66, n.25 (1978).

[503] *Id.* at 466.

[504] *Id.* at 467.

the circumstances of CPA solicitation in the business context are not inherently conducive to overreaching and other forms of misconduct. As the Court noted, "[u]nlike a lawyer, a CPA is not 'a professional trained in the art of persuasion.' A CPA's training emphasizes independence and objectivity, not advocacy." Furthermore, "[t]he typical client of a CPA is far less susceptible to manipulation than the young accident victim in *Ohralik*. [A CPAs'] prospective clien[t] [is a] sophisticated and experienced business executive[e] who understand[s] well the services that a CPA offers, . . . has an existing professional relation with an accountant, and so has an independent basis for evaluating the claims of a new CPA seeking professional work," selects the time and place for their meeting, and for whom there is no expectation or pressure to retain the CPA on the spot.[505]

[I176] *Friedman* upheld a Texas ban on practice of optometry under a trade name as a permissible requirement that commercial information "appear in such a form . . . as [is] necessary to prevent its being deceptive."[506] The Court noted that "[a] trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public. The possibilities for deception are numerous. The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. A trade name frees an optometrist from dependence on his personal reputation to attract clients, and even allows him to assume a new trade name if negligence or misconduct casts a shadow over the old one. By using different trade names at shops under his common ownership, an optometrist can give the public the false impression of competition among the shops. The use of a trade name also facilitates the advertising essential to large-scale commercial practices with numerous branch offices, conduct the State rationally may wish to discourage while not prohibiting commercial optometrical practice altogether."[507] In addition, the Court emphasized that the restriction on the use of trade names had only "the most incidental effect on the content of the commercial speech of Texas optometrists. As noted above, a trade name conveys information only because of the associations that grow up over time between the name and a certain level of price and quality of service. Moreover, . . . the factual information associated with trade names may be communicated freely and explicitly to the public. An optometrist may advertise the type of service he offers, the prices he charges, and whether he practices as a partner, associate, or employee with other optometrists."[508] In light of these considerations, the Court concluded that, "[r]ather than stifling commercial speech, [the challenged statute ensured] that information regarding optometrical services [would] be communicated more fully and accurately to consumers than it had been in the past, when

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505 Edenfield v. Fane, 507 U.S. 761, 774–76 (1993).

506 Friedman v. Rogers, 440 U.S. 1, 10 (1979).

507 *Id.* at 12–13.

508 *Id.* at 16.

optometrists [could] convey the information through unstated and ambiguous associations with a trade name."[509]

[I177] *Drug Advertising.* In *Virginia Pharmacy Board*, the Court considered the validity under the First Amendment of a Virginia statute declaring that a pharmacist was guilty of "unprofessional conduct" if he advertised prescription drug prices. Central among the proffered justifications for the advertising ban "were claims that the ban was essential to the maintenance of professionalism among licensed pharmacists. It was asserted that advertising would create price competition that might cause the pharmacist to economize at the customer's expense. He might reduce or eliminate the truly professional portions of his services: the maintenance and packaging of drugs so as to assure their effectiveness, and the supplementation on occasion of the prescribing physician's advice as to use. Moreover, it was said, advertising would cause consumers to price-shop, thereby undermining the pharmacist's effort to monitor the drug use of a regular customer so as to ensure that the prescribed drug would not provoke an allergic reaction or be incompatible with another substance the customer was consuming. Finally, it was argued that advertising would reduce the image of the pharmacist as a skilled and specialized craftsman—an image that was said to attract talent to the profession and to reinforce the good habits of those in it—to that of a mere shopkeeper. . . . Although acknowledging that the State had a strong interest in maintaining professionalism among pharmacists, the Court concluded that the proffered justifications were inadequate to support the advertising ban."[510] High professional standards were assured in large part by the close regulation to which pharmacists in Virginia were subject. And, as the Court observed, "the State's protectiveness of its citizens rest[ed] in large measure on the advantages of their being kept in ignorance" of the entirely lawful terms that competing pharmacists were offering.[511]

[I178] Drug compounding is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient (e.g., of a patient who is allergic to an ingredient in a mass-produced product). The Food and Drug Administration Modernization Act of 1997 (FDAMA) exempted "compounded drugs" from the Food and Drug Administration's (FDA) standard drug approval requirements under the Federal Food, Drug, and Cosmetic Act (FDCA), so long as the providers of the compounded drugs abided by several restrictions, including that the prescription be "unsolicited," and that the providers "not advertise or promote the compounding of any particular drug, class of drug, or type of drug." The pharmacy, licensed pharmacist, or licensed physician might, however, advertise and promote the compounding service. The government asserted that three substantial interests underlay the FDAMA: (1) preserving the effectiveness and integrity of the FDCA's new drug approval process and the protection of the public health it provided; (2) preserving the availability of compounded drugs for patients who, for particularized medical reasons, could not use commercially available products approved by the FDA; and (3) achieving the proper balance between those two competing interests. As the Court noted, "[p]reserving the effectiveness and integrity of the FDCA's new drug

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509 *Id.*

510 *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977), *discussing* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

511 Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 768–69 (1976).

approval process [wa]s clearly an important governmental interest, and the Government ha[d] every reason to want as many drugs as possible to be subject to that approval process. The Government also ha[d] an important interest, however, in permitting the continuation of the practice of compounding so that patients with particular needs [might] obtain medications suited to those needs. And it would not make sense to require compounded drugs created to meet the unique needs of individual patients to undergo the testing required for the new drug approval process. . . . [Hence,] the Government need[ed] to be able to draw a line between small-scale compounding and large-scale drug manufacturing. That line [should] distinguish compounded drugs produced on such a small scale that they could not undergo safety and efficacy testing from drugs produced and sold on a large enough scale that they could undergo such testing and therefore [should] do so." The government argued that the FDAMA's speech-related provisions provided just such a line, by using advertising as the trigger for requiring FDA approval, and that Congress' decision to limit the FDAMA's compounding exemption to pharmacies not engaging in promotional activity was "rationally calculated" to avoid creating a loophole that would allow unregulated drug manufacturing to occur under the guise of pharmacy compounding. However, even assuming that the FDAMA's prohibition on advertising compounded drugs directly advanced the government's asserted interests, the Court found that the government had failed to demonstrate that the speech restrictions were "not more extensive than [wa]s necessary to serve those interests." "Several non-speech-related means of drawing a line between compounding and large-scale manufacturing might be possible [in that case.] . . . [T]he Government could ban the use of commercial scale manufacturing or testing equipment for compounding drug products. . . . It could prohibit pharmacists from compounding more drugs in anticipation of receiving prescriptions than in response to prescriptions already received. . . . It could prohibit pharmacists from offering compounded drugs at wholesale to other state licensed persons or commercial entities for resale. . . . Alternately, it could limit the amount of compounded drugs, either by volume or by numbers of prescriptions, that a given pharmacist or pharmacy might sell out of State. . . . Another possibility would be capping the amount of any particular compounded drug, either by drug volume, number of prescriptions, gross revenue, or profit that a pharmacist or pharmacy might make or sell in a given period of time. It might even be sufficient to rely solely on the non-speech-related provisions of the FDAMA, such as the requirement that compounding only be conducted in response to a prescription or a history of receiving a prescription, and the limitation on the percentage of a pharmacy's total sales that out-of-state sales of compounded drugs might represent. The Government ha[d] not offered any reason why these possibilities, alone or in combination, would be insufficient to prevent compounding from occurring on such a scale as to undermine the new drug approval process." Moreover, even if the government had argued (as did the dissent) "that the FDAMA's speech-related restrictions were motivated by a fear that advertising compounded drugs would put people not needing such drugs at risk by causing them to convince their doctors to prescribe the drugs anyway, that fear would fail to justify the restrictions." This concern rested on the questionable assumption that doctors would prescribe unnecessary medications and amounted to a fear that people would make bad decisions if given truthful information, a notion that the Court rejects as a justification for an advertising ban. And even if the government had asserted an interest in preventing people not needing compounded drugs from obtaining those drugs, the statute did not directly advance that interest. The statute did not directly forbid such sales; it instead restricted advertising, of course not just to those

who did not need compounded drugs, but also to individuals needing compounded drugs and their doctors. Although the advertising ban might reduce the demand for compounded drugs from those who did not need the drugs, it did nothing to prevent such individuals from obtaining compounded drugs other than requiring prescriptions. Finally, the FDAMA's advertising provisions were unconstitutional because of the amount of beneficial speech that they prohibited. Forbidding the advertisement of compounded drugs would prevent pharmacists with no interest in mass-producing medications, but who served clienteles with special medical needs, from telling the doctors treating those clients about the alternative drugs available through compounding. The fact that the FDAMA would prohibit such seemingly useful speech, even though doing so did not appear to directly further any asserted governmental objective, confirmed that the prohibition was unconstitutional.[512]

[I179] *Birth Control Advertising.*[513] In *Carey v. Population Services International*, the Court held that the prohibition of any advertisement or display of contraceptives cannot be justified on the ground that advertisements of contraceptive products would offend and embarrass those exposed to them, and that permitting them would legitimize sexual activity of young people. Such advertisements, which state the availability of products and services that are not only entirely legal, but also constitutionally protected, cannot be totally banned—at least where obscenity is not involved—even if they offend many people, as long as they are not directed to inciting or producing imminent lawless action and are not likely to incite or produce such action.[514]

[I180] In *Bolger*, the Court rejected the federal government's paternalistic effort to ban potentially "offensive" and "intrusive" direct mail advertisements for contraceptives. Minimizing the government's allegations of harm, the Court reasoned that recipients of objectionable mailings might effectively avoid further bombardment of their sensibilities simply by averting their eyes. Consequently, the Court found that the "short, though regular, journey from mail box to trash can is an acceptable burden, at least so far as the Constitution is concerned." The second interest asserted by the government—aiding parents' efforts to discuss birth control with their children—was undoubtedly substantial. As a means of effectuating this interest, however, the challenged statute failed to withstand scrutiny. To begin with, such a prohibition provided only "the most limited incremental support for this interest." As the Court assumed, most parents already exercised substantial control over the disposition of mail once it entered their mailboxes. Moreover, under the statute, parents could also exercise control over information that flowed into their mailboxes. And parents should "already cope with the multitude of external stimuli that color[ed] their children's perception of sensitive subjects." Under these circumstances, a ban on unsolicited advertisements served "only to assist those parents who desire[d] to keep their children from confronting such mailings, who [we]re otherwise unable to do so, and whose children ha[d] remained relatively free from such stimuli. This marginal degree of protection [wa]s achieved by purging all mailboxes of unsolicited material that [wa]s entirely suitable for adults." The Court emphasized that "the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." The prohibition was also defective, because it denied to parents "truthful information bearing on their ability to

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512 Thompson v. W. States Med. Ctr., 535 U.S. 357, 369–77 (2002).

513 *See also* para. I162, n.465.

514 Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977).

discuss birth control and to make informed decisions in this area." Considering that the proscribed information might "bear on one of the most important decisions parents have a right to make," the Court concluded that such a restriction of the free flow of truthful information constituted a "'basic' constitutional defect, regardless of the strength of the government's interest."[515]

[I181] *Advertising of Alcohol or Tobacco Products.* In *Rubin*, the Court struck down a statute prohibiting beer labels from displaying alcohol content. The Court admitted that the government had "a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs." Nevertheless, the Court concluded that the statute could not "directly and materially advance its asserted interest because of the overall irrationality of the Government's regulatory scheme." First, "[t]he failure to prohibit the disclosure of alcohol content in beer advertising, which would seem to constitute a more influential weapon in any strength war than labels, ma[de] no rational sense if the government's true aim [wa]s to suppress strength wars." And while the statute banned the disclosure of alcohol content on beer labels, it allowed the exact opposite in the case of wines and spirits; "[i]f combatting strength wars were the goal, . . . Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones." Moreover, the government permitted brewers to signal high alcohol content through use of the term "malt liquor." Hence, other provisions of the same Act directly undermined and counteracted the effects of the challenged prohibition. The statute's defects were further highlighted by the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech, "such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength, . . . or limiting the labeling ban only to malt liquors."[516]

[I182] *44 Liquormart* involved Rhode Island laws banning the advertisement of retail liquor prices except at the place of sale. The state justified the ban on the ground that it was intended to keep alcohol prices high as a way to keep consumption low. By preventing sellers from informing customers of prices, the regulation prevented competition from driving prices down and required consumers to spend more time to find the best price for alcohol. The higher cost of obtaining alcohol, the state argued, would lead to reduced consumption. A majority of the members of the Court agreed that the ban was more extensive than necessary to serve its stated interest, since the state had other methods at its disposal—e.g., "establishing minimum prices and/or increasing sales taxes on alcoholic beverages"—that "would more directly accomplish [its] stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers."[517] The Court also found that the Twenty-first Amendment could not save Rhode Island's price advertising ban, because this Amendment "does not license the States to ignore their obligations under other constitutional provisions," including the First Amendment.[518]

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[515] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72–75 (1983).

[516] Rubin v. Coors Brewing Co., 514 U.S. 476, 485, 488–91 (1995).

[517] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507, 530 (1996). Four Justices also held that the advertising ban did not directly advance the state's substantial interest in promoting temperance, finding that the state had presented no evidence to suggest that its speech prohibition would *significantly* reduce alcohol consumption. *Id.* at 505–06.

[518] *Id.* at 516.

[I183] "[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States."[519] However, the First Amendment "constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information."[520] In *Lorillard Tobacco*, the Court invalidated Massachusetts' regulations that (1) prohibited smokeless tobacco or cigar advertising within a 1,000-foot radius of a school or playground, and (2) prohibited indoor, point-of-sale advertising of smokeless tobacco and cigars lower than five feet from the floor of a retail establishment located within 1,000 feet of a school or playground. Although the state provided ample documentation of the problem with underage use of smokeless tobacco and cigars, the first prohibition, did not satisfy *Central Hudson*'s fourth prong. The record indicated that the regulations prohibited advertising in a substantial portion of Massachusetts' major metropolitan areas; in some areas, they would constitute nearly a complete ban on the communication of truthful information. This "substantial geographical reach" was compounded by other factors. "Outdoor" advertising included not only advertising located outside an establishment, but also advertising inside a store if visible from outside. Moreover, the regulations restricted advertisements of any size, and the term advertisement also included oral statements. The Court stressed that the governmental interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. "The breadth and scope of [the challenged] regulations [did] not demonstrate a careful calculation of the speech interests involved. "First, "[t]he uniformly broad sweep of the geographical limitation demonstrate[d] a lack of tailoring. In addition, the range of communications restricted seem[ed] unduly broad. For instance, it [wa]s not clear from the regulatory scheme why a ban on oral communications [wa]s necessary to further the State's interest. Apparently that restriction mean[t] that a retailer [wa]s unable to answer inquiries about its tobacco products if that communication occur[red] outdoors. Similarly, a ban on all signs of any size seem[ed] ill suited to target the problem of highly visible billboards, as opposed to smaller signs. To the extent that studies ha[d] identified particular advertising and promotion practices appealing to youth, tailoring would involve targeting those practices while permitting others. As crafted, the regulations ma[de] no distinction among practices on this basis."[521] Moreover, "[i]n some instances, Massachusetts' outdoor advertising regulations would impose particularly onerous burdens on speech. . . . For example, if some retailers ha[d] relatively small advertising budgets and use[d] few avenues of communication, then the . . . outdoor advertising regulations potentially place[d] a great burden on those retailers' speech. . . . In addition, a retailer in Massachusetts [might] have no means of communicating to passersby on the street that it sold tobacco products because alternative forms of advertisement, like newspapers, [did] not allow that retailer to propose an instant transaction in the way that on-site advertising does. The ban on any indoor advertising that [wa]s visible from the outside also present[ed] problems in establishments like convenience stores, which have unique security concerns that counsel in favor of full visibility of the store from the outside."[522]

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519 Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

520 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001).

521 *Id.* at 562–63.

522 *Id.* at 564–65.

Subsequently, the Court concluded that the state had failed to show that the outdoor advertising regulations for smokeless tobacco and cigars were not more extensive than necessary to advance the state's substantial interest in preventing underage tobacco use. The second prohibition failed both the third and fourth steps of the *Central Hudson* analysis. The five-foot rule did not seem to advance the goals of preventing minors from using tobacco products and curbing demand for that activity by limiting youth exposure to advertising, for not all children are less than five feet tall, and those who are can look up and take in their surroundings. Moreover, the restriction did not constitute a reasonable fit with these goals.[523]

[I184] Massachusetts had also promulgated regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with a salesperson before they would be able to handle such a product. The Court found that the state had "demonstrated a substantial interest in preventing access to tobacco products by minors and ha[d] adopted an appropriately narrow means of advancing that interest." Because unattended displays of such products presented an opportunity for access without the proper age verification required by law, the state prohibited self-service and other displays that would allow an individual to obtain tobacco without direct contact with a salesperson. Further, the regulations left open ample communication channels. They did "not significantly impede adult access to tobacco products," and retailers had "other means of exercising any cognizable speech interest in the presentation of their products." The Court presumed that vendors might place empty tobacco packaging on open display, and display actual tobacco products so long as that display would only be accessible to sales personnel. As for cigars, there was no indication that a customer was unable to examine a cigar prior to purchase, so long as that examination could take place through a salesperson.[524]

[I185] *Advertising of Gambling and Lottery Activities.*[525] *Posadas* involved a Puerto Rico statute that permitted certain forms of casino gambling in licensed places in order to promote the development of tourism, but also provided that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." Based on this view of the legislature's intent, a state court had issued a narrowing construction of the statute, declaring that advertisements of the casinos in Puerto Rico were prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos. The Court held that the statute, as construed by the state court, was not unconstitutionally vague and passed muster under the *Central Hudson* test. First, the particular kind of commercial speech at issue concerned a lawful activity and was not misleading or fraudulent, at least in the abstract. Second, the Puerto Rico legislature's interest in promoting the "health, safety, and welfare" of its citizens, by reducing their demand for gambling, provided a sufficiently "substantial" governmental interest to justify the regulation of gambling advertising. Third, the restrictions on commercial speech directly advanced the government's asserted interest. The Court rejected the argument that the challenged advertising restrictions were underinclusive, because other kinds of gambling, such as horse racing, cockfighting, and the lottery, might be adver-

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523 *Id.* at 566–67.

524 *Id.* at 569–70.

525 Gambling "implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that can be, and frequently has been, banned altogether." *See* United States v. Edge Broad. Co., 509 U.S. 418, 426 (1993).

tised to the residents of Puerto Rico, noting that the legislature's interest was not necessarily to reduce demand for all games of chance but to reduce demand for casino gambling. According to the state court, horse racing, cockfighting, or small games of chance at fiestas and the lottery had been "traditionally part of the Puerto Rican's roots," so that "the legislator could have been more flexible than in authorizing more sophisticated games which were not so widely sponsored by the people. . . . In other words, the legislature [had] felt that, for Puerto Ricans, the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico." And fourth, the restrictions were no more extensive than necessary to serve the government's interest since, as construed by the state court, they did not affect advertising aimed at tourists but applied only to advertising aimed at Puerto Rico residents. Relatedly, the Court rejected the contention that the First Amendment required the Puerto Rico legislature to reduce demand for casino gambling among the residents of Puerto Rico not by suppressing commercial speech, which might encourage such gambling, but by promulgating additional speech designed to discourage it. In doing so, the Court said that "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude . . . that residents of Puerto Rico [we]re already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct."[526]

[I186] In *Edge*, the Court confronted a federal statute that generally prohibited the broadcast of any lottery advertisements but allowed broadcasters to advertise state-run lotteries on stations licensed to a state that conducted such lotteries. This exemption had been enacted to accommodate the operation of legally authorized state-run lotteries consistent with continued federal protection to non-lottery states' policies. North Carolina was a non-lottery state, while Virginia sponsored a lottery. Edge Company owned and operated a radio station licensed by the Federal Communications Commission to serve a North Carolina community, and it broadcasted from near the Virginia-North Carolina border. Over 90 percent of its listeners were in Virginia, but the remaining listeners lived in nine North Carolina counties. Wishing to broadcast Virginia lottery advertisements, Edge filed an action, alleging that, as applied to it, the restriction violated the First Amendment. The Court noted, first, that Congress had opted to support the anti-gambling policy of a state like North Carolina by forbidding stations in such a state from airing lottery advertising. At the same time, it had sought not to unduly interfere with the policy of a lottery-sponsoring state, such as Virginia. Congress had made "the common-sense judgment that each North Carolina station would have an audience in that State, even if its signal reached elsewhere, and that enforcing the statutory restriction would insulate each station's listeners from lottery ads, and hence advance the governmental purpose of supporting North Carolina's laws against gambling." This congressional policy of balancing the interests of lottery and non-lottery states constituted a substantial governmental interest, directly served by applying the statutory restriction to all stations in North Carolina. Moreover, the Court held that, in this case, the "fit" between the challenged restriction and the aforesaid government interest was a "reasonable" one. The validity of the restriction at issue should

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[526] Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340–44 (1986).

be judged "by the relation it [bore] to the general problem of accommodating the policies of both lottery and non-lottery States, not by the extent to which it further[ed] the Government's interest in an individual case." Because Edge's signals with lottery ads would be heard in the nine counties in North Carolina that its broadcasts reached, this would be in derogation of the substantial federal interest in supporting North Carolina's laws making lotteries illegal. Applying the restriction to a broadcaster, such as Edge, directly advanced the governmental interest in enforcing the restriction in non-lottery states, while not interfering with the policy of lottery states like Virginia. Further, the restriction, as applied to Edge, gave sufficient support to the government's interest. The exclusion of gambling invitations from an estimated 11 percent of the radio listening time in the nine-county area could hardly be called "ineffective." And the restriction was not made ineffective by the fact that Virginia radio and television stations with lottery advertising could be heard in North Carolina. Finally, the Court observed that the government could advance its purpose "by substantially reducing lottery advertising, even where it would not be wholly eradicated."[527]

[I187] In *Greater New Orleans Broadcasting*, the Court decided that a federal statute prohibiting radio and television broadcasters from carrying advertising about privately operated commercial casino gambling, regardless of the station's or casino's location, could not constitutionally be applied to advertisements of lawful private casino gambling that were broadcast by radio or television stations located in a state where such gambling was legal. The interests asserted by the government were substantial: "(1) reducing the social costs associated with casino and other forms of gambling; and (2) assisting States that restrict[ed] or prohibit[ed] casino and other forms of gambling." However, the Court emphasized that the characterization of these interests as "substantial" was by no means self-evident, since, "in the judgment of both Congress and many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits." Hence, the Court could not ignore "Congress' unwillingness to adopt a single national policy that consistently endorse[d] either interest asserted" by the government. Considering both the quality of the asserted interests and the information sought to be suppressed, the cross-currents in the scope and application of the challenged statute became more difficult to defend. Consequently, the Court found that the provision in question, as applied to petitioners' case, did not satisfy the third and fourth parts of the *Central Hudson* test. With regard to the government's first asserted interest, the operation of the statute was so pierced by exemptions and inconsistencies that the government could not hope to exonerate it. While federal law prohibited a broadcaster from carrying advertising about privately operated commercial casino gambling regardless of the station's or casino's location, it exempted advertising about state-run casinos, certain occasional commercial casino gambling, and tribal casino gambling even if the broadcasters were located in or broadcasted to a jurisdiction with the strictest of anti-gambling policies. "To the extent that federal law distinguishe[d] among information about tribal, governmental, and private casinos based on the identity of their owners or operators, the Government present[ed] no sound reason why such lines [bore] any meaningful relationship to the Government's asserted interest." The government's second asserted interest provided no more convincing basis for upholding the regulation than the first. As the Court

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[527] United States v. Edge Broadcasting Co., 509 U.S. 418, 428–34 (1993).

noted, "even assuming that the state policies on which the Federal Government [sought] to embellish [we]re more coherent and pressing than their federal counterpart, [the challenged statute] sacrifice[d] an intolerable amount of truthful speech about lawful conduct when compared to the diverse policies at stake and the social ills that one could reasonably hope such a ban to eliminate."[528]

[I188] *Advertising that Promotes Energy Consumption. Central Hudson* considered a regulation completely banning all promotional advertising by electric utilities. The Court found that the state's interest in energy conservation was substantial, in view of the "country's dependence on energy resources beyond [its] control." Further, the Court held that this state interest was directly advanced by the challenged regulation, noting that there was "an immediate connection between advertising and demand for electricity." Nevertheless, it concluded that the ban could not be sustained, because it was more extensive than necessary to further the state's interest in energy conservation. The order reached "all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it was, [could not] justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing ha[d] been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests; . . . for example, [the state might] require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future."[529]

[I189] *Outdoor Advertising Displays*[530]*—Commercial Newsracks. Linmark* involved a township ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs, for the purpose of stemming what the township had perceived as the flight of Caucasian homeowners from a racially integrated community. The Court did not doubt the importance of this goal, recognizing that "substantial benefits flow" to both Caucasians and African-Americans "from interracial association." Nevertheless, it did not appear that the ordinance was needed to achieve that objective. The evidence did not support the township's apparent fears that it was experiencing a substantial incidence of panic selling by Caucasian homeowners; did not establish that "For Sale" signs in front of 2 percent of the township's homes were a major cause of panic selling; and did not confirm the township's assumption that proscribing such signs would reduce public awareness of realty sales and thereby decrease public concern over selling. More fundamentally, the township had proscribed particular types of signs based on their *content*, because it feared their "primary" effect—"the substance of the information communicated to its citizens." The Court emphasized that "[i]f dissemination of this information [could] be restricted, then every locality in the country [could] suppress any facts that reflect[ed] poorly on the locality, so long as a plausible claim [might] be made that disclosure would cause the recipients of the information to act 'irrationally.'" *Virginia Pharmacy* disapproved such

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[528] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 185–87, 193–94 (1999).

[529] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 568–71 (1980). The state's laudable concern over the equity and efficiency of appellant's rates did not provide a constitutionally adequate reason for restricting protected speech, because the link between the advertising prohibition and appellant's rate structure was found to be, at most, tenuous. *Id.* at 569.

[530] *See also* para. I183.

sweeping powers. In addition, the ordinance did not leave open ample alternative channels for communication. "Although, in theory, sellers remain[ed] free to employ a number of different alternatives, . . . the options to which sellers realistically [we]re relegated—primarily newspaper advertising and listing with real estate agents—involve[d] more cost and less autonomy than 'For Sale' signs; . . . [we]re less likely to reach persons not deliberately seeking sales information; . . . and [might] be less effective media for communicating the message conveyed by a 'For Sale' sign in front of the house to be sold." These alternatives were far from satisfactory. Subsequently, the Court concluded that the ordinance violated the First Amendment.[531]

[I190] In *Metromedia*, the Court reviewed an ordinance imposing substantial prohibitions on outdoor advertising displays within the City of San Diego in the interest of traffic safety and aesthetics. The ordinance permitted on-site commercial advertising (a sign advertising goods or services available on the property where the sign was located), but forbade other commercial advertising using fixed-structure signs, unless permitted by one of the ordinance's 12 specified exceptions, such as "for sale" signs. First, the Court noted that the twin governmental goals that the ordinance sought to further were substantial. Then, it rejected the claim that the ordinance was broader than necessary and, therefore, failed the fourth part of the *Central Hudson* test. "If the city ha[d] a sufficient basis for believing that billboards constitute[d] traffic hazards and [we]re unattractive, then obviously the most direct, and perhaps the only, effective approach to solving the problems they create[d] [wa]s to prohibit them. [And] [t]he city ha[d] gone no further than necessary in seeking to meet its ends. . . . [It] ha[d] not prohibited all billboards, but allow[ed] on-site advertising and some other specifically exempted signs." The more serious question, concerned the third of the *Central Hudson* criteria: did the ordinance "directly advance" governmental interests in traffic safety and in the appearance of the city? The Court did not disagree with "the accumulated, common sense judgments of local lawmakers and of the many reviewing courts that billboards [we]re real and substantial hazards to traffic safety." Similarly, it was "not speculative to recognize that billboards, by their very nature, wherever located and however constructed, [could] be perceived as an 'esthetic harm.'" It was nevertheless argued that the city denigrated its interest in traffic safety and beauty and defeated its own case by permitting on-site advertising and other specified signs. The Court rejected the argument. In the first place, whether on-site advertising was permitted or not, the prohibition of off-site advertising was directly related to the stated objectives of traffic safety and esthetics. This was not altered by the fact that the ordinance was underinclusive, because it permitted on-site advertising. Second, "the city [might] believe that off-site advertising, with its periodically changing content, present[ed] a more acute problem than d[id] on-site advertising." Third, San Diego had obviously chosen to value one kind of commercial speech—on-site advertising—more than another kind of commercial speech—off-site advertising. The ordinance reflected a decision by the city that the former interest, but not the latter, was stronger than the city's interests in traffic safety and esthetics. As the Court noted, "the city could reasonably conclude that a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere." In light of the above analysis, the Court could not conclude that the ordinance was

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[531] Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 93–97 (1977).

broader than was necessary to meet its interests, or that it failed directly to advance substantial government interests.[532]

[I191] In *Discovery Network*, the Court held that a city's categorical ban on commercial newsracks attached too much importance to the distinction between commercial and non-commercial speech. Concerned about the safety and esthetics of its streets and sidewalks, the city of Cincinnati decided to do something about the proliferation of newsracks on its street corners. Pursuant to an existing ordinance prohibiting the distribution of "commercial handbills" on public property, the city ordered Discovery Network to remove its newsracks from its sidewalks within 30 days. Discovery published and distributed free of charge magazines that consisted principally of commercial advertisements. These publications accounted for 62 of the 1,500–2,000 newsracks that cluttered Cincinnati's street corners. The Court first found that the city did not meet its burden to establish a "reasonable fit" between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests. The ordinance on which it relied was an outdated prohibition against the distribution of any commercial handbills on public property. It had been enacted long before any concern about newsracks had developed. "Its apparent purpose was to prevent the kind of visual blight caused by littering, rather than any harm associated with permanent, freestanding dispensing devices. . . . The fact that the city ha[d] failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicate[d] that it ha[d] not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition. [And] [t]he benefit to be derived from the removal of 62 newsracks, while about 1,500–2,000 remained in place, was . . . minute." Further, the Court rejected the city's argument that, because every decrease in the overall number of newsracks on its sidewalks necessarily effected an increase in safety and an improvement in the attractiveness of the cityscape, there was a close fit between its ban on newsracks dispensing "commercial handbills" and its interests in safety and esthetics. The Court accepted the validity of the city's proposition, but considered it "an insufficient justification for the discrimination against [Discovery's] use of newsracks that [we]re no more harmful than the permitted newsracks, and ha[d] only a minimal impact on the overall number of newsracks on the city's sidewalks." The major premise supporting the city's argument was the proposition that commercial speech had only a low value. Based on that premise, the city contended that the fact that assertedly more valuable publications were allowed to use newsracks did not undermine its judgment that its esthetic and safety interests were stronger than the interest in allowing commercial speakers to have similar access to the reading public. The Court did not agree and observed that the city's argument "seriously underestimate[d] the value of commercial speech." Moreover, because the ban was predicated on the content of the publications distributed by the subject newsracks, it could not qualify as a valid time, place, or manner restriction on protected speech. For these reasons, the Court held that Cincinnati's categorical ban on the distribution, via newsrack, of "commercial handbills" could not be squared with the dictates of the First Amendment.[533]

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[532] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–12 (1981) (plurality opinion); *id.* at 541 (opinion of Stevens, J.).

[533] City of Cincinnati v. Discovery Network, 507 U.S. 410, 417–29 (1993). The Court noted, however, that its holding was narrow. It did not reach "the question whether, given certain facts

iii. Trade Names[534]

[I192] The Court "has recognized that words are not always fungible, and that the suppression of particular words 'run[s] a substantial risk of suppressing ideas in the process.'"[535] "Yet this recognition always has been balanced against the principle that, when a word acquires value 'as the result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word."[536] In *San Francisco Arts & Athletics*, the Court held that Congress could grant exclusive use of the word "Olympic" to the U.S. Olympic Committee (USOC). To the extent that the challenged statute applied to uses "for the purpose of trade [or] to induce the sale of any goods or services," its application was to commercial speech. One reason for Congress to grant the USOC exclusive control of the word "Olympic," as with other trademarks, was to ensure that the USOC received the benefit of its own efforts, so that the USOC would have "an incentive to continue to produce a 'quality product' that, in turn, benefit[ed] the public." But in the special circumstance of the USOC, Congress had "a broader public interest in promoting, through the activities of the USOC, the participation of amateur athletes from the United States in . . . the Olympic Games." The USOC's goal, under the Olympic Charter, was to further the Olympic movement, purposed "to promote the development of those physical and moral qualities which are the basis of sport;" "to educate young people through sport in a spirit of better understanding between each other and of friendship, thereby helping to build a better and more peaceful world;" and "to spread the Olympic principles throughout the world, thereby creating international goodwill." The statute "directly advance[d] these governmental interests by supplying the USOC with the means to raise money to support the Olympics and encourage[d] the USOC's activities by ensuring that it [would] receive the benefits of its efforts." Moreover, the statutory restrictions were not broader than Congress reasonably could have determined to be necessary to further these interests. The statute primarily applied to all uses of the word "Olympic" to induce the sale of goods or services. Congress reasonably could conclude that "most commercial uses of the Olympic words and symbols [we]re likely to be confusing." It also could determine that "unauthorized uses, even if not confusing, nevertheless [might] harm the USOC by lessening the distinctiveness and thus the commercial value of the marks." "Even though this protection could exceed the traditional rights of a trademark owner in certain circumstances," the application of the statute to commercial speech at issue (title "Gay Olympic Games" on T-shirts, buttons, bumper stickers, and other items for sale) was not broader than necessary to protect the legitimate congressional interest, and therefore did not violate the First Amendment.[537]

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and under certain circumstances, a community might be able to justify differential treatment of commercial and non-commercial newsracks." The Court simply held that, on the record of the case, Cincinnati had failed to make such a showing. *Id.* at 428.

534 *See also* para. I176.

535 San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522, 532 (1987), *quoting* Cohen v. California, 403 U.S. 15, 26 (1971).

536 San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522, 532 (1987), *quoting* Int'l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918), and *citing* Trade-Mark Cases, 100 U.S. 82, 92 (1879).

537 San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522, 532–541 (1987).

f. Campaign-Related Speech[538]—Lobbying[539]

[I193] "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by [the] Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[540] "This no more than reflects [the] 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[541] "[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office and issue-based elections."[542] "When a law burdens core political speech, [the Court] appl[ies] 'exacting scrutiny,' and [it] uphold[s] the restriction only if it is narrowly tailored to serve an overriding state interest,"[543] such as protecting "the integrity and reliability" of the election process.[544]

[I194] *Meyer* struck down Colorado's prohibition of payment for the circulation of ballot initiative petitions. Petition circulation, the Court held, is core political speech, because it involves "interactive communication concerning political change." Such a prohibition burdens political expression in two ways. "First, it limits the number of voices who will convey the [initiative proponents'] message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that [the proponents of a new law] will garner the number of necessary signatures, thus limiting their ability to make the matter the focus of statewide discussion. . . . [This prohibition] restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open other avenues of communication, does not relieve its burden on First Amendment expression, . . . [for this] Amendment protects the [right of the proponents of an initiative measure] not only to advocate their cause, but also to select what they believe to be the most effective means for so doing."[545] Further, the state's claimed interest in protecting the integrity of the initiative process did not justify the prohibition, because the state had failed to demonstrate that it was necessary to burden one's ability to communicate his message in order to meet its concerns. The state argued that the petition circulator had the duty to verify the authenticity of signatures on the petition, and that compensation might provide the circulator with a temptation to disregard that duty. Nevertheless, no evidence had been offered to support that speculation, and the Court

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538 *See also* para. I247 *(prohibition of election-day editorial endorsements)*; para. I317 *(election-day "campaign-free zone" around polling places)*; para. I238 *(ban on anonymous campaign literature)*; para. I459 *(ban of primary endorsements by political parties)*; paras. I483 *et seq. (campaign financing laws)*; para. I482 *(campaign activities of government employees)*.

539 *See also* para. I230 *(provision of the Internal Revenue Code depriving an otherwise eligible organization of its tax-exempt status and its right to receive tax-deductible contributions if it engaged in lobbying)*.

540 Buckley v. Valeo, 424 U.S. 1, 14 (1976) *(per curiam), quoting* Roth v. United States, 354 U.S. 476, 484 (1957).

541 Buckley v. Valeo, 424 U.S. 1, 14 (1976) *(per curiam), quoting* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

542 Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)

543 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

544 Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 191 (1999).

545 Meyer v. Grant, 486 U.S. 414, 422–24 (1988).

was "not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot."[546] Besides, other provisions of the Colorado statute dealt expressly with the potential danger that circulators might be tempted to pad their petitions with false signatures. It was a crime to forge a signature on a petition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition. In addition, the top of each page of the petition should bear a statement printed in red ink warning potential signatories that it was a felony to forge a signature on a petition or to sign the petition when not qualified to vote. These provisions seemed "adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting."[547]

[I195] *ACLF* invalidated Colorado's requirement that initiative petition circulators be registered voters. This provision produced "a speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*." Colorado acknowledged that the registration requirement limited speech, but not severely, the state asserted, because it was exceptionally easy to register to vote. The ease with which qualified voters might register to vote, however, did not lift the burden on speech at petition circulation time, since the choice not to register could be a "form of private and public protest." The state's dominant justification appeared to be its strong interest in policing lawbreakers among petition circulators. This interest, however, was served by the requirement that each circulator submit an affidavit setting out, among several particulars, the address at which he or she resided. "This address attestation ha[d] an immediacy, and corresponding reliability, that a voter's registration [might] lack." Hence, the state failed to justify the challenged burden on political expression.[548]

[I196] In *White*, a sharply divided Court, struck down a Minnesota rule that prohibited a candidate for a judicial office from "announcing his or her views on disputed legal or political issues." The rule "cover[ed] much more than *promising* to decide an issue a particular way. The prohibition extend[ed] to the candidate's mere statement of his current position, even if he d[id] not bind himself to maintain that position after election," given that the Minnesota Code contained a so-called "pledges or promises" clause, which *separately* prohibited judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,"—a prohibition on which the Court expressed no view. The Court found it clear that the challenged rule prohibited a judicial candidate from stating his views on any specific non-fanciful legal question within the province of the court for which he was running, except in the context of discussing past decisions—and in the latter context as well, if he expressed the view that he was not bound by *stare decisis*. Hence, it prohibited speech based on its content and burdened a category of speech "at the core" of First Amendment freedoms—"speech about the qualifications of candidates for public office." The Eighth Circuit had concluded, and the parties did not dispute, that the proper test to be applied to determine the constitutionality of such a restriction was

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546 *Id.* at 426.

547 *Id.* at 427.

548 Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 194–96 (1999).

strict scrutiny, under which the state had the burden to prove that the rule was narrowly tailored to serve a compelling state interest. The state claimed that its interests in preserving the state judiciary's impartiality and preserving the appearance of that impartiality were sufficiently compelling to justify the rule, arguing that the first protected the due process rights of litigants, and that the second preserved public confidence in the judiciary. The Court rejected this argument. First, the rule was not narrowly tailored to serve impartiality (or its appearance) in the traditional sense of the word, i.e., as a lack of bias for or against either party to a judicial proceeding. Indeed, the rule was barely tailored to serve that interest at all, inasmuch as it did "not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." Second, it was possible to use the term "impartiality" in the judicial context to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality "would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case." Although "impartiality" in this sense might well be an interest served by the rule, pursuing this objective, the Court held, "is not a *compelling* state interest," since it "is neither possible nor desirable . . . to find a judge who does not have preconceptions about the law;" indeed, even if it were possible to select judges who would not have preconceived views on legal issues, "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." A third possible meaning of "impartiality" might be described as open-mindedness. "This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so." However, the Court pointed out, "statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition was implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. . . . More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. [And] [j]udges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches." The short of the matter was this: in Minnesota, a candidate for judicial office might not say "I think it is constitutional for the legislature to prohibit same-sex marriages," although he could say the very same thing up until the very day before he declared himself a candidate, and he might say it repeatedly (until litigation was pending) after he was elected. Hence, as a means of pursuing the objective of open-mindedness, the rule was "so woefully underinclusive as to render belief in that purpose a challenge to the credulous."[549]

[I197] Lobbying constitutes a traditional avenue of political expression and an important aspect of the right of petition. It is thus protected by the First Amendment.[550] *Harriss*

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[549] Republican Party of Minnesota v. White, 536 U.S. 765, 770–81 (2002). The dissenters noted, *inter alia*, that uncoupled from the rule at issue, the ban on pledges or promises could be easily circumvented, and that, no less than the pledges or promises clause itself, the rule was an indispensable part of Minnesota's effort to protect litigants' due process rights and to preserve the public's confidence in the integrity and impartiality of its judiciary. *Id.* at 816–21.

[550] *See, e.g.*, E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127,

involved a federal statute that required any person receiving any contributions or expending any money for the purposes of influencing the passage or defeat of legislation by Congress to file with the Clerk of the House quarterly statements that set out the name and address of each person who had made a contribution of $500 or more not mentioned in the preceding report. It also required that any person who engaged himself for pay for the purpose of attempting to influence the passage or defeat of legislation, before doing anything in furtherance of that objective, register with the Clerk of the House and the Secretary of the Senate, and state in writing, *inter alia*, his name and address and the name and address of the person by whom he was employed and in whose interest he worked. These paid lobbyists should file quarterly reports of all money received and expended in carrying on their work, to whom paid, for what purposes, the names of publications in which they had caused any articles to be published, and the proposed legislation they were employed to support or oppose; this information was to be printed in the Congressional Record. The Court held that the First Amendment did not prohibit the criminal prosecutions charging violation of the foregoing registration and reporting statutory provisions. As the Court said, "legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise, the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This [wa]s the evil which the [statute] was designed to help prevent. Toward that end, Congress ha[d] not sought to prohibit these pressures. It ha[d] merely provided for a modicum of information from those who, for hire, attempt[ed] to influence legislation or who collect[ed] or spen[t] funds for that purpose."[551]

E. SPEECH IN THE PUBLIC SECTOR

1. Speech of Government Employees or Contractors[552]

a. In General

[I198] Public employees—even if they do not have tenure[553]—may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."[554] And a public employee does not forfeit his First Amendment protection against governmental abridgment of freedom of speech when he "arranges to communicate privately with his employer, rather than to spread his views before the public."[555] However, the government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to

137–38 (1961). In that case, the Court decided that the Sherman Act should not be construed to forbid joint efforts by railway companies seeking legislation that would disadvantage the trucking industry.

551 United States v. Harriss, 347 U.S. 612, 625 (1954).

552 *See also* paras. H11–H14, I482.

553 *See* Perry v. Sindermann, 408 U.S. 593, 596–98 (1972); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 283–84 (1977).

554 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

555 Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414–15 (1979).

the public at large."[556] "[T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate."[557] *Pickering* held that when a court is required to determine the validity of such a restraint, it must "arrive at a balance between the interests of the [employee,] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[558] "Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. . . . The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[559]

[I199] Under *Connick*, the foregoing balancing test applies only when the employee spoke "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Even where a public employee's speech does not touch upon a matter of public concern, that speech is not totally beyond the protection of the First Amendment, but, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[560] "Thus, private speech that involves nothing more than a complaint about a change in the employee's own duties may give rise to discipline without imposing any special burden of justification on the government employer."[561] But "if the speech does involve a matter of public concern, the Government bears the burden of justifying its adverse employment action."[562]

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[556] United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995).

[557] Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion). The Court has, therefore, "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 676 (1996), *quoting* Waters v. Churchill, *supra*, at 673.

[558] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[559] City of San Diego v. Roe, 543 U.S. 77, 82 (2004) *(per curiam)*.

[560] Connick v. Myers, 461 U.S. 138, 146–47 (1983).

[561] United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995), *citing* Connick v. Myers, 461 U.S. 138, 148–49 (1983). As the Court noted in the latter case, "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While, as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *See* Connick, *supra*, at 149.

[562] United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995), *citing*

[I200] "The inquiry into the protected status of speech is one of law, not fact. . . . Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[563] "In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. . . . [The Court has] recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[564]

Rankin v. McPherson, 483 U.S. 378, 388 (1987). *See also* Waters v. Churchill, 511 U.S. 661, 674 (1994).

563 Connick v. Myers, 461 U.S. 138, 147–48, n.7 (1983). "The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *See* Rankin v. McPherson, 483 U.S. 378, 387 (1987).

In *Waters v. Churchill*, 511 U.S. 661 (1994), a four-Justice plurality rejected the proposition that the relevant factual inquiry must turn on what the speech actually was, not on what the employer *reasonably thought* it was. The plurality found that such an approach gives insufficient weight to the government's interest in efficient employment decisionmaking and would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. "But employers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct." On the other hand, the plurality did not believe that the courts "must apply the *Connick* test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. . . . If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case." Although "such care is normally not constitutionally required unless the employee has a protected property interest in her job," the plurality stressed that "the possibility of inadvertently punishing someone for exercising her First Amendment rights makes such care necessary." The plurality concluded that employer decisionmaking is not unduly burdened by having courts look to the facts as the employer reasonably found them to be. *See id.* at 675–78 (opinion of O'Connor, J., joined by Rehnquist, C.J., Souter, and Ginsburg, JJ.). Three other Justices considered that a government employer's First Amendment liability with respect to "public concern" speech is only liability for intentional wrong (retaliation for the employee's speech), not for mere negligence. Hence, they thought that there is no constitutional requirement that the employer conduct an investigation before taking disciplinary action in certain circumstances. *See id.* at 686–94 (concurring opinion of Scalia, J., joined by Kennedy and Thomas, JJ.). Justices Stevens and Blackmun held that the governing version of the facts in public employment free speech cases is not "what the government employer thought was said," but "what the trier of fact ultimately determines to have been said," since a First Amendment violation does not vanish merely because the firing was based upon a reasonable mistake about what the employee *said*. *See id.* at 697–98.

564 Rankin v. McPherson, 483 U.S. 378, 388 (1987), *citing* Pickering v. Bd. of Educ., 391 U.S. 563, 570–73 (1968). "Where . . . an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from [employee's statements

[I201] In *Pickering*, the Court held impermissible, under the First Amendment, the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was a matter of legitimate public concern. Although some of the teacher's public statements were erroneous, these statements were neither shown nor could be presumed to have in any way "either impeded the teacher's proper performance of his daily duties in the classroom, or to have interfered with the regular operation of the schools generally." Further, there was no proof that the statements at issue had been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. The Court concluded that, under the circumstances of that case, "the interest of the school administration in limiting teachers' opportunities to contribute to public debate [wa]s not significantly greater than its interest in limiting a similar contribution by any member of the general public."[565]

[I202] In *Mt. Healthy*, a public school teacher was not rehired, in part because of his exercise of First Amendment rights and in part because of permissible considerations. The teacher had relayed to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The memorandum was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues, and, indeed, the radio station promptly announced the adoption of the dress code as a news item. The Court accepted that the communication involved a matter of public concern. Further, the Court rejected a rule of causation that would focus solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, on the grounds that such a rule could make the employee better off by exercising his constitutional rights than by doing nothing at all. Instead, the Court outlined the following approach. First, "the plaintiff had to show that the employer's disapproval of his First Amendment protected expression played a role in the employer's decision to discharge him. If that burden of persuasion were carried, the burden would be on the defendant to show by a preponderance of the evidence that he would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights."[566]

[I203] In *Connick v. Myers*, the Court upheld the dismissal of an Assistant District Attorney for circulating among her co-workers a questionnaire implicitly criticizing her superiors. In reaching this conclusion, the Court viewed "the questions pertaining to the confidence and trust that Myers' coworkers possessed in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court. Unlike the dissent, [the majority did] not believe these questions [we]re of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor

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that are made in a private conversation with another employee] is minimal." *See* Rankin, *supra*, at 389–91.

565 Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968).

566 *See* Nat'l Labor Relations Bd. v. Transp. Mgmt. Corp., 462 U.S. 393, 403 (1983), *discussing* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1977).

did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of the District Attorney and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee [wa]s upset with the *status quo*. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions [wa]s not to evaluate the performance of the office, but rather to gather ammunition for another round of controversy with her superiors. These questions reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a *cause celebre*." Although one of Myers' questions—dealing with pressure in the office to participate in political campaigns—did touch upon a matter of public concern, Myers' survey, and especially the question that asked whether or not the Assistants had confidence in and relied on the word of five named supervisors, "carr[ied] the clear potential for undermining office relations." Moreover, the questionnaire had been prepared and distributed at the office; the manner of distribution required not only Myers to leave her work but others to do the same in order that the questionnaire be completed. This fact supported Connick's fears that "the functioning of his office was endangered." Finally, the context of the dispute was also significant. As the Court pointed out, "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." Since "Myers' questionnaire touched upon matters of public concern in only a most limited sense [and was] most accurately characterized as an employee grievance concerning internal office policy, . . . [t]he limited First Amendment interest involved [t]here d[id] not require that the District Attorney tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." Myers' discharge therefore did not offend the First Amendment.[567]

[I204] In *Rankin v. McPherson*, a data-entry employee in a county Constable's office, was discharged for remarking to a co-worker, after hearing of an attempt on the President's life, "if they go for him again, I hope they get him." Satisfied that the statement was not a threat to kill the President, which the First Amendment would not have protected, the Court concluded that the statement involved a matter of public concern, and that the firing violated the First Amendment. While McPherson's statement had been made at the workplace, there was no evidence that "it interfered with the efficient functioning of the office." Moreover, her discharge was not based on any assessment by the Constable that "the remark demonstrated a character trait that made [McPherson] unfit to perform her work," which involved no confidential or policy-making role. And "McPherson's employment-related interaction with the Constable was apparently negligible." "Given the function of the agency, McPherson's position in the office, and the

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[567] Connick v. Myers, 461 U.S. 138, 148, 153–54 (1983). In *City of San Diego v. Roe*, 543 U.S. 77 (2004) *(per curiam)*, the city terminated a police officer for selling videotapes that showed him stripping off a police uniform and engaging in sexually explicit acts. The Court rejected respondent's allegation that the termination violated his First and Fourteenth Amendment rights to freedom of speech, noting that (1) "Roe's expression was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image;" (2) the speech in question was "detrimental to the mission and functions of the employer;" and (3) there was "no basis for finding that it was of concern to the community." *Id.* at 82.

nature of her statement," the Court was not persuaded that the Constable's interest in discharging her outweighed her rights under the First Amendment.[568]

[I205] Government employees are protected from undue burdens on their expressive activities created by a prohibition against accepting honoraria. *Treasury Employees* invalidated a federal Act prohibiting government employees from accepting an honorarium for making an appearance or speech or writing an article, to the extent that the prohibition was applied to federal employees below grade GS-16. The challenged provision unquestionably imposed a significant burden on expressive activity. "Publishers compensate authors because compensation provides a significant incentive toward more expression. By denying federal employees that incentive, the honoraria ban induce[d] them to curtail their expression if they wish[ed] to continue working for the Government." Moreover, this "large-scale disincentive to expression impose[d] a significant burden on the public's right to read and hear what [government] employees would otherwise have written and said." "Because the vast majority of the speech at issue . . . d[id] not involve the subject matter of government employment and [took] place outside the workplace," the government could not justify the ban on the grounds of "immediate workplace disruption" asserted in *Pickering* and its progeny. Instead, the government submitted that the ban comported with the First Amendment, because the prohibited honoraria had been reasonably deemed by Congress to interfere with the efficiency of the public service. The government's underlying concern was that federal officers might misuse or appear to misuse power by accepting compensation for their unofficial and non-political writing and speaking activities. This interest was undeniably powerful, but the government cited no evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16. The limited evidence of actual or apparent impropriety by members of Congress and high-level executives could not justify extension of the honoraria ban to all federal employees below grade GS-16, "an immense class of workers with negligible power to confer favors on those who may pay to hear them speak or to read their articles." Moreover, while "operational efficiency is undoubtedly a vital governmental interest," several features of the text of the ban and of the pertinent regulations "cast serious doubt on the Government's submission that Congress perceived honoraria as so threatening to the efficiency of the entire federal service as to render the ban a reasonable response to the threat." First, the provision excluded "a series of appearances, speeches, or articles" from the prohibited category, unless the subject matter was directly related to the individual's official duties, or the payment was made because of the individual's status with the government. In other words, accepting pay for a *series* of articles was prohibited if, and only if, a nexus existed between the author's employment and either the subject matter of the expression or the identity of the payor. For an *individual* article or speech, in contrast, pay was taboo even if neither the subject matter nor the payor bore any relationship at all to the author's duties. Second, the statute restricted only expressive activities and did not prohibit compensation for other services that a government employee might perform in his spare time, such as "consulting, professional or similar fees; payments for serving on boards; travel; sport, or other entertainment expenses not reasonably necessary for the appearance involved; or any other benefit that [would] be the substantial equivalent of an honorarium." The Court concluded that "the speculative benefits the honoraria ban

[568] Rankin v. McPherson, 483 U.S. 378, 386–92 (1987).

[might] provide the Government [we]re not sufficient to justify this crudely crafted burden" on First Amendment rights of federal employees below grade GS-16.[569]

[I206] In *Umbehr*, the Court found no difference, of constitutional magnitude, between independent contractors and employees in the context of freedom of speech. "Independent government contractors are similar in most relevant respects to government employees, although both the speaker's and the government's interests are typically—though not always—somewhat less strong in the independent contractor case." Hence, the Court's framework for government employee cases also applies to independent contractors. Accordingly, under *Mt. Healthy*, the government may not terminate contracts "in retaliation for protected First Amendment activity." And *Pickering* requires "a fact-sensitive and deferential weighing of the government's legitimate interests as contractor." To prevail, an independent contractor "must show that the termination [or non-renewal] of his contract was motivated by his speech on a matter of public concern. . . . If he can make that showing, the [government] will have a valid defense if it can show, by a preponderance of the evidence, that, in light of [its] knowledge, perceptions and policies at the time of the termination, [it] would have terminated the contract regardless of the contractor's speech. The [government] will also prevail if it can persuade the [courts] that [its] legitimate interests as contractor, deferentially viewed, outweigh the free speech interests at stake."[570]

b. Military Personnel

[I207] "While the members of the military services are entitled to the protections of the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."[571] "The rights of military men must yield somewhat 'to meet certain overriding demands of discipline and duty.'"[572] "Speech likely to interfere with these vital prerequisites for military effectiveness therefore can be excluded from a military base."[573] In light of these considerations, the Court has found no facial constitutional infirmity in a provision of the Uniform Code of Military Justice punishing any person, subject to the Code, for conduct that is "directly and palpably prejudicial to good order and discipline" in the armed forces[574] and in regulations that allow a commander to determine, before distribution, whether

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569 United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 468–77 (1995).

570 Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 677–78, 684–85 (1996). If the contractor prevails, evidence that the government discovered facts after termination that would have led to a later termination anyway, and evidence of mitigation of his loss by means of his subsequent government contracts, would be relevant in assessing what remedy is appropriate. *Id.* at 685.

571 Parker v. Levy, 417 U.S. 733, 758 (1974).

572 Brown v. Glines, 444 U.S. 348, 354 (1980), *quoting* Parker v. Levy, 417 U.S. 733, 744 (1974).

573 Brown v. Glines, 444 U.S. 348, 354 (1980).

574 Parker v. Levy, 417 U.S. 733 (1974). In that case, the Court also upheld, on its face, a provision of the Uniform Code of Military Justice punishing a commissioned officer for "conduct unbecoming an officer and a gentleman" which offends "so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time is of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." *See, in extenso*, para. E85.

particular materials pose a clear danger to the loyalty, discipline, readiness, or morale of his troops.[575]

c. Disclosure of Confidential Information

[I208] Government officials in sensitive confidential positions may have special duties of non-disclosure. "As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." Hence, a public official may be criminally punished for disclosing a wiretap, even after its authorization expires.[576]

[I209] "The Government has a compelling interest in protecting both the secrecy of information important to [the] national security [of the United States] and the appearance of confidentiality so essential to the effective operation of [its] foreign intelligence service."[577] Employment with the CIA entails a high degree of trust that is perhaps unmatched in government service. Thus, a former CIA agent does not have a First Amendment right to make public statements about Agency matters without prior clearance by the Agency.[578]

2. Legislators' Speech[579]

[I210] "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. . . . Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office. . . . The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen critics than to legislators." Hence, a state may not apply to a legislator a First Amendment standard stricter than that applicable to a private citizen.[580]

3. Speech in Public Schools[581]

[I211] Education "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[582] "[P]ublic schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental

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575 Brown v. Glines, 444 U.S. 348, 354–58 (1980); Greer v. Spock, 424 U.S. 828, 837–40 (1976).

576 United States v. Aguilar, 515 U.S. 593, 605–06 (1995).

577 Snepp v. United States, 444 U.S. 507, 509, n.3 (1980) *(per curiam)*.

578 Haig v. Agee, 453 U.S. 280, 308–09 (1981).

579 *See also* para. I85 *(Speech or Debate Clause)*.

580 Bond v. Floyd, 385 U.S. 116, 135–36 (1966).

581 *See also* para. H10 *(freedom of thought)*; paras. H127–H131 *(establishment clause)*; paras. E86, I55 *(school disciplinary rules)*; para. I107 *(offensive speech at a public school board meeting)*; para. I243 *(mandatory student activity fee)*.

582 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

values necessary to the maintenance of a democratic political system.'"[583] Public education is committed to the control of state and local authorities,[584] and the Court has long recognized that local school boards have broad discretion in the management of school affairs.[585] At the same time, however, the Court has emphasized that the discretion of the states and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. Hence, a student in a public school cannot be compelled to salute the flag.[586] And a state law that prohibits the teaching of the Darwinian theory of evolution in any state-supported school is unconstitutional.[587]

[I212] Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[588] They cannot be punished merely for expressing their personal views, even on controversial subjects, on the school premises—whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours"—unless such speech "for any reason—whether it stems from time, place, or type of expression—materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[589] Under these considerations, *Tinker* held that a schoolchild's First Amendment freedom of expression entitled him, contrary to school policy, to attend school wearing a black armband as a silent protest against American military involvement in Vietnam.[590]

[I213] Nonetheless, the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings."[591] While the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, it does not follow that the same latitude must be permitted to children in a public school. "The schools, as instruments of the state, [may take into consideration the sensibilities of students, and] may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd [and vulgar] speech. . . . Indeed, the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others."[592] Accordingly, the Court held in *Fraser* that a student could be disciplined for having delivered a speech that was "sexually explicit," but not legally obscene, at an official school assembly, because "the school was entitled to 'disassociate itself' from the speech in a manner that would demonstrate to others that such vulgarity is 'wholly inconsistent with the fundamental values of public school education.'"[593]

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583 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion), *quoting* Ambach v. Norwick, 441 U.S. 68, 76–77 (1979).

584 Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

585 *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 402 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

586 W. Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *See* para. H5.

587 Epperson v. Arkansas, 393 U.S. 97 (1968). *See* para. H112.

588 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

589 *Id.* at 512–13.

590 *Id.* at 514.

591 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

592 *Id.* at 681, 683.

593 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266–67 (1988), *quoting* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986).

[I214] *Papish* involved the expulsion of a graduate student for lewd expression in an off-campus "underground" newspaper that she sold on campus pursuant to university authorization. The particular newspaper issue in question was found to be unacceptable for two reasons. First, on the front cover, the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice. The caption under the cartoon read: "With Liberty and Justice for All." Secondly, the issue contained an article entitled "M___f___ Acquitted," which discussed the trial and acquittal on an assault charge of a New York City youth who was a member of an organization known as "Up Against the Wall, M___f___." The Court noted that petitioner had been expelled because of the disapproved content of the newspaper, rather than the time, place, or manner of its distribution. In the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether the state university could proscribe this form of expression. Emphasizing that "dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency,'" the Court held that the state university's action violated the First Amendment.[594]

[I215] "The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may, in its capacity as publisher of a school newspaper or producer of a school play, 'disassociate itself' . . . not only from speech that 'would substantially interfere with [its] work . . . or impinge upon the rights of other students,' but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world—and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse

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[594] Papish v. Univ. of Missouri Bd. of Curators, 410 U.S. 667, 670–71, n.6 (1973) *(per curiam).*

to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order,' . . . or to associate the school with any position other than neutrality on matters of political controversy."[595] Accordingly, "the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression." Instead, *Hazelwood* held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns."[596] And school officials are permitted to exercise this kind of control even without specific written regulations, for "[t]o require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate."[597]

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[595] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–72 (1988).

[596] *Id.* at 272–73. This case arose out of the deletion from a certain issue of a school's newspaper of two pages that included an article describing school students' experiences with pregnancy and another article *discussing* the impact of divorce on students at the school. The initial paragraph of the pregnancy article declared that all names had been changed to keep the identity of these girls a secret. The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. The principal therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who had been given no opportunity to consent to its publication or to offer a response. Further, since girls commented in the article concerning their sexual histories and their use or non-use of birth control, it was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters. Moreover, the student who was quoted by name in the version of the divorce article seen by the principal made comments sharply critical of her father. Hence, the principal could reasonably have concluded that an individual publicly identified as an inattentive parent—indeed, as one who chose "playing cards with the guys" over home and family—was entitled to an opportunity to defend himself as a matter of journalistic fairness. Finally, the Court held that the principal's decision to delete two pages of the newspaper, rather than to delete only the offending articles or to require that they be modified, was reasonable, given the particular circumstances of this case, which included the pressure felt by the principal to make an immediate decision so that students would not be deprived of the newspaper altogether. *See id.* at 274–76.

As a number of lower federal courts have recognized, educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. The Court did not decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level. *See id.* at 273, n.7.

[597] *Id.* The Court did not decide whether specific written regulations are required before school officials may censor publications not sponsored by the school that students seek to distribute on school grounds. Moreover, there was no need for the Court to decide whether the court of appeals had correctly construed *Tinker* as precluding school officials from censoring student speech to avoid "invasion of the rights of others," except where that speech could result in tort liability to the school. *Id.* at 273, n.5.

[I216] In *Island Trees*, the Court addressed the question whether, and to what extent, the First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries. There, a Board of Education had removed from the library shelves certain books characterized as "anti-American, anti-Christian, anti-Semitic, and just plain filthy." Four Justices stressed that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" The plurality thus held that, if a school board "*intended* by its removal decision to deny [students] access to ideas with which [it] disagreed, and if this intent was the decisive factor in [its] decision," then the board exercised its significant discretion to determine the content of its school libraries in violation of the Constitution. But "if it were demonstrated that the removal decision was based solely upon the 'educational suitability' of the books in question, then their removal would be 'perfectly permissible.'"[598] All members of the Court, otherwise sharply divided, acknowledged that a school board has the authority to remove books that are vulgar.[599] The dissenters noted, *inter alia*, that, "[u]nlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry, [but] they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas. . . . [Hence,] [w]ith respect to the education of children in elementary and secondary schools, the school board may properly determine in many cases that a particular book, a particular course, or even a particular area of knowledge is not educationally suitable for inclusion within the body of knowledge which the school seeks to impart. Without more, this is not a condemnation of the book or the course." Further, the dissent rejected plurality's motive test and found a far more satisfactory basis for addressing the question at issue in *Tinker*' holding that "prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." In the specific case, the board had simply ordered the removal of books containing vulgarity and profanity, but it had not attempted to preclude discussion about the themes of the books or the books

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598 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871–72 (1982) (opinion of Brennan, J., joined by Marshall and Stevens, JJ.); *id.* at 879–80, 882 (Blackmun J., concurring in part). Brennan acknowledged that "local school boards have a substantial legitimate role to play in the determination of school library content," but observed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding," and that "[t]he school library is the principal locus of such freedom." *Id.* at 868–69. Blackmun noted that school officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other "politically neutral" reasons is present. Further, he found that even absent space or financial limitations, First Amendment principles would allow a school board to refuse to make a book available to students, because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are "manifestly inimical to the public welfare." And school officials may choose one book over another, because they believe that one subject is more important or is more deserving of emphasis. *Id.* at 880. Justice White concurred in the judgment of affirmance, without reaching the constitutional question. *Id.* at 884.

599 *Id.* at 871 (plurality opinion); *id.* at 879–81 (Blackmun, J., concurring); *id.* at 883 (White, J., concurring); *id.* at 918–20 (Rehnquist, J., dissenting).

themselves. Such a decision, on the board's version of the facts, was sufficiently related to "educational suitability" to pass muster under the First Amendment.[600]

4. Speech Rights in the Prison Context[601]

[I217] "[C]hallenges to prison restrictions that are asserted to inhibit First Amendment speech interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law."[602] *Turner* adopted a standard of review that focuses on the reasonableness of prison regulations: the relevant inquiry is whether the actions of prison officials were "reasonably related to legitimate penological interests." Under this standard, four factors are relevant. First and foremost, the governmental objective underlying the regulations at issue must be legitimate and "neutral,"[603] and the regulations must be "rationally related" to that objective. In addition, courts should consider three other factors: the existence of alternative means of exercising the right available to inmates; the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally; and the absence of ready alternatives available to the prison for achieving the governmental objectives.[604]

[I218] *Martinez* was the Court's first significant decision regarding First Amendment rights in the prison context. There, the Court invalidated California regulations concerning personal correspondence between inmates and non-inmates, regulations that provided for censorship of letters that "unduly complain," "magnify grievances," or "express inflammatory political, racial, religious or other views or beliefs." In that case, the Court determined that the proper standard of review for prison restrictions on correspondence between prisoners and members of the general public could be decided without resolving the broad questions of prisoners' rights, and it based its ruling striking down the content-based regulation on the First Amendment rights of those who are *not* prisoners. The Court held that constitutional challenges to censorship of prisoner mail are reviewed under the following standard. "First, the regulation or practice in question should further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials . . . must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus, a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad." On the basis of this standard, the Court found that the challenged regulations were not valid, for they authorized censorship of prisoner

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600 *Id.* at 915, 919–20 (dissenting opinion of Rehnquist, J., joined by Burger, C.J., and Powell, J.).

601 *See also* paras. I274, I275, I321.

602 Pell v. Procunier, 417 U.S. 817, 822 (1974).

603 The regulation in question "must further an important or substantial governmental interest unrelated to the suppression of expression." Where prison administrators draw distinctions between communications solely on the basis of their potential implications for prison security, the regulations are "neutral." *See* Thornburgh v. Abbott, 490 U.S. 401, 416 (1989).

604 Turner v. Safley, 482 U.S. 78, 89–90 (1987). *See, in extenso*, para. B80.

mail far broader than any legitimate interest of penal administration demanded. In so holding, the Court acknowledged that the legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence. "Perhaps, the most obvious example of justifiable censorship of prisoner mail would be refusal to send or deliver letters concerning escape plans or containing other information concerning proposed criminal activity, whether within or without the prison. Similarly, prison officials may properly refuse to transmit encoded messages." Further, the Court stressed that, under the Due Process Clause, the decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards: "an inmate [is to] be notified of the rejection of a letter written by or addressed to him; . . . the author of that letter [must] be given a reasonable opportunity to protest that decision; [and] complaints [must] be referred to a prison official other than the person who originally disapproved the correspondence."[605]

[I219] *Martinez's* holding turned on the fact that the challenged regulation caused a consequential restriction on the First and Fourteenth Amendment rights of those who were not prisoners. In *Turner*, the Court declined to apply the *Martinez* standard in "prisoners' rights" cases because, *Martinez* could be read to require a strict "least restrictive alternative" analysis, "without sufficient sensitivity to the need for discretion in meeting legitimate prison needs."[606] *Turner* held that restrictions on inmate-to-inmate communications pass constitutional muster if the restrictions are "reasonably related to legitimate penological objectives." That case involved a regulation that permitted correspondence between immediate family members, who were inmates at different institutions within the state's jurisdiction, and between inmates concerning legal matters, but it allowed other inmate correspondence only if each inmate's classification/treatment team deemed it in the best interests of the parties. Trial testimony indicated that, as a matter of practice, the determination whether to permit inmates to correspond was based on team members' familiarity with the progress reports, conduct violations, and psychological reports in the inmates' files, rather than on individual review of each piece of mail. The Court found that the regulation was "logically connected to [the] legitimate security concerns" of prison officials, who had testified that mail between prisons facilitated the development of informal organizations that threatened safety and security at penal institutions, and could be used to communicate escape plans, to arrange violent acts, and to foster prison gang activity. Moreover, the regulation did not deprive prisoners of all means of expression, but simply barred communication "with a limited class of people—other inmates—with whom authorities had particular cause to be concerned." Nor was there an obvious, easy alternative to the regulation, since "monitoring inmate correspondence clearly would impose more than a *de minimis* cost on the pursuit of legitimate corrections goals" and would create "an appreciable risk of missing dangerous messages," for it would be impossible for the prison officials to read every piece of inmate-to-inmate correspondence, and, in any event, prisoners could easily write in jargon or codes to prevent detection of their real messages. Considering that the regulation was "content-neutral, it logically advance[d] the goals of institutional security and safety, . . . and it [wa]s not an exaggerated response

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[605] Procunier v. Martinez, 416 U.S. 396, 413–18 (1974). *Martinez* was overruled by *Turner* and *Thornburgh* (*see* para. I220), insofar as it concerned incoming mail.

[606] Thornburgh v. Abbott, 490 U.S. 401, 410 (1989), *discussing* Turner v. Safley, 482 U.S. 78, 89–90 (1987).

to those objectives," the Court concluded that the challenged restrictions did not unconstitutionally abridge the First Amendment rights of prison inmates.[607]

[I220] *Thornburgh* dealt with incoming publications, material requested by an individual inmate but targeted to a general audience. "Once in the prison, material of this kind reasonably may be expected to circulate among prisoners, with the concomitant potential for coordinated disruptive conduct. Furthermore, prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow's beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly. . . . In the volatile prison environment, it is essential that prison officials be given broad discretion to prevent such disorder." In light of these considerations, *Thornburgh* held that regulations affecting the sending of a publication to a prisoner must be analyzed under the *Turner* reasonableness standard—and not under the less deferential standard of *Martinez*, whereby prison regulations authorizing mail censorship must be "generally necessary" to protect legitimate governmental interests. At the same time, the *Thornburgh* Court limited *Martinez* to regulations concerning outgoing correspondence. In doing so, the Court stressed that "[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials. Outgoing correspondence that magnifies grievances or contains inflammatory racial views cannot reasonably be expected to present a danger to the community *inside* the prison. . . . In addition, the implications for security are far more predictable. Dangerous outgoing correspondence is more likely to fall within readily identifiable categories, [such as] escape plans, plans relating to ongoing criminal activity, and threats of blackmail or extortion." Accordingly, *Thornburgh* expressly overruled *Martinez* to the extent that it might support the drawing of a categorical distinction between incoming correspondence from prisoners (to which *Turner* applied its reasonableness standard) and incoming correspondence from non-prisoners.[608] Further, *Thornburgh* upheld on its face a regulation that generally permitted prisoners to receive publications from the "outside," but authorized wardens, pursuant to specified criteria, to reject an incoming publication if it was found "to be detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." Its underlying objective of protecting prison security was undoubtedly legitimate and was neutral with regard to the content of the expression regulated. Also, the broad discretion the regulation accorded wardens was rationally related to security interests; "a more closely tailored standard could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder." Moreover, alternative means of expression remained open to the inmates, since the regulation permitted "a broad range of publications to be sent, received, and read." Finally, the regulation was not an exaggerated response to the problem at hand, since no obvious, easy alternative had been established.[609]

[I221] *Bell v. Wolfish* concerned a First Amendment challenge to a rule restricting inmates' receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores. Hardback books "are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings. . . . They also are difficult to search effectively." The rule was "a rational response" to a clear secu-

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607 Turner v. Safley, 482 U.S. 78, 85–93 (1987).

608 Thornburgh v. Abbott, 490 U.S. 401, 411–14 (1989).

609 *Id.* at 415–18.

rity problem. Because there was no evidence that prison officials had "exaggerated their response to the security problem and to the administrative difficulties posed by the necessity of carefully inspecting each book mailed from unidentified sources," the considered judgment of these experts should control in the absence of prohibitions far more sweeping than those involved there. Moreover, the rule operated "in a neutral fashion, without regard to the content of the expression." And there were alternative means of obtaining reading material that had not been shown to be "burdensome or insufficient." The restriction allowed soft-bound books and magazines to be received from any source and hardback books to be received from publishers, bookstores, and book clubs. To the limited extent the rule might possibly increase the cost of obtaining published materials, the Court noted that, "where other avenues remain available for the receipt of materials by inmates, the loss of cost advantages does not fundamentally implicate free speech values." In addition, the prison had a relatively large library for use by inmates. In light of these considerations, the Court sustained the challenged rule.[610]

[I222] *Wolff* dealt, *inter alia*, with the opening of incoming mail from attorneys, in the presence of the prisoners-clients. As the Court noted, "[i]f prison officials had to check in each case whether a communication was from an attorney before opening it for inspection, a near-impossible task of administration would be imposed. [Hence, it is] entirely appropriate that the State require any such communications to be specially marked as originating from an attorney, with his name and address being given, if they are to receive special treatment. It would also certainly be permissible that prison authorities require that a lawyer desiring to correspond with a prisoner, first identify himself and his client to the prison officials, to assure that the letters marked privileged are actually from members of the bar. As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, since the inmate's presence insured that prison officials would not read the mail. [And] [t]he possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters." This need not only be done in "appropriate circumstances;" "a rule whereby the inmate is present when mail from attorneys is inspected, [is] all, and perhaps even more than, the Constitution requires."[611]

[I223] *Pell* involved a constitutional challenge to a prison regulation prohibiting face-to-face media interviews with specific prisoners. The regulation limited visitations to individuals who had either a personal or professional relationship to the inmate family, friends of prior acquaintance, legal counsel, and clergy. In the judgment of the state corrections officials, this visitation policy would permit "inmates to have personal contact with those persons who [would] aid in their rehabilitation, while keeping visitations at a manageable level that [would] not compromise institutional security." The Court noted that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in these matters." Moreover, alternative means of communication remained open to the inmates: they could correspond by mail with persons, including media representatives; they had rights

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610 Bell v. Wolfish, 441 U.S. 520, 550–52 (1979).

611 Wolff v. McDonnell, 418 U.S. 539, 576–77 (1974).

of visitation with family, clergy, attorneys, and friends of prior acquaintance; and they had unrestricted opportunity to communicate with the press or public through their prison visitors. For these reasons, the Court rejected the inmates' First Amendment challenge to the ban on media interviews.[612]

[I224] Inmates "have a right to receive legal advice from other inmates only when it is a necessary 'means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'"[613] In *Johnson v. Avery*, an inmate was disciplined for violating a prison regulation that prohibited inmates from assisting other prisoners in preparing habeas corpus petitions. The Court held that, "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief," inmates could not be barred from furnishing assistance to each other.[614] The Court extended the holding of *Johnson* in *Wolff*, where it struck down a similar regulation that prevented inmates from assisting one another in the preparation of civil rights complaints—i.e., actions under 42 U.S.C. Section 1983 to vindicate fundamental constitutional rights.[615] These holdings were premised on prisoners' right of access to the courts, which is founded in the Due Process Clause. In *Shaw*, the Court decided that inmates do not "possess a special First Amendment right to provide legal assistance to fellow inmates that enhances the protections otherwise available under *Turner*." "Augmenting First Amendment protection for inmate legal advice would undermine prison officials' ability to address the 'complex and intractable' problems of prison administration. . . . Although supervised inmate legal assistance programs may serve valuable ends, it is indisputable that inmate law clerks 'are sometimes a menace to prison discipline' and that prisoners have 'an acknowledged propensity . . . to abuse both the giving and the seeking of legal assistance.' . . . Prisoners have used legal correspondence as a means for passing contraband and communicating instructions on how to manufacture drugs or weapons. . . . The legal text also could be an excuse for making clearly inappropriate comments, which 'may be expected to circulate among prisoners,' . . . despite prison measures to screen individual inmates or officers from the remarks." *Shaw* thus declined "to cloak the provision of legal assistance with any First Amendment protection above and beyond the protection normally accorded prisoners' speech."[616]

5. Government Funding of Speech[617]—Tax Exemptions or Deductions

[I225] The Constitution empowers Congress "to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States" (Article I, Section 8, Clause 1). "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objec-

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612 Pell v. Procunier, 417 U.S. 817, 823–28 (1974). The Court also rejected the reporters' assertion of a special right of access to prisons. *See* para. I274.

613 Shaw v. Murphy, 532 U.S. 223, 231, n.3 (2001), *quoting* Lewis v. Casey, 518 U.S. 343, 350–51 (1996).

614 Johnson v. Avery, 393 U.S. 483, 489–90 (1969).

615 Wolff v. McDonnell, 418 U.S. 539, 577–80 (1974).

616 Shaw v. Murphy, 532 U.S. 223, 225, 231 (2001).

617 *See also* paras. I215 *(school-sponsored expressive activities)*; I515 *(campaign funding)*; I160 *(public libraries receiving federal funds)*, I244 *(compelled funding of government speech)*.

tives."[618] But other constitutional provisions, apart from the Spending Clause, may provide an independent bar to the conditional grant of federal funds.[619] Indeed, the First Amendment certainly has application in the subsidy context.[620]

[I226] In *Rust*, Congress established program clinics to provide subsidies for doctors to advise patients on a variety of family planning topics. Congress did not consider abortion to be within its family planning objectives, however, and it forbade doctors employed by the program from discussing abortion with their patients. Recipients of funds challenged the Act's restriction, which provided that none of the federal funds appropriated for family planning services could be used in programs where abortion was a method of family planning. The recipients argued that the regulations constituted impermissible viewpoint discrimination favoring an anti-abortion position over a pro-abortion approach in the sphere of family planning. They also asserted that Congress had imposed an unconstitutional condition on recipients of federal funds by requiring them to relinquish their right to engage in abortion advocacy and counseling in exchange for the subsidy. The Court upheld the law, reasoning that Congress had "merely chosen to fund one activity to the exclusion of the other." The restrictions were designed "to ensure that the limits of the federal program [we]re observed." The government did not discriminate on the basis of viewpoint, but simply "refus[ed] to fund activities, including speech, which [we]re specifically excluded from the scope of the project funded."[621]

[I227] "The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities . . . amounted to governmental speech; when interpreting the holding in later cases, however, [the Court] explained *Rust* on this understanding."[622] The Court has said that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker,"[623] "or instances, like *Rust*, in which the government 'used private speakers to transmit information pertaining to its own program.'"[624] "When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[625] "The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from [the Court's] observation that '[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.'"[626]

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618 United States v. Am. Library Ass'n, 539 U.S. 194, 203 (2003), *citing* S. Dakota v. Dole, 483 U.S. 203, 206 (1987).

619 S. Dakota v. Dole, 483 U.S. 203, 208 (1987). Under the "independent constitutional bar" limitation on the spending power, Congress may not "induce" the recipient to engage in activities that would themselves be unconstitutional. *Id.* at 210.

620 Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 587 (1998).

621 Rust v. Sullivan, 500 U.S. 173, 193–95 (1991).

622 Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001).

623 *Id.*, *citing* Bd. of Regents of Univ. of Wisconsin System v. Southworth, 529 U.S. 217, 229, 235 (2000).

624 Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001), *quoting* Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 833 (1995).

625 Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 833 (1995).

626 Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541–42 (2001), *quoting* Bd. of Regents of Univ. of Wisconsin System v. Southworth, 529 U.S. 217, 235 (2000).

[I228] Nevertheless, "[n]either the latitude for government speech nor its rationale applies to subsidies for private speech in every instance."[627] "[V]iewpoint-based restrictions [may not] be proper when the [government] does not itself speak or subsidize transmittal of a message it favors, but instead expends funds to encourage a diversity of views from private speakers."[628] *Legal Services Corporation* involved a federal subsidy program (LSC), which provided financial support for legal assistance to indigent persons in, *inter alia*, welfare benefits claims, but prohibited funding of any organization that represented clients in an effort to amend or otherwise challenge existing welfare law. Hence, the restriction prevented an attorney from arguing to a court that a state statute conflicted with a federal statute or that either a state or federal statute, by its terms or in its application, was violative of the U.S. Constitution. Further, upon determining a question of statutory validity was present in any anticipated or pending case or controversy, the LSC-funded attorney should cease the representation at once. A five-Justice majority held that the foregoing funding condition was invalid. The program was "designed to facilitate private speech, not to promote a governmental message," since LSC-funded attorneys represented the interests of indigent clients and spoke on the behalf of their clients in a claim against the government for welfare benefits. "By providing LSC subsidies, the Government [sought] to facilitate suits for benefits by using the State and Federal courts and the independent bar on which those courts depend[ed] for the proper performance of their duties and responsibilities. [But] [r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distort[ed] the legal system by altering the traditional role of the attorneys. . . . [The government] may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary. . . . An informed, independent judiciary presumes an informed, independent bar." However, the restriction at issue prevented LSC attorneys from advising the courts of serious statutory validity questions. It also threatened "severe impairment of the judicial function" by "sift[ing] out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry. . . . In cases where LSC counsel were attorneys of record, there would be lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation to the court. The courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all reference to questions of statutory validity and constitutional authority. A scheme so inconsistent with accepted separation of powers principles is an insufficient basis to sustain or uphold the restriction on speech. . . . Where private speech is involved, Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest."[629]

[I229] "[A] discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech."[630] In *Speiser*, the Court invalidated a state program under which taxpayers applying for a certain tax exemption bore the burden of proving that they did not advocate the overthrow of the U.S. government. Noting that "[t]o deny an exemption to claimants who engage in certain forms of speech is, in effect, to penalize

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627 Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001),

628 Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 834 (1995).

629 Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542, 544–46, 548–49 (2001).

630 Speiser v. Randall, 357 U.S. 513, 518 (1958).

them for such speech," and that the program was "aimed at the suppression of dangerous ideas," the Court held that the presumption against the taxpayer was unconstitutional because the state had "no such compelling interest at stake as to justify a short-cut procedure which [would] inevitably result in suppressing protected speech."[631]

[I230] By contrast, "[n]ondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not aimed at the suppression of dangerous ideas."[632] In *Taxation With Representation*, the Court found that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. In so holding, the Court explained that such organizations remained free "to receive [tax-]deductible contributions to support nonlobbying activit[ies]." Thus, under the Internal Revenue Code, a charitable organization could create an affiliate to conduct its nonlobbying activities using tax-deductible contributions, and, at the same time, establish a separate affiliate to pursue its lobbying efforts without such contributions. Given that statutory alternative, the Court concluded that Congress had "not infringed any First Amendment rights or regulated any First Amendment activity[; it] ha[d] simply chosen not to pay for [appellee's] lobbying."[633]

[I231] Indeed, "even where the Constitution prohibits coercive governmental interference with specific individual rights, it 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'"[634] In *Lyng v. Automobile Workers*, the Court rejected a First Amendment attack on an amendment to the Food Stamp Act providing that no household could become eligible for benefits while a household member was on strike. The statute "require[s] no exaction from any individual; it d[id] not 'coerce' belief; and it d[id] not require appellees to participate in political activities or support political views with which they disagree[d]. It merely decline[d] to extend additional food stamp assistance to striking individuals simply because the decision to strike inevitably [led] to a decline in their income."[635]

[I232] In *League of Women Voters*, the Court invalidated a federal law providing that non-commercial television and radio stations receiving federal grants might not engage in editorializing. This funding restriction was "specifically directed at a form of speech—the expression of editorial opinions—that lies at the heart of First Amendment protection," and was defined solely on the basis of the content of the suppressed speech. Thus, the law singled out non-commercial broadcasters and denied them the right to address their chosen audience on matters of public importance. Such a restriction could

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631 *Id.* at 518–19, 529.

632 Cammarano v. United States, 358 U.S. 498, 513 (1959).

633 Regan v. Taxation With Representation of Washington, 461 U.S. 540, 545–46 (1983).

634 Lyng v. Auto. Workers, 485 U.S. 360, 369 (1988), *quoting* Regan v. Taxation With Representation of Washington, 461 U.S. 540, 550 (1983), *quoting, in turn*, Harris v. McRae, 448 U.S. 297, 318 (1980).

635 Lyng v. Auto. Workers, 485 U.S. 360, 369 (1988). Moreover, the statute did not infringe the associational rights of the individual appellees and their unions. It did not "directly and substantially interfere" with the workers' ability to combine together to assert their lawful rights. Even if isolated instances might be found in which a striking individual might have left his union, in order to obtain food stamps, in the overwhelming majority of cases, it was exceedingly unlikely that the provision would have any effect at all. *Id.* at 366.

be upheld only if it were "narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues." The government claimed that the ban was necessary, first, to protect non-commercial educational broadcasting stations from being coerced, as a result of federal financing, into becoming vehicles for government propagandizing or the objects of governmental influence; and, second, to keep these stations from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints. Nevertheless, this contention could not stand. Various statutory provisions substantially reduced the risk of governmental interference with the editorial judgments of local stations without restricting those stations' ability to speak on matters of public concern. In addition, an underlying supposition of the government's argument in this regard was that individual non-commercial stations were likely to speak so forcefully on particular issues that Congress, the ultimate source of the stations' federal funding, would be tempted to retaliate against these individual stations by restricting appropriations for all of public broadcasting. But the character of public broadcasting suggested that such a risk was speculative, at best. There were literally hundreds of public radio and television stations in communities scattered throughout the United States and its territories. Given that central fact, it seemed reasonable to infer that the editorial voices of these stations would prove to be as distinctive, varied, and idiosyncratic as the various communities they represented. More importantly, the editorial focus of any particular station could fairly be expected to focus largely on issues affecting only its community. Accordingly, "absent some showing by the Government to the contrary, the risk that local editorializing [would] place all of public broadcasting in jeopardy [wa]s not sufficiently pressing to warrant [the statute's] broad suppression of speech." Indeed, what was far more likely than local station editorials to pose the kinds of dangers hypothesized by the government were the wide variety of programs addressing controversial issues produced, often with substantial federal funding, for national distribution to local stations. The challenged ban, however, was "plainly not directed at the potentially controversial content of such programs; it [wa]s, instead, leveled solely at the expression of editorial opinion by local station management, a form of expression that is far more likely to be aimed at a smaller local audience, to have less national impact, and to be confined to local issues." Besides, the proscription was not sufficiently tailored to the harms it sought to prevent. The prohibition included within its grip "a potentially infinite variety of speech, most of which would not be related in any way to governmental affairs, political candidacies, or elections. Indeed, the breadth of editorial commentary is as wide as human imagination permits." Further, the public's interest in preventing public broadcasting stations from becoming fora for lopsided presentations of narrow partisan positions was already secured by a variety of other regulatory means—like the FCC's fairness doctrine—that intruded far less drastically upon the "journalistic freedom" of non-commercial broadcasters. Relatedly, the statute did not prevent the use of non-commercial stations for the presentation of partisan views on controversial matters; instead, it merely barred a station from specifically communicating such views on its own behalf or on behalf of its management. Moreover, "the public's paramount right to be fully and broadly informed on matters of public importance through the medium of noncommercial educational broadcasting [wa]s not well served by the restriction, for its effect [wa]s plainly to diminish, rather than augment, the volume and quality of coverage of controversial issues." Finally, the Court rejected the argument that Congress had, in the proper exercise of its spending power, simply determined that it would not subsidize public broadcasting station editorials. Under the challenged statute, a recipient of fed-

eral funds was barred absolutely from all editorializing, because it was "not able to segregate its activities according to the source of its funding," and thus had "no way of limiting the use of its federal funds to all noneditorializing activities." The effect of the law was that a non-commercial educational station that received only 1 percent of its overall income from federal grants was barred absolutely from all editorializing and was barred from using even wholly private funds to finance its editorial activity. The Court expressly recognized, however, that were Congress to permit the recipient stations to establish "affiliate" organizations, which could then use the station's facilities to editorialize with non-federal funds, such a statutory mechanism would plainly be valid. Such a scheme would permit the station to make known its views on matters of public importance, through its non-federally funded, editorializing affiliate, without losing federal grants for its non-editorializing broadcast activities.[636]

[I233] The subsidy at issue in *Rosenberger* was available to all student organizations that were related to the educational purpose of the University of Virginia. There, a private student newspaper, which had an avowed religious perspective, sought funding from a student activity fund on the same basis as its secular counterparts. The Court held that, by subsidizing the student activities fund, the University had created a "limited public forum" from which it impermissibly excluded all publications with "religious editorial viewpoints."[637]

[I234] In *National Endowment for the Arts* (NEA), the Court upheld, on its face, an art funding program that required the NEA to use content-based criteria in making funding decisions. More specifically, the statute vested the NEA with substantial discretion to award financial grants to support the arts and identified only the broadest funding priorities, including "artistic and cultural significance, giving emphasis to creativity and cultural diversity," "professional excellence," and the encouragement of "public education and appreciation of the arts." A 1990 amendment to the statute directed the NEA to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." The Court rejected the claim that the provision was facially unconstitutional, because the "decency and respect" criteria were sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination. Given the varied interpretations of the criteria and the vague exhortation to "take them into consideration," the Court did "not perceive a realistic danger" that the amendment would compromise First Amendment values and was reluctant to invalidate the provision on the basis of its "hypothetical application to situations not before the Court." At the same time, the Court stressed that "[a]ny content-based considerations that may be taken into account in the grantmaking process are a consequence of the nature of arts funding. . . . [Indeed,] it would be impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression. . . . In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately encourage a diversity of views from private speakers."[638] Consequently, the Court expressly declined to apply "public forum" analysis. "The NEA's mandate [wa]s to make aesthetic judgments, and the inher-

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[636] Fed. Communications Comm'n v. League of Women Voters of California, 468 U.S. 364, 380–400 (1984).

[637] Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 828–32 (1995).

[638] Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 585–86 (1998).

ently content-based 'excellence' threshold for NEA support se[t] it apart from the subsidy at issue in *Rosenberger*, . . . and from comparably objective decisions on allocating public benefits."[639] Relatedly, the Court noted that it had no occasion there to address an as-applied challenge in a situation where the denial of a grant might be shown to be the product of invidious viewpoint discrimination. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then it would be a different case, for, "even in the provision of subsidies, the Government may not aim at the suppression of dangerous ideas," and "if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate."[640] Further, the Court stressed that "[i]n the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if [the challenged] statute [were] unconstitutionally vague, then so too [we]re all government programs awarding scholarships and grants on the basis of subjective criteria such as 'excellence.'" Hence, to accept respondents' vagueness argument "would be to call into question the constitutionality of these valuable government programs and countless others like them."[641] The Court concluded that unless and until the provision was applied in a manner raising concern about the suppression of disfavored viewpoints, its constitutionality should be upheld.

F. THE RIGHT NOT TO SPEAK

1. Generally[642]

[I235] Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to speak. "'Since *all* speech inherently involves choices of what to say and what to leave unsaid' . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"[643] "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."[644] Hence, a regulation compelling speech is content-based and subject to "exacting First Amendment scrutiny."[645] Although the state may at times "prescribe what shall be orthodox in commercial advertising, by requiring the dissemination of purely factual and uncontroversial information,"[646] outside that context it may not, as a matter of principle, require persons to "repeat an objectionable message out of their own mouths,"[647] compel them to pay subsidies for speech to which they object,[648] "require them to use their own prop-

639 *Id.* at 586.

640 *Id.* at 587.

641 *Id.* at 589.

642 *See also* para. H5 *(freedom of mind).*

643 Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995), *quoting* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of California, 475 U.S. 1, 11, 16 (1986) (plurality opinion).

644 Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 795 (1988).

645 *Id.* at 798.

646 Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985). *See also* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748, 772, n.24 (1976).

647 Glickman v. Wileman Bros. & Elliott, Inc. 521 U.S. 457, 471 (1997), *citing* W. Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

648 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–235 (1977); United States v. United

erty to convey an antagonistic ideological message,"[649] "force them to respond to a hostile message when they would prefer to remain silent,"[650] or "require them to be publicly identified or associated with another's message."[651] The general rule "that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."[652]

2. Anonymous Speech—Compelled Disclosure of the Speaker's Identity[653]

[I236] "'Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.' . . . Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[654]

Foods, Inc., 533 U.S. 405 (2001). However, "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties." *See* Bd. of Regents of Univ. of Wisconsin System v. Southworth, 529 U.S. 217, 229 (2000).

See also Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005), where the Court made clear that citizens "have no First Amendment right not to fund government speech," and that "this is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object." There, the Court rejected a First Amendment challenge to a federal program that financed generic advertising to promote an agricultural product, finding that (1) the message of the promotional campaign at issue was effectively controlled by the federal government, since the compelled subsidy funded communicative activities were prescribed by law and developed under official government supervision; and (2) the record did not show that individual beef advertisements were attributed to respondents. *Id.* at 560–62, 565.

649 Glickman v. Wileman Bros. & Elliott, Inc. 521 U.S. 457, 471 (1997), *citing* Wooley v. Maynard, 430 U.S. 705 (1977), and Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of California, 475 U.S. 1, 18 (1986) (plurality opinion).

650 Glickman v. Wileman Bros. & Elliott, Inc. 521 U.S. 457, 471 (1997).

651 *Id., citing* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980). *See also* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 580–81 (1995).

652 Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995), *citing* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995); Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 797–98 (1988).

653 *See also* paras. I509 *et seq. (campaign expenditures)*; paras. I380, I390, I391 *(identification permit requirement for canvassing or soliciting from house to house)*, para. I197 *(lobbying activities)*, I330 *(dissemination of political propaganda by an agent of a foreign principal)*; paras. I414 *et seq. (associational privacy)*.

654 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995), *quoting* Talley v. California, 362 U.S. 60, 64 (1960).

[I237] In *Talley*, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain merchants allegedly engaging in discriminatory employment practices. In so holding, the Court noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all," and reminded that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names.[655]

[I238] "On occasion, quite apart from any threat of persecution, an advocate may believe [his] ideas will be more persuasive if [his] readers are unaware of [his] identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge [his] message simply because they do not like its proponent. The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes."[656] *McIntyre* reviewed an Ohio law that prohibited the distribution of anonymous campaign literature. The writing in question was a handbill urging voters to defeat a ballot issue. The Court considered that the law was a regulation of core political speech and, hence, subject to "exacting scrutiny." The state argued that the challenged disclosure requirement was justified by its important and legitimate interests in preventing fraudulent and libelous statements and in providing the electorate with relevant information. The Court disagreed. First, it noted that "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. . . . Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author adds little, if anything, to the reader's ability to evaluate the document's message."[657] Thus, Ohio's informational interest was plainly insufficient to support the constitutionality of its disclosure requirement. Further, Ohio's election code included detailed and specific prohibitions against making or disseminating false statements during political campaigns. Thus, Ohio's prohibition of anonymous leaflets plainly was not its principal weapon against fraud. Rather, it served as "an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators." Although these "ancillary benefits [we]re assuredly legitimate," the Court was not persuaded that they justified the extremely broad prohibition in question. The challenged ban "encompasse[d] documents that [we]re not even arguably false or misleading. It appl[ied] not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It appl[ied] not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It appl[ied] not only to leaflets distributed on the eve of an election, when the opportunity for reply [would be] limited, but also to those distributed months in advance. It appl[ied] no matter what the character or strength of the author's interest in anonymity. [In addition,] the absence of the author's name on a document [did] not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the election code. Nor ha[d] the State explained why it [could] more easily enforce the direct bans on disseminating false doc-

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655 Talley v. California, 362 U.S. 60, 64–65 (1960).

656 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342–43 (1995).

657 *Id.* at 348–49.

uments against anonymous authors and distributors than against wrongdoers who might have used false names and addresses in an attempt to avoid detection. [The Court recognized] that a State's enforcement interest might justify a more limited identification requirement, but Ohio ha[d] shown scant cause for inhibiting the leafletting at issue [t]here."[658]

[I239] *ACLF* struck down a state provision requiring ballot initiative petition circulators to wear identification badges. The state urged that the badge enabled the public to identify, and the state to apprehend, petition circulators who engaged in misconduct. However, the statutory requirement that to each petition section be attached a signed, notarized, and dated affidavit executed by the circulator, which should include, among several particulars, his or her name and address, was responsive to the state's concern. "Unlike a name badge worn at the time a circulator [wa]s soliciting signatures, the affidavit [wa]s separated from the moment the circulator [spoke.] . . . [T]he name badge requirement force[d] circulators to reveal their identities at the same time they deliver[ed] their political message; . . . it operate[d] when reaction to the circulator's message [wa]s immediate, and [might be] intense, emotional, and unreasoned. . . . The affidavit, in contrast, d[id] not expose the circulator to the risk of 'heat of the moment' harassment. . . . [T]he badge requirement compel[led] personal name identification at the precise moment when the circulator's interest in anonymity [wa]s greatest. . . . For this very reason, it d[id] not qualify for inclusion among the 'more limited [election process] identification requirements,' . . . alluded in *McIntyre*. . . . In contrast, the affidavit requirement, . . . which [should] be met only after circulators ha[d] completed their conversations with electors, exemplifie[d] the type of regulation for which *McIntyre* left room."[659]

[I240] "Corporate [political] advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."[660] Moreover, when an agent of a foreign principal disseminates political materials in the United States, Congress may require the disseminators to label that material with certain information, the agent's identity, and the identity of the principal for whom he acts, "so that the Government and the people of the United States . . . may appraise the statements and actions of such persons in the light of their associations and activities."[661]

3. Compelled Contributions to Objectionable Speech[662]

[I241] The First Amendment does not forbid all compelled financial contributions to fund advertising. *Glickman* rejected a First Amendment challenge to the constitu-

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[658] *Id.* at 350–53. The Court distinguished *Buckley*, noting that (1) required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in preventing the actual or apparent corruption of candidates, which had no application to that case; (2) "even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill—and, as a result, when money supports an unpopular viewpoint, it is less likely to precipitate retaliation." *See id.* at 354–55.

[659] Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 198–200 (1999).

[660] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 792, n.32 (1978).

[661] *See* Meese v. Keene, 481 U.S. 465, 469, 477–81 (1987).

[662] *See also* paras. I444 *et seq.*

tionality of a series of agricultural marketing orders that, as part of a larger regulatory marketing scheme, required producers of certain California tree fruit to pay assessments for product advertising. In deciding that case, the Court emphasized the importance of the statutory context in which it arose. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." Indeed, the marketing orders "displaced competition" to such an extent that they were expressly exempted from the anti-trust laws. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices." The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "d[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme."[663] "The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation."[664]

[I242] *United Foods* involved a federal law mandating that fresh mushroom handlers pay assessments used primarily to fund advertisements promoting mushroom sales. Respondent wanted to convey the message that its brand of mushrooms was superior to those grown by other producers. It objected to being charged for the message that mushrooms were worth consuming whether or not they were branded. In the government's view, the assessment was permitted by *Glickman*. However, the Court disagreed. The features of the marketing scheme found important in *Glickman* were not present in that case. "Almost all of the funds collected under the mandatory assessments [we]re for one purpose: generic advertising. Beyond the collection and disbursement of advertising funds, there [we]re no marketing orders that regulate[d] how mushrooms might be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions. . . . The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment [found] no corollary [t]here; the expression respondent [wa]s required to support [wa]s not germane to a purpose related to an association independent from the speech itself."[665] For these reasons, the assessments were not permitted under the First Amendment.

[I243] *Southworth* addressed the question whether the First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech. The Court decided that the standard of *germane* speech, set forth in *Abood* and *Keller*,[666] is unworkable as applied to student speech at a university and "gives insufficient protection both to the objecting students and to the University program itself."[667] First, where a State University "undertakes to stimulate the whole universe of speech and ideas, . . . [t]o insist upon asking what speech is 'germane would be contrary to the very goal the University seeks to pursue. It is not for the Court

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663 Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 461, 469 (1997).

664 *See* United States v. United Foods, 533 U.S. 405, 412 (2001), *discussing Glickman.*

665 United States v. United Foods, 533 U.S. 405, 412, 415 (2001).

666 *See* paras. I446, I453.

667 Bd. of Regents of Univ. of Wisconsin System v. Southworth, 529 U.S. 217, 231 (2000).

to say what is or is not germane to the ideas to be pursued in an institution of higher learning."[668] Further, "[j]ust as the vast extent of permitted expression makes the test of germane speech inappropriate for intervention, so too does it underscore the high potential for intrusion on the First Amendment rights of the objecting students. It is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs. If the standard of germane speech is inapplicable, then it might be argued the remedy is to allow each student to list those causes which he or she will or will not support. If a university decided that its students' First Amendment interests were better protected by some type of optional or refund system, it would be free to do so. . . . [A] system of that sort [is not] a constitutional requirement, however. The restriction could be so disruptive and expensive that the program to support extracurricular speech would be ineffective. The First Amendment does not require the University to put such a program at risk."[669] "The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends. The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students," the Court concluded, "is the requirement of viewpoint neutrality in the allocation of funding support. . . . When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. . . . [V]iewpoint neutrality is the justification for requiring the student to pay the fee in the first instance, and for ensuring the integrity of the program's operation once the funds have been collected."[670] And to the extent a student referendum "substitutes majority determinations for viewpoint neutrality, it would undermine the constitutional protection such a program requires."[671]

4. Compelled Access for the Speech of Others[672]

[I244] "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[673] In *Pacific Gas & Electric*, the Court inval-

668 *Id.* at 232.

669 *Id.*

670 *Id.* at 233.

671 *Id.* at 235. The Court made no distinction between campus activities and the off-campus expressive activities of objectionable student organizations. "Universities possess significant interests in encouraging students to take advantage of the social, civic, cultural, and religious opportunities available in surrounding communities and throughout the country. Universities, like all of society, are finding that traditional conceptions of territorial boundaries are difficult to insist upon in an age marked by revolutionary changes in communications, information transfer, and the means of discourse." The Court concluded that "[i]f the rule of viewpoint neutrality is respected, [its] holding affords the University latitude to adjust its extracurricular student speech program to accommodate these advances and opportunities." *Id.* at 234.

672 *See also* paras. I281, I288–I291, I296, I297 *(mandatory access to the print and electronic media)*; para. H5 *(state mottos on license plates of private motor vehicles).*

673 Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 576 (1995).

idated a rule requiring a privately owned utility, on a quarterly basis, to include with its monthly bills an editorial newsletter published by a consumer group critical of the utility's ratemaking practices. The regulation conferred benefits to speakers based on viewpoint, and "impermissibly require[d] appellant to associate with speech with which appellant [might] disagree" and "to enhance the relative voice of its opponents." Hence, the utility would "be forced either to appear to agree [with the intruding leaflet] or to respond. . . . This kind of forced response, is antithetical to the free discussion the First Amendment seeks to foster."[674] Appellees argued that the order furthered the state's interest in effective rate-making proceedings. However, that interest could be served through means that would not violate appellant's First Amendment rights, such as awarding costs and fees. The Court also rejected the contention that the order furthered the state's interest in promoting speech by making a variety of views available to appellant's customers. This interest was not furthered by an order that was not content-neutral. Moreover, the means chosen to advance variety "tend[ed] to inhibit expression" of the utility's views. Therefore, the regulation was not a narrowly tailored means of furthering a compelling state interest.[675]

[I245] In *Hurley*, the South Boston Allied War Veterans Council ran a privately operated St. Patrick's Day parade. Respondent, an organization known as "GLIB," represented a contingent of gays, lesbians, and bisexuals who sought to march in the petitioners' parade, behind a GLIB banner, as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals. When the parade organizers refused GLIB's admission, GLIB brought suit under a Massachusetts' statute that prohibited discrimination on account of sexual orientation in any place of public accommodation, which the state courts interpreted to include the parade. Petitioners argued that forcing them to include GLIB in their parade would violate their free speech rights. The Court agreed. The St. Patrick's Day parade was an expressive undertaking. GLIB's marching in the parade would be an expressive act suggesting the view "that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." "The parade's organizers [might] not believe these facts about Irish sexuality to be so, or they [could] object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But, whatever the reason, it boil[ed] down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[676] Applying the Massachusetts' public accommodation law in such circumstances "would require speakers to modify the content of their expression to whatever extent beneficiaries of the law [chose] to alter it with messages of their own. But in the absence of some further, legitimate end, this [would] merely allow exactly what the general rule of speaker's autonomy forbids."[677]

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[674] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of California, 475 U.S. 1, 14–16 (1986) (plurality opinion).

[675] *Id.* at 19–20 (plurality opinion). Justice Marshall concurred in the judgment, finding that the state (1) had "redefined a property right in the extra space in appellant's billing envelope in such a way as to achieve a result—burdening the speech of one party in order to enhance the speech of another—that the First Amendment disallows"; (2) had sanctioned a substantial intrusion into appellant's property. *Id.* at 25.

[676] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 574–75 (1995).

[677] *Id.* at 578.

[I246] In *PruneYard*, a shopping center owner sought to deny access to a group of students who wished to hand out pamphlets in the shopping center's common area. The California supreme court held that the students' access was protected by the state Constitution; the shopping center owner argued that this ruling violated *his* First Amendment rights. The Court rejected this claim, noting that the proprietors were running "a business establishment that [wa]s open to the public" at large, that the solicitations would "not likely be identified with those of the owner," and that the proprietors could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or hand-billers [stood.]"[678] "Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content-based."[679] The principle of speaker's autonomy was simply not threatened in that case.[680]

G. FREEDOM OF THE PRESS

1. General Principles

[I247] The First Amendment, which applies to the states through the Fourteenth, prohibits laws abridging the freedom of speech, or of the press. "An untrammeled press is a vital source of public information, . . . and an informed public is the essence of working democracy."[681] "The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . [as well as the electronic media,] to play an important role in the discussion of public affairs. Thus, the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials, and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of the Constitution thoughtfully and deliberately selected to improve the American society and keep it free."[682] Accordingly, the Court has held that a state cannot make it a crime for the editor of a daily newspaper to write and publish an editorial on election day urging people to vote a certain way on issues submitted to them.[683]

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678 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

679 *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of California, 475 U.S. 1, 12 (1986) (plurality opinion).

680 *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 580 (1995).

681 Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983).

682 Mills v. Alabama, 384 U.S. 214, 219 (1966).

683 *Id.* at 220. The Alabama supreme court had sustained the law on the ground that it protected the public "from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day, when, as a practical matter, because of lack of time, such matters [could] not be answered or their truth determined until after the election [wa]s over." But this argument, "even if it were relevant to the constitutionality of the law, ha[d] a fatal flaw." The state statute left "people free to hurl their campaign charges up to the last minute of the day before election." The law then went on "to make

[I248] However, the constitutional protection of the press, even as to previous restraint, is not absolutely unlimited. Indeed, liberty of the press is "not an absolute right, and the State may punish its abuse."[684] "[T]he press is not free to publish with impunity everything and anything it desires to publish. [For example,] [a]lthough it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution."[685]

[I249] "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. . . . The press may not with impunity break and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source."[686] The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws.[687] Similarly, the media must obey the National Labor Relations Act[688] and the Fair Labor Standards Act;[689] may not restrain trade in violation of the anti-trust laws;[690] must pay non-discriminatory taxes;[691] and may be held liable for compensatory damages under a state law doctrine that, in the absence of a contract, creates obligations never explicitly assumed by the parties.[692] It is therefore beyond dispute that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."[693] Accordingly, "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."[694]

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it a crime to answer those 'last-minute' charges on election day, the only time they [could] be effectively answered. Because the law prevent[ed] any adequate reply to these charges, it [wa]s wholly ineffective in protecting the electorate 'from confusive last-minute charges and countercharges.'" *Id.* at 219–20.

[684] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 708 (1931).

[685] Branzburg v. Hayes, 408 U.S. 665, 683 (1972).

[686] Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991). *See, in extenso,* para. I282.

[687] *Cf.* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576–79 (1977).

[688] Associated Press v. Nat'l Labor Relations Bd., 301 U.S. 103, 129–32 (1937). There, provisions of the National Labor Relations Act empowering the National Labor Relations Board, in protection of inter-state commerce, to require that employees discharged for union activities and advocacy of collective bargaining be restored to employment and their losses of pay made good were upheld, against a First Amendment challenge, as applied to an employee of the Associated Press.

[689] Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 192–93 (1946).

[690] Associated Press v. United States, 326 U.S. 1, 6–7, 19–20 (1945).

[691] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987).

[692] Cohen v. Cowles Media Co., 501 U.S. 663, 668–672 (1991).

[693] Associated Press v. Nat'l Labor Relations Bd., 301 U.S. 103, 132–33 (1937).

[694] Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991). Although the press' unique societal role may not entitle the press to greater protection under the Constitution, it does provide a compelling reason for the state to exempt media corporations from the scope of political expenditure limitations. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 667–68 (1990).

[I250] The First Amendment does not "mandate strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others. In *Leathers v. Medlock*, for example, [the Court] upheld against First Amendment challenge the application of a general state tax to cable television services, even though the print media were exempted from taxation. As *Leathers* illustrates, the fact that a law singles out a certain medium, or even the press as a whole, 'is insufficient by itself to raise First Amendment concerns.' . . . Rather, laws of this nature are 'constitutionally suspect only in certain circumstances.'"[695] The taxes invalidated in *Minneapolis Star* and *Arkansas Writers' Project*,[696] for instance, "targeted a small number of speakers, and thus threatened to 'distort the market for ideas.' . . . Although there was no evidence that an illicit governmental motive was behind either of the taxes, both were structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas. . . . But such heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated."[697]

[I251] As a general matter, "state action to punish the publication of truthful information seldom can satisfy constitutional standards."[698] More specifically, *Daily Mail* held that "if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order."[699] "According the press the ample protection provided by that principle is supported by at least three separate considerations, in addition to, of course, the overarching 'public interest, secured by the Constitution, in the dissemination of truth.' . . . First, because the *Daily Mail* formulation only protects the publication of information which a newspaper has 'lawfully obtain[ed],' the government retains ample means of safeguarding significant interests upon which publication may impinge. . . . To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired. To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts."[700] "A second consideration undergirding the *Daily Mail* principle is the fact that punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act. It is not, of course, always the case that information lawfully acquired by the press is known, or accessible, to others. But where the government

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695 Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 660 (1994) *(Turner I), quoting* Leathers v. Medlock, 499 U.S. 439, 444, 452 (1991).

696 *See* paras. I278, I279.

697 Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 660–61 (1994), *quoting* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983).

698 Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979).

699 *Id.* at 103.

700 Florida Star v. B.J.F., 491 U.S. 524, 534 (1989).

has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release."[701] "A third and final consideration is the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing . . . truthful information . . . released, without qualification, by the government. A contrary rule, depriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper's sole object is to reproduce, with no substantial change, the government's rendition of the event in question."[702]

[I252] In this context, the Court has decided that where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, the government may not punish the ensuing publication of that information based on the defect in a chain.[703] Nevertheless, the Court has not resolved the question whether, in cases where information has been acquired unlawfully by a newspaper, the government may ever punish not only the unlawful acquisition but the ensuing publication as well.[704] The Court also has declined to "hold broadly that truthful publication may never be punished consistent with the First Amendment."[705] Relatedly, the Court has hypothesized that government might prevent "publication of the sailing dates of transports or the number and location of troops."[706]

2. Newsgathering

a. In General

[I253] "There is an undoubted right to gather news 'from any source by means within the law,' . . . but that affords no basis for the claim that the First Amendment compels others—private persons or government—to supply information to the press."[707] Indeed, "the First Amendment generally does not guarantee the press a constitutional right of

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[701] *Id.* at 535.

[702] *Id.* at 535–36.

[703] Bartnicki v. Vopper, 532 U.S. 514 (2001). *See, in extenso,* para. I90.

[704] This issue was raised, but not definitively resolved, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), and reserved in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978). *See* Florida Star v. B.J.F., 491 U.S. 524, 535, n.8 (1989).

[705] Florida Star v. B.J.F., 491 U.S. 524, 533 (1989).

[706] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931). In *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670–71 (1991), the Court held, by a five-to-four vote, that the First Amendment does not prohibit a plaintiff from recovering compensatory damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. The Court reasoned that the state doctrine of promissory estoppel—a law doctrine that, in the absence of a contract, creates obligations never explicitly assumed by the parties—was generally applicable to the daily transactions of all the citizens of the state. Moreover the majority noted, in response to arguments advanced by the dissenters, that (1) compensatory damages are not a form of punishment; (2) it was not at all clear that respondents had obtained Cohen's name "lawfully," for they had been informed of Cohen's identity only by making a promise which they did not honor.

[707] Houchins v. KQED, 438 U.S. 1, 11 (1978) (plurality opinion).

special access to information not available to the public;" for example, "[n]ewsmen have no constitutional right of access to the scenes of crime [or to public records] when the general public is excluded."[708]

b. Justice and the Press[709]

i. Access to Judicial Proceedings and Records—Free Press and Fair Trial

[I254] The Court's decision in *Richmond Newspapers* "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. Although there was no opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment."[710] "Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.' . . . [Thus, the right of access to criminal trials ensures] that the constitutionally protected 'discussion of governmental affairs' is an informed one. Two features of the criminal justice system together serve to explain why a right of access to criminal trials in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. . . . Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process, with benefits to both the defendant and to society as a whole."[711] "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[712]

[I255] "Although the right of access to criminal trials is of constitutional stature, it is not absolute. . . . But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one."[713] "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values, [such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information,] and is narrowly tailored to serve that interest. The inter-

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[708] Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972). *See also* Nixon v. Warner Communications, 435 U.S. 589, 609 (1978).

[709] *See also* paras. I91 *et seq. (privacy interests in judicial proceedings).*

[710] *See* Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 603 (1982), *citing* Richmond Newspapers v. Virginia, 448 U.S. 555, 558–81 (1980) (three-member plurality); *id.* at 584–98 (Brennan and Marshall, JJ., concurring in judgment); *id.* at 598–601 (Stewart, J., concurring in judgment); *id.* at 601–04 (Blackmun, J., concurring in judgment).

[711] Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 604–06 (1982).

[712] Press-Enter. Co. v. Superior Court of California, 464 U.S. 501, 508 (1984) *(Press-Enterprise I).*

[713] Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 606 (1982).

est is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."[714]

[I256] "The need for an open proceeding may be particularly strong with respect to suppression hearings. A challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor. . . . The public in general . . . has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny."[715] However, "[p]ublicity concerning pretrial suppression hearings . . . poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury. . . . Publicity concerning the proceedings at a pretrial hearing . . . could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial."[716] "But this risk of prejudice does not automatically justify refusing public access to hearings on every motion to suppress. Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict."[717] Hence, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."[718]

[I257] The guarantees of open public proceedings in criminal trials cover proceedings for the *voir dire* examination of potential jurors. In *Press-Enterprise I*, the state court had asserted two interests in support of its closure order and orders denying a transcript: the right of the defendant to a fair trial, and the right to privacy of the prospective jurors, for any whose special experiences in sensitive areas did not appear to be appropriate for public discussion. Nevertheless, the California court's conclusion that Sixth Amendment and privacy interests were sufficient to warrant prolonged closure was unsupported by findings showing that an open proceeding in fact threatened those interests. Moreover, the trial court's orders denying access to *voir dire* testimony had failed to consider whether alternatives were available to protect the privacy interests of the prospective jurors. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.[719]

[I258] *Press-Enterprise II* addressed a California law that allowed magistrates to close preliminary hearings, if it was reasonably likely that the defendant's ability to obtain a fair hearing would be prejudiced. Applying the "tests of experience and logic," the Court struck down the law on the grounds that preliminary criminal hearings of the type conducted in California had traditionally been public, and because the hearings at issue were "sufficiently like a trial" that public access was "essential to the proper functioning

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714 Press-Enter. Co. v. Superior Court of California, 464 U.S. 501, 510 (1984).

715 Waller v. Georgia, 467 U.S. 39, 47 (1984).

716 Gannett Co. v. DePasquale, 443 U.S. 368, 377–378 (1979).

717 Press-Enter. Co. v. Superior Court of California 478 U.S. 1, 15 (1986) *(Press-Enterprise II).*

718 Waller, v. Georgia, 467 U.S. 39, 48 (1984). The decision was based on the Sixth Amendment's right of the accused to insist upon a public trial. The Court noted, *inter alia*, that this right is no less protective of a public trial than the implicit First Amendment right of the press and public. *Id.* at 46.

719 Press-Enter. Co. v. Superior Court of California, 464 U.S. 501, 508 (1984) *(Press-Enterprise I).*

of the criminal justice system." Several features were cited in support of the finding that California's preliminary hearings were "sufficiently like a trial" to require public access; hearings were held before a neutral magistrate; the accused was afforded the rights to counsel, to cross-examination, to present exculpatory evidence and to suppress illegally seized evidence; the accused was bound over for trial only upon the magistrate's finding probable cause; such a finding led to a guilty plea in the majority of cases; and "[b]ecause of its extensive scope, the preliminary hearing [wa]s often the final and most important step in the criminal proceeding." In addition, "the absence of a jury, long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,' . . . ma[de] the importance of public access to a preliminary hearing even more significant." Since a qualified First Amendment right of access attaches to such preliminary hearings, "the proceedings cannot be closed unless specific, on-the-record findings are made demonstrating that closure is essential to preserve higher values, and is narrowly tailored to serve that interest. . . . If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[720]

[I259] By contrast, "the proper functioning of [the] grand jury system depends upon the secrecy of grand jury proceedings. [The Court has] noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses appearing before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, . . . persons who are accused but exonerated by the grand jury will not be held up to public ridicule."[721] Nevertheless, these interests do not "warrant a permanent ban on the disclosure by a witness of his own testimony once a grand jury has been discharged." Such a ban does serve a state's interest in seeing that "persons who are accused but exonerated by the grand jury will not be held up to public ridicule," although "it would have the opposite effect if applied to a witness who was himself a target of the grand jury probe and desired to publicize this testimony by way of exonerating himself. But even in those situations where the disclosure by the witness of his own testimony could have the effect of revealing the names of persons who had been targeted by the grand jury but exonerated, [the Court's] decisions establish that, absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech."[722]

[I260] "Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated

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[720] Press-Enter. Co. v. Superior Court of California, 478 U.S. 1, 10–14 (1986) *(Press-Enterprise II). See also* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993) *(per curiam).*

[721] Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 218 (1979), *cited with approval in* Press-Enter. Co. v. Superior Court of California, 478 U.S. 1, 9 (1986).

[722] Butterworth v. Smith, 494 U.S. 624, 632–34 (1990).

by a compelling governmental interest, and is narrowly tailored to serve that interest."[723] *Globe Newspaper* involved a rule barring press and public access to criminal sex-offense trials during the testimony of minor victims. The state interests asserted to support the statutory provision were two: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner. The Court recognized that the first interest was a compelling one. Nevertheless, "the circumstances of the particular case may affect the significance of [that] interest, . . . [which] could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the wellbeing of the minor victim necessitate[d] closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest."[724] Hence, the provision at issue could not be viewed as a narrowly tailored means of accommodating the state's interest in safeguarding the physical and psychological well-being of minors. Nor could the rule be justified on the basis of the state's second asserted interest. Not only was the claim "speculative in empirical terms," but it was also "open to serious question as a matter of logic and common sense." Although the statute barred the press and general public from the courtroom during the testimony of minor sex victims, the press was "not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony." Thus, the rule could not "prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity." If the state's interest in encouraging minor victims to come forward depended on keeping such matters secret, the rule "hardly advance[d] that interest in an effective manner." In any event, it was "doubtful that the interest would be sufficient to overcome the constitutional attack, for that same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward: surely it cannot be suggested that minor victims of sex crimes are the only crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify. The State's argument based on this interest therefore prove[d] too much, and [ran] contrary to the very foundation of the right of access."[725]

[I261] "The First Amendment generally grants the press no right to information about a trial superior to that of the general public. 'Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door, and within, a reporter's constitutional rights are no greater than those of any other member of the public.' . . . [W]hile the constitutional guarantee of a public trial, is 'a safeguard against any attempt to employ [the] courts as instruments of persecution,' . . . it confers no special benefit on the press. . . . Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."[726]

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[723] Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 606–07 (1982).

[724] *Id.* at 608–09.

[725] *Id.* at 609–10.

[726] Nixon v. Warner Communications, 435 U.S. 589, 609–10 (1978). There, the Court rejected respondents' claim that they had a First Amendment right to access to copies of White

[I262] "[T]he public has the right to be informed as to what occurs in its courts. [And] reporters of all media, including television, . . . are plainly free to report whatever occurs in open court through their respective media."[727] But "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."[728] Freedom of discussion "must not be allowed to divert the trial from 'the very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' . . . Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources," whether of private talk or public print.[729]

[I263] No one may be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power."[730] "Due process requires that the accused receive a trial by an impartial jury free from outside influences. . . . [Hence,] [t]he presence of the press at judicial proceedings must be limited when it is apparent that, [under the 'totality of circumstances,'] the accused might otherwise be prejudiced or disadvantaged."[731] *Sheppard* focused sharply on the impact of extensive pre-trial publicity and a trial court's duty to protect the defendant's constitutional right to a fair trial. As the Court emphasized, "given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury is something the judge may raise *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[732]

House tapes—to which the public had never had physical access—admitted into evidence at the trial of Nixon's former advisers. In doing so, the Court noted that the case presented no question of a truncated flow of information to the public, since the media had been furnished transcripts of the tapes.

727 Estes v. Texas, 381 U.S. 532, 541–42 (1965).

728 Bridges v. California, 314 U.S. 252, 271 (1941).

729 Sheppard v. Maxwell, 384 U.S. 333, 350–51 (1966).

730 Chambers v. Florida, 309 U.S. 227, 236–37 (1940).

731 Sheppard v. Maxwell, 384 U.S. 333, 362, 358 (1966).

732 *Id.* 362–63 (emphasis added). The community from which the jury was drawn in that case had been inundated by publicity hostile to the defendant. The trial could only be described as a circus, with the courtroom taken over by the press and jurors turned into media stars. Since the trial judge had not fulfilled his duty to protect the defendant from the inherently prejudicial publicity that had saturated the community and to control disruptive influences in the court-

[I264] *Nebraska Press* struck down a direct prior restraint imposed by a trial judge on the members of the press, prohibiting them from publishing or broadcasting accounts of confessions or admissions made by the accused or facts "strongly implicative" of the accused in a widely reported murder of six persons. Although the trial judge had rea-

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room, the Court vacated the judgment of conviction and a new trial followed, in which the accused was acquitted.

KPNX Broadcasting Co. v. Arizona Superior Court, 459 U.S. 1302 (1982), involved an application of a broadcasting company and several reporters and courtroom sketch artists to stay orders of a state trial court that (1) prohibited court personnel, counsel, witnesses, and jurors in a murder case from speaking directly with the press, and (2) directed that all sketches of jurors be reviewed by the court before being broadcast on television. Relying in part on *Sheppard*, Justice Rehnquist denied the application.

"[A]dverse pretrial publicity may create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." See Patton v. Yount, 467 U.S. 1025, 1031 (1984) (emphasis added).

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Court held that pre-trial publicity in connection with a capital trial had so tainted the jury pool in Gibson County, Indiana, that the defendant was entitled, as a matter of federal constitutional law, to a change of venue to another county. The defendant there was convicted of murder following intensive and hostile news coverage. The trial judge had granted a defense motion for a change of venue, but only to an adjacent county, which had been exposed to essentially the same news coverage: "[A] barrage of newspaper headlines, articles, cartoons and pictures was unleashed against [the defendant] during the six or seven months preceding his trial. . . . [T]he newspapers in which the stories appeared were delivered regularly to approximately 95 percent of the dwellings in Gibson County, and . . . the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents." At trial, 430 persons were called for jury service; 268 were excused because they had fixed opinions as to guilt. Two-thirds of the jurors actually seated had formed an opinion that the defendant was guilty, and acknowledged familiarity with material facts and circumstances of the case. Although each of these jurors said that he could be impartial, the Court concluded: "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." *Id.* at 725–28.

Similarly, in *Rideau v. Louisiana*, 373 U.S. 723, 724–27 (1963), the Court presumed community prejudice mandating a change in venue when petitioner's filmed confession obtained during a police interrogation was broadcast on local television (in a community of 150,000) over three consecutive days.

Nevertheless, "juror exposure to information about a . . . defendant's prior convictions or to news accounts of the crime with which he is charged [do not] alone presumptively deprive[e] the defendant of due process." See Murphy v. Florida, 421 U.S. 794, 799 (1975) (emphasis added). There, the Court reviewed a trial in which many jurors had heard of the defendant through extensive news coverage. Characterizing *Irvin, Rideau* and *Sheppard* as cases involving "a trial atmosphere that had been utterly corrupted by press coverage," the Court recognized: "Qualified jurors need not, however, be totally ignorant of the facts and issues involved. 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" *Id.* at 799–800, *quoting* Irvin, *supra*, at 723. The Court concluded that the petitioner in *Murphy* had failed to show that the trial setting was inherently prejudicial, or that the jury selection process permitted an inference of actual prejudice, noting, *inter alia*, that the extensive publication of news articles about Murphy largely had ceased some seven months before the jury was selected. *Id.* at 802.

sonably concluded there would be intense and pervasive pre-trial publicity concerning this case, and that publicity might impair the defendant's right to a fair trial, there was no finding—and no evidence to support the conclusion—that alternative measures, such as change of trial venue, or postponement of the trial to allow public attention to subside, would not have protected the defendant's rights. Moreover, it was far from clear that prior restraint on publication would have effectively protected the accused's rights, in view of such practical problems as the limited territorial jurisdiction of the trial court issuing the restraining order, the difficulties inherent in predicting what information would in fact undermine the jurors' impartiality, and the fact that in that case, the events had taken place in a small community where rumors would have traveled swiftly by word of mouth. In addition, to the extent that the order prohibited the reporting of evidence adduced at the open preliminary hearing held to determine whether the accused should

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Likewise, in *Patton v. Yount*, 467 U.S. 1025 (1984), the record showed that prejudicial publicity was greatly diminished and community sentiment had softened when the jury for the second trial was selected four years later. The passage of time between the first and second trials clearly rebutted any presumption of partiality or prejudice that existed at the time of the initial trial. Potential jurors who had retained fixed opinions as to respondent's guilt were disqualified, and the fact that the great majority of veniremen "remembered the case," without more, was essentially irrelevant; the relevant question was whether the jurors at respondent's second trial had such fixed opinions that they could not judge impartially respondent's guilt. The Court thus concluded that the trial court had not committed manifest error in finding that the jury as a whole was impartial.

In *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the community had been subjected to a barrage of publicity prior to Mu'Min's trial for capital murder. News stories appeared over a course of several months and included, in addition to details of the crime itself, numerous items of prejudicial information inadmissible at trial. In distinguishing *Irvin*, the Court stated: "[T]he cases differ both in the kind of community in which the coverage took place and in extent of media coverage. Unlike the community involved in *Irvin*, the county in which petitioner was tried, Prince William, had a population in 1988 of 182,537, and this was one of nine murders committed in the county that year. It is a part of the metropolitan Washington statistical area, which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year. In *Irvin*, news accounts included details of the defendant's confessions to 24 burglaries and six murders, including the one for which he was tried, as well as his unaccepted offer to plead guilty in order to avoid the death sentence. They contained numerous opinions as to his guilt, as well as opinions about the appropriate punishment. While news reports about Mu'Min were not favorable, they did not contain the same sort of damaging information. Much of the pretrial publicity was aimed at the Department of Corrections and the criminal justice system in general, criticizing the furlough and work release programs that made this and other crimes possible. Any killing that ultimately results in a charge of capital murder will engender considerable media coverage, and this one may have engendered more than most because of its occurrence during the 1988 Presidential campaign, when a similar crime committed by a Massachusetts inmate became a subject of national debate. But while the pretrial publicity in this case appears to have been substantial, it was not of the same kind or extent as that found to exist in *Irvin*." *Id.* at 429–30. Eight of the 12 individuals seated on Mu'Min's jury admitted some exposure to pre-trial publicity. None of those who had read or heard something indicated that they had formed an opinion based on the outside information, or that it would affect their ability to determine petitioner's guilt or innocence based solely on the evidence presented at trial. Petitioner contended, however, that his Sixth Amendment right to an impartial jury and his right to due process under the Fourteenth Amendment were violated because the trial judge refused to question further prospective jurors about the specific contents of the news reports to which they had been exposed. The Court rejected petitioner's submission. *Id.* at 417.

be bound over for trial, it violated the settled principle that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." And finally, the prohibition regarding "implicative" information was too vague and too broad to survive the scrutiny given to restraints on First Amendment rights.[733]

[I265] The Court has rejected the proposition that all photographic or broadcast coverage of criminal trials is inherently a denial of due process. "An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage. A case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly. . . . Alternatively, a defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process."[734]

ii. Sanctions for Out-of-Court Publications that Comment upon a Pending Case

[I266] "The operations of the courts and the judicial conduct of judges are matters of utmost public concern. 'A responsible press has always been regarded as the handmaiden of effective judicial administration. . . . The press does not simply publish information about trials, but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.' . . . Although it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions, and, by tradition, will not respond to public commentary, the law gives judges as persons, or courts as institutions no greater immunity from criticism than other persons or institutions."[735]

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[733] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–68 (1976).

[734] Chandler v. Florida, 449 U.S. 560, 574–75, 581 (1981). Appellants in that case were convicted of various theft crimes at a jury trial that was partially televised under a new Canon of Judicial Ethics promulgated by the Florida Supreme Court. They claimed that the unusual publicity and sensational courtroom atmosphere created by televising the proceedings had influenced the jurors and had precluded a fair trial. However, they failed to show with any specificity that the presence of cameras had impaired the ability of the jurors to decide the case on only the evidence before them, or that their trial had been affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast. For that reason, the Court refused to set aside their conviction.

In *Estes v. Texas*, 381 U.S. 532 (1965), the Court held that the defendant had not been afforded due process where the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself inherently prevented a sober search for the truth. "The trial in *Estes* had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment." *See* Murphy v. Florida, 421 U.S. 794, 799 (1975).

[735] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838–39 (1978), *quoting* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

[I267] The "inherent tendency" or "reasonable tendency" of an out-of-court publication to cause disrespect for the judiciary or interfere with the orderly administration of justice in a pending case is not sufficient to establish punishable contempt.[736] *Bridges* "fixed reasonably well marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. The case placed orderly operation of courts as the primary and dominant requirement in the administration of justice. . . . This essential right of the courts to be free of intimidation and coercion was held to be consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order. A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present danger rule. . . . The evil consequence of comment must be 'extremely serious, and the degree of imminence extremely high, before utterances can be punished.'"[737] The Court thus held that the compulsion of the First Amendment forbade the punishment by contempt for comment on pending cases in the absence of a showing that the utterances created a clear and present danger to the orderly and fair administration of justice. Consequently, it reversed two convictions for contempt of court. The first one concerned an editorial comment of a powerful newspaper that failure of an elected judge to impose a severe sentence would be a "serious mistake." The second one involved the publication of a telegram from the president of an important union who threatened a damaging strike in the event of an adverse decision.[738]

[I268] "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice. . . . In the borderline instances where it is difficult to say upon which side the alleged offense falls, . . . the . . . freedom of public comment should weigh heavily against a possible tendency to influence pending cases."[739] *Pennekamp* involved two newspaper editorials and a cartoon criticizing certain actions taken by a state trial court of general jurisdiction in pending non-jury proceedings as being too favorable to defendants. The Court concluded that, on the record of the case, the danger to fair judicial administration had not the clearness and immediacy necessary to close the door of permissible public comment. Since the publications concerned the attitude of the judges toward those charged with crime, not comments on evidence or rulings during a jury trial, their effect on juries that might eventually try the alleged offenders was too remote to be considered a clear and present danger to justice. And this criticism of the judges' inclinations or actions in pending non-jury proceedings could not directly affect the fair administration of justice. Furthermore, the Court rejected the contention that a judge might "be influenced by a desire to placate the accusing newspaper to retain public esteem and secure reelection at the cost of unfair rulings against an accused," noting that "too many fine-drawn assumptions against the independence of judicial action should be made to call such a possibility a clear and present danger to justice."[740]

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[736] *See* Bridges v. California, 314 U.S. 252, 272 (1941).

[737] Pennekamp v. Florida, 328 U.S. 331, 334 (1946), *discussing and quoting* Bridges v. California, 314 U.S. 252, 263 (1941).

[738] Bridges v. California, 314 U.S. 252, 263–78 (1941).

[739] Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

[740] *Id.* at 347–50. The Court also noted that when the newspaper statements amount to defamation, a judge has such remedy in damages for libel as do other public servants. *Id.* at 348–49.

[I269] "[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. . . . [In addition,] [t]he vehemence of the language used or inaccuracies in reporting are not alone the measure of the power to punish for contempt. The fires which an article kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[741] Under these considerations, the Court decided, in *Craig v. Harney*, that the publication of news articles unfairly reporting events in a case pending in a state court, and an editorial strongly attacking the trial judge (a layman elected for a short term) while a motion for a new trial was pending, did not, in the circumstances of this case, constitute a clear and present danger to the administration of justice.

[I270] "[T]he limitations on free speech assume a different proportion when expression is directed toward a trial, as compared to a grand jury investigation. . . . Particularly in matters of local political corruption and investigations is it important that freedom of communication be kept open, and that the real issues not become obscured to the grand jury. . . . When the grand jury is performing its investigatory function into a general problem area, without specific regard to indicating a particular individual, society's interest is best served by a thorough and extensive investigation, and a greater degree of disinterestedness and impartiality is assured by allowing free expression of contrary opinion."[742] In light of these considerations, and in the absence of any showing of an actual interference with the undertakings of the grand jury, *Wood* held a court might not punish a sheriff for publicly criticizing a judge's charges to a grand jury, regarding black voting practices.[743]

[I271] "[L]awyers in pending cases [may be] subject to ethical restrictions on speech to which an ordinary citizen would not be."[744] In *Sawyer*, the Court had before it an order affirming the suspension of an attorney from practice because of her attack on the fairness and impartiality of a judge. The plurality opinion, which found the discipline improper, concluded that the comments had not, in fact, impugned the judge's integrity. Justice Stewart, who provided the fifth vote for reversal of the sanction, said that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."[745] The four dissenting Justices, who would have sustained the discipline, pointed out that "[a] lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person, and not even merely a lawyer. . . . He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense."[746]

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741 Craig v. Harney, 331 U.S. 367, 376 (1947).

742 Wood v. Georgia, 370 U.S. 375, 390, 392 (1962).

743 *Id.* at 390–94. Although the sheriff was technically an "officer of the court" by virtue of his position, the Court determined that his statements were made in his capacity as a private citizen. And, in any event, there was no evidence that the publications interfered with the performance of his duties as sheriff or with his duties, if any he had, in connection with the grand jury's investigation. *Id.* at 393.

744 *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991), *discussing In re* Sawyer, 360 U.S. 622 (1959).

745 *In re* Sawyer, 360 U.S. 622, 646–47 (1959).

746 *Id.* at 666, 668 (Frankfurter, J., dissenting, joined by Clark, Harlan, and Whittaker, JJ.).

[I272] Under *Gentile*, the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the "clear and present danger" of actual prejudice or imminent threat standard established for regulation of the press during pending proceedings. "Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech, as well as their conduct. . . . '[A]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. . . . Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative."[747] Subsequently, the Court held that a state may prohibit a lawyer from making extra-judicial statements to the press that he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding. Such a prohibition, which is aimed at comments that are likely to influence a trial's outcome or prejudice the jury *venire*, even if an untainted panel is ultimately found, is constitutional, for it is designed to protect the integrity and fairness of a state's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech.[748]

iii. Judicial Disciplinary Proceedings

[I273] The operation of the judicial system itself is a matter of public interest. And reporting judicial disciplinary proceedings "lies near the core of the First Amendment."[749] In *Landmark Communications*, a Virginia statute made it a crime to divulge information regarding proceedings before the state judicial review commission. A newspaper publisher was convicted of violating the statute after publishing an article accurately reporting on a pending inquiry by the commission and identifying the state judge under investigation. The Court held that the conviction violated the First Amendment. While assuming that the confidentiality of the judicial review proceedings served legitimate state interests, the Court observed that the state had "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined." Relatedly, the Court noted that over 40 states with similar judicial review procedures had found it unnecessary to criminalize the type of conduct at issue in order to preserve the integrity of their proceedings. Moreover, injury to the reputation of judges or the institutional reputation of courts was an insufficient reason for repressing speech that would otherwise be free; "speech cannot be punished when the purpose is simply 'to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which, in a democracy, other public servants are exposed.'" Although some risk of injury to the judge under inquiry, to the system of justice, or to the operation of the Judicial Inquiry and Review Commission might be posed by premature disclosure, the danger should be "clear and present," and, in the Court's view, the risk in that case fell far short of that requirement. Moreover, "much of the risk could be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings."[750]

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747 Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074 (1991).

748 *Id.* at 1074–76.

749 Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978).

750 *Id.* at 841–45.

c. Access to Prisons

[I274] The conditions in American prisons are a matter that is both newsworthy and of great public importance. *Pell* and *Saxbe* sustained prison regulations prohibiting face-to-face media interviews with specific prisoners. Inmates' families, their attorneys, and religious counsel were accorded liberal visitation privileges. Even friends of inmates were allowed to visit, although their privileges appeared to be somewhat more limited. Other than members of these limited groups with personal and professional ties to the inmates, members of the general public were not permitted to enter the prisons and interview consenting inmates. This policy was applied with an even hand to all prospective visitors, including newsmen, who, like other members of the public, might enter the prisons to visit friends or family members. But, again like members of the general public, they might not enter the prison and insist on visiting an inmate with whom they had no such relationship. There was no indication on the record of the case that the policy was applied to prohibit a person, who was otherwise eligible to visit and interview an inmate, from doing so merely because he was a member of the press. Furthermore, the regulation of pre-arranged inmate press interviews was imposed only after experience revealed that such interviews posed disciplinary problems and was not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions. Indeed, press representatives were permitted to tour the prisons and to conduct brief interviews with any inmates they might encounter during such tours. In addition, newsmen and inmates were permitted written correspondence with each other. In light of the foregoing considerations, and relying on the premise that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public," the Court rejected the contention that the challenged regulations amounted to unconstitutional state interference with a free press.[751]

[I275] In *Houchins v. KQED*, supervised tours of prison facilities were permitted, but the tours would not allow any use of cameras or communication with inmates and would not include the cell portions of the jail where a prisoner's suicide reportedly had occurred and where conditions were assertedly responsible for prisoners' problems (Little Greystone). The district court preliminarily enjoined the supervisor of the jail from denying KQED news personnel and responsible news media representatives reasonable access to the jail, including Little Greystone, and from preventing their using photographic or sound equipment or from conducting inmate interviews. The court of appeals affirmed. A four-Justice majority of the Court, relying on the "no greater access" doctrine of *Pell* and *Saxbe*, reversed this judgment and remanded the case. In doing so, a three-member plurality emphasized that the prison officials could not "prevent respondents from learning about jail conditions in a variety of ways, albeit not as conveniently as they might prefer. Respondents ha[d] a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions. . . . [They we]re free to interview those who rendered the legal assistance to which inmates [we]re entitled. . . . They [we]re also free to seek out former inmates, visitors to the prison, public officials, and institutional personnel. . . . Moreover, [state] statutes provided for a prison Board of Corrections that had the authority to inspect jails and prisons and [should] provide a public report at regular intervals. . . . Health inspectors [we]re required to inspect

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[751] Pell v. Procunier, 417 U.S. 817, 834–35 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 846–50 (1974).

prisons and provide reports to a number of officials, including the State Attorney General and the Board of Corrections. . . . Grand juries, with the potent subpoena power—not available to the media—traditionally concern themselves with conditions in public institutions. [And] a prosecutor or judge could initiate similar inquiries. . . . [Hence, a] number of alternatives [we]re available to prevent problems in penal facilities from escaping public attention."[752] Justice Stewart agreed that "[t]he Constitution does no more than assure the public and the press equal access once government has opened its doors," but he believed that "the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public," and that "terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who convey to the general public what the visitors see." Under these principles, KQED was clearly entitled to some form of preliminary injunctive relief. In his view, although the district court's preliminary injunction was overbroad, insofar as it ordered the Sheriff to permit reporters into the Little Greystone facility, and it required him to let them interview randomly encountered inmates, the elements of the court's order that allowed press access to the jail "at reasonable times and hours," without causing undue disruption, and permitted the press to use cameras and recording equipment for effective presentation to the viewing public of the conditions at the jail seen by individual visitors, were both sanctioned by the Constitution and amply supported by the record.[753] The three dissenters stressed that "[a]n official prison policy of concealing knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of the press," and they found that the record demonstrated that both the public and the press had been consistently denied any access to the inner portions of the jail, that there had been excessive censorship of inmate correspondence, and that there was no valid justification for these broad restraints on the flow of information.[754]

3. Taxation of the Press

[I276] "[A] genuinely nondiscriminatory tax on the receipts or income of newspapers is constitutionally permissible."[755] But discriminatory taxation of the press burdens rights protected by the First Amendment and poses a particular danger of abuse by the state. "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. . . . When the State singles out the press, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute."[756] "The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion."[757] Selective taxation of the press—either singling out the press as a whole or targeting indi-

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752 Houchins v. KQED, Inc., 438 U.S. 1, 12–16 (1978) (opinion of Burger, C.J., joined by White and Rehnquist, JJ.).

753 *Id.* at 16–18.

754 *Id.* at 38 (opinion of Stevens, J., joined by Brennan and Powell, JJ.).

755 Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987).

756 Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983).

757 Leathers v. Medlock, 499 U.S. 439, 447 (1991).

vidual members of the press—"unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."[758] Hence, "a tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action:"[759] "the State must show that its regulation is necessary to serve a compelling state interest, and is narrowly drawn to achieve that end."[760]

[I277] In *Grosjean*, the state of Louisiana imposed a license tax of 2 percent of the gross receipts from the sale of advertising on all newspapers with a weekly circulation above 20,000. Out of at least 124 publishers in the state, only 13 were subject to the tax. After noting that the tax was "single in kind," and that keying the tax to circulation curtailed the flow of information, the Court held the tax invalid as an abridgment of the freedom of the press. Both the brief and the argument of the publishers in the Court emphasized the events leading up to the tax and the contemporary political climate in Louisiana. All but one of the large papers subject to the tax had "ganged up" on Senator Huey Long, and a circular distributed by Long and the governor to each member of the state legislature described "lying newspapers" as conducting "a vicious campaign" and the tax as "a tax on lying, 2 cent a lie." Although the Court's opinion did not describe this history,[761] it invalidated the tax, "because, in the light of its history and of its setting, it [wa]s seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information,"[762] "an explanation that suggests that the motivation of the legislature [might] have been significant."[763]

[I278] *Minneapolis Star* resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax on First Amendment grounds. As the Court emphasized, "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment."[764] At issue in that case, was a Minnesota special use tax on the cost of paper and ink consumed in the production of publications. The tax exempted the first $100,000 worth of paper and ink consumed annually. Eleven publishers, producing only 14 of the state's 388 paid circulation newspapers, incurred liability under the tax in its first year of operation. The *Minneapolis Star* was responsible for roughly two-thirds of the total revenue raised by the tax. The following year, 13 publishers, producing only 16 of the state's 374 paid circulation papers, paid the tax. Again, the *Star* bore roughly two-thirds of the tax's burden. The Court found no evidence of impermissible legislative motive in the case apart from the structure of the tax itself. It nevertheless held the Minnesota tax unconstitutional for two reasons. First, the tax sin-

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[758] Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983).

[759] *Id.* at 592–93.

[760] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987). Since such tax systems directly implicate freedom of the press, the Court analyzes the problem primarily in First Amendment terms, although it is obviously intertwined with interests arising under the Equal Protection Clause. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585, n.7 (1983); Arkansas Writers' Project, *supra*, at 227, n.3.

[761] *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 579–80 (1983).

[762] Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

[763] Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 580 (1983).

[764] *Id.* at 592.

gled out the press for special treatment, and Minnesota offered no adequate justification for the special treatment of newspapers. Its interest in raising revenue, standing alone, could not justify such treatment, for the alternative means of taxing businesses generally was clearly available. Further, the Court was "hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason for this reluctance [wa]s that the very selection of the press for special treatment threatens the press with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions."[765] Second, the Minnesota tax targeted a small group of newspapers—those so large that they remained subject to the tax despite its exemption for the first $100,000 of ink and paper consumed annually. The state explained this exemption as part of a policy favoring an "equitable" tax system. Nevertheless, even if large businesses were more profitable, and therefore better able to bear the burden of the tax, the state's commitment to this "equity" was "questionable, for the concern ha[d] not led the State to grant benefits to small businesses in general. And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises."[766]

[I279] *Arkansas Writers' Project* reaffirmed the rule that selective taxation of the press through the narrow targeting of individual members offends the First Amendment. In that case, Arkansas Writers' Project sought a refund of state taxes it had paid on sales of the *Arkansas Times*, a general interest magazine, under Arkansas' Gross Receipts Act of 1941. Exempt from the sales tax were receipts from sales of religious, professional, trade and sports magazines. The Court held that Arkansas' magazine exemption, which meant that only a few Arkansas magazines paid any sales tax, operated in much the same way as did the $100,000 exemption in *Minneapolis Star*, and therefore suffered from the same type of discrimination identified in that case. Moreover, the basis on which the tax differentiated among magazines depended entirely on their subject matter. In order to determine whether a magazine was subject to sales tax, Arkansas' enforcement authorities should necessarily examine the content of the message that was conveyed. "Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."[767]

[I280] The foregoing cases "demonstrate that differential taxation of [members of the press] is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints."[768] In *Leathers*, the Court upheld the application of a general state tax—tax on receipts from the sale of all tangible personal property and a broad range of specified services—to cable television services, even though the print media were exempted from taxation. The tax did "not single out the press, and [thereby] threaten to hinder it as a watchdog of government activity." Arkansas had "not selected

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765 *Id.* at 588.

766 *Id.* at 592.

767 Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229–30 (1987).

768 Leathers v. Medlock, 499 U.S. 439, 447 (1991).

a narrow group to bear fully the burden of the tax," since the challenged law extended the tax uniformly to the approximately 100 cable systems operating in the state. In addition, the tax was not content-based, since there was nothing in the statute's language that referred to the content of mass media communications, and since the record contained no evidence that the variety of programming cable television offered subscribers differed systematically in its message from that communicated by newspapers or magazines. Nothing about the state's choice had ever suggested an interest in censoring the expressive activities of cable television; and the tax was not structured so as to raise suspicion that it was intended to do so. Nor did anything in the record indicate that Arkansas' broad-based, content-neutral sales tax was likely to stifle the free exchange of ideas. Consequently, the Court concluded that the provision at issue did not violate the First Amendment.[769]

4. Government-Enforced Access to the Press[770]

[I281] "*Tornillo* affirmed an essential proposition: the First Amendment protects the editorial independence of the press."[771] That case involved a challenge to Florida's right-of-reply statute. The Florida law provided that, if a newspaper assailed a political candidate's character or record, the candidate could demand that the newspaper print a reply of equal prominence and space. The Court "found that the statute directly interfered with the newspaper's right to speak in two ways. . . . First, the newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message. The statute purported to advance free discussion, but its effect was to deter newspapers from speaking out in the first instance: by forcing the newspaper to disseminate opponents' views, the statute penalized the newspaper's own expression"[772] on the basis of its content, by imposing additional printing, composing, and materials costs and by taking up space that could be devoted to other material the newspaper might have preferred to print.[773] The Court, therefore, concluded that a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'"[774] Second, the Court emphasized that "[t]he choice of material to go into a new paper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public official—whether fair or unfair—constitute the exercise of editorial control and judgment. . . . Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors."[775]

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769 *Id.* at 447–53.

770 *See also* paras. I288–I291, I 296, I297 *(mandatory access to the electronic media).*

771 *See* Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 653 (1994).

772 *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of California, 475 U.S. 1, 10 (1986), *discussing* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

773 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).

774 *Id.* at 257, *quoting* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1963).

775 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974). The Court rejected the claim that the newspaper could permissibly be made to serve as a public forum. It also flatly rejected the argument that the newspaper's alleged media monopoly could justify forcing the paper to speak in contravention of its own editorial discretion.

5. Governmental Demand of Information from the Press[776]

[I282] *Branzburg* held that the First Amendment does not relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a good faith criminal investigation, even though the reporter might be required to reveal a confidential source. The Court there could "perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[777] Nevertheless, four dissenting Justices in *Branzburg* discerned at least some protection in the First Amendment for confidences garnered during the course of news-gathering.[778] And Justice Powell, who joined the Court in *Branzburg*, wrote separately to emphasize that requests for reporter's documents should be carefully weighed with due deference to the vital constitutional and societal interests at stake.[779] Consequently, the Court seems not to have foreclosed news reporters from resisting a subpoena on First Amendment grounds.[780]

6. The Electronic Media

a. Radio—Television[781]

[I283] Radio and television are engaged in "speech" under the First Amendment, and are part of the "press."[782] "When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity. . . . Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."[783] However, there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[784] "The fundamental distinguishing characteristic" of radio and television broadcasting that requires some adjustment in First Amendment analysis is "that broadcast frequencies are a scarce and valuable resource that must be portioned out among applicants."[785] "Congress unquestionably has the

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[776] *See also* para. G132 *(search of newspaper offices for evidence of crime reasonably believed to be on the premises).*

[777] Branzburg v. Hayes, 408 U.S. 665, 690–91 (1972).

[778] *Id.* at 721 (Douglas, J., dissenting); *id.* at 744–47 (dissenting opinion of Stewart, J., joined by Brennan and Marshall, JJ., who held that the government must be required to show probable cause that the newsman has information that is clearly relevant to a specific probable violation of criminal law).

[779] *Id.* at 710.

[780] *See In re* Roche, 448 U.S. 1312, 1315 (1980) (Brennan, J., in chambers) (application for stay).

[781] *See also* para. I150 *(sexually explicit speech)*; paras. I261, I165 *(broadcast coverage of trials)*; para. I232 *(conditional federal grants).*

[782] *See* United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); Leathers v. Medlock, 499 U.S. 439, 444 (1991).

[783] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998).

[784] Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 388 (1969).

[785] Fed. Communications Comm'n v. League of Women Voters of California, 468 U.S. 364, 377 (1984).

power to grant and deny licenses and to eliminate existing stations. . . . No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' . . . By the same token, as far as the First Amendment is concerned, those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[786] "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio [and television] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial [in this context.] . . . That right may not constitutionally be abridged either by Congress or by the [Federal Communications Commission.]"[787] And if this interest is to be fully served, broadcasters must be "entitled, under the First Amendment, to exercise the widest journalistic freedom consistent with their public duties."[788] "As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination. . . . To comply with their obligation to air programming that serves the public interest, broadcasters must often choose among speakers expressing different viewpoints. 'That [broadcast] editors . . . can and do abuse this power is beyond doubt,' . . . but '[c]alculated risks of abuse are taken in order to preserve higher values.'"[789]

[I284] Hence, "the broadcasting industry plainly operates under restraints not imposed upon other media. . . . But . . . these restrictions are upheld only when they are narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues. . . . Making that judgment requires a critical examination of the interests of the public and broadcasters in light of the particular circumstances of each case."[790]

[I285] In *NBC*, the Court upheld a delegation to the Federal Communications Commission (FCC) granting it the authority to promulgate regulations in accordance with its view of the "public interest." Further, it sustained FCC regulations governing

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[786] Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 389 (1969).

[787] *Id.* at 390.

[788] Columbia Broad. Sys. v. Fed. Communications Comm'n, 453 U.S. 367, 395 (1981).

[789] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673–74 (1998), *quoting* Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 124–25 (1973).

[790] Fed. Communications Comm'n v. League of Women Voters of California, 468 U.S. 364, 380–81 (1984).

relations between broadcast stations and network organizations for the purpose of preserving the stations' ability to serve the public interest through their programming.[791]

[I286] *National Citizens Committee for Broadcasting* involved FCC regulations, adopted after a lengthy rule-making proceeding, that prospectively barred formation or transfer of co-located newspaper-broadcast combinations. Existing combinations were generally permitted to continue in operation. However, in communities in which there was common ownership of the only daily newspaper and the only broadcast station, or (where there was more than one broadcast station) of the only daily newspaper and the only television station, divestiture of either the newspaper or the broadcast station was required within five years, unless grounds for waiver were demonstrated. The Court noted that, far from seeking to limit the flow of information, the FCC had acted "to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech." And the limited divestiture requirement "reflect[ed] a rational weighing of competing policies." The FCC had rationally concluded that forced dissolution of all existing co-located combinations, though fostering diversity, would disrupt the industry and cause individual hardship, and it would or might harm the public interest in several respects, especially in light of the fact that the number of co-located newspaper-broadcast combinations was already on the decline as a result of natural market forces and would decline further as a result of the prospective rules. Hence, the regulations were "a reasonable means of promoting the public interest in diversified mass communications" and did not violate the First Amendment rights of those who would be denied broadcast licenses pursuant to them.[792]

[I287] *Metro Broadcasting* was an equal protection challenge against two minority preference policies adopted by the FCC. The policies in question were (1) a program awarding an enhancement for minority ownership in comparative proceedings for new licenses, and (2) the minority "distress sale" program, which permitted a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms. The Court upheld the policies, finding that they were substantially related to the achievement of the important governmental interest in diversity of views and information over the airwaves.[793]

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[791] Nat'l Broad. Co. v. United States, 319 U.S. 190, 198–227 (1943). There, the Court upheld, against a First Amendment challenge, *inter alia*, regulations providing that no license would be granted: (1) to a standard broadcast station having any contract, arrangement, or understanding with a network organization under which the station was prevented or hindered from, or penalized for, broadcasting the programs of any other network organization; (2) to a standard broadcast station having any contract, etc., with a network organization that prevented or hindered another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevented or hindered another station serving a substantially different area from broadcasting any program of the network organization; (3) to a standard broadcast station having any contract, etc., with a network organization that provided for the affiliation of the station with the network organization for a period longer than two years; (4) to a standard broadcast station having any contract, etc., with a network organization under which the station was prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[792] Fed. Communications Comm'n v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 800–04 (1978).

[793] Metro Broad. v. Fed. Communications Comm'n, 497 U.S. 547, 563–600 (1990). *See also* para. K20.

[I288] *Red Lion* upheld the FCC's "fairness doctrine"—which required broadcasters to provide adequate coverage of public issues and to ensure that this coverage fairly and accurately reflected the opposing views[794]—"because the doctrine advanced the substantial governmental interest in ensuring balanced presentations of views in [radio and television,] and yet posed no threat that a broadcaster would be denied permission to carry a particular program or to publish his own views."[795] However, at the same time, the Court noted that if experience with the administration of that doctrine indicated that it had the net effect of reducing, rather than enhancing, the volume and quality of coverage, it would then be forced to reconsider the constitutional implications.[796] The FCC repealed the fairness doctrine in 1987.[797]

[I289] "[I]n most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming."[798] In *CBS v. Democratic National Committee*, the Court held that, assuming governmental action is involved, the First Amendment does not require broadcasters to accept paid editorial advertisements from citizens at large. Although it was argued that such a requirement

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[794] Under the fairness doctrine the FCC's responsibility was to judge whether a licensee's overall performance indicated a sustained good faith effort to meet the public interest in being fully and fairly informed.

[795] *See* Fed. Communications Comm'n v. League of Women Voters of California, 468 U.S. 364, 378 (1984), *discussing* Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 386–400 (1969). In the latter case, the Court sustained the "political editorial" and "personal attack" portions of the FCC's fairness doctrine. The "personal attack" rule provided that when, during the presentation of views on a controversial issue of public importance, an attack was made upon the honesty, character, integrity, or like personal qualities of an identified person, the licensee should notify the person attacked and offer him an opportunity to respond. The "political editorializing" rule provided that, when a licensee endorsed a candidate for political office, it should give other candidates or their spokesmen an opportunity to respond. The fairness doctrine did not require that a broadcaster provide "common carriage;" it contemplated a wide range of licensee discretion. *See* Fed. Communications Comm'n v. Midwest Video Corp., 440 U.S. 689, 795, n.14 (1979).

[796] Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 393 (1969).

[797] *See* Syracuse Peace Council, 2 F.C.C. Rec. 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). The FCC found that the doctrine produced chilling effects by placing burdens on stations that chose to air numerous programs on controversial issues—including the fear of denial of license renewal due to fairness doctrine violations, the cost of defending fairness doctrine attacks and of providing free air time to opposing views if a fairness violation were found, and the reputational harm resulting from even a frivolous fairness challenge. Therefore, in net effect the fairness doctrine often discouraged the presentation of controversial issue programming. Furthermore, since the doctrine compelled coverage only of "major" or "significant" opinions, the FCC claimed that in assessing fairness doctrine compliance, the Commission was called upon to evaluate broadcasters' decisions concerning the importance of given viewpoints. The fairness doctrine thus had the potential to interject the government, even unintentionally, into the position of favoring one type of opinion over another. The FCC also noted that the growth in the number of broadcast outlets reduced any need for the doctrine; since there were so many more stations, it was likely that all sides of issues would be covered one place or another. The court of appeals concluded that the FCC's decision that the fairness doctrine no longer served the public interest was neither arbitrary, capricious nor an abuse of discretion. Accordingly it upheld the decision without reaching the constitutional issues.

[798] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 675 (1998).

would serve the public's First Amendment interest in receiving additional views on public issues, the Court rejected this approach. "The public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth. . . . [This] [p]roblem would not necessarily be solved by applying the Fairness Doctrine . . . to editorial advertising. If broadcasters were required to provide time, free when necessary, for the discussion of the various shades of opinion on the issue discussed in the advertisement, the affluent could still determine in large part the issues to be discussed. . . . If the Fairness Doctrine were applied to editorial advertising, there [wa]s also the substantial danger that the effective operation of that doctrine would be jeopardized. To minimize financial hardship and to comply fully with its public responsibilities, a broadcaster might well be forced to make regular programming time available to those holding a view different from that expressed in an editorial advertisement. . . . The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees, who [we]re accountable for broadcast performance, to private individuals, who [we]re not. The public interest would no longer be 'paramount,' but, rather, subordinate to private whim, especially since . . . a broadcaster would be largely precluded from rejecting editorial advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster. . . . [And] [i]f the Fairness Doctrine were suspended . . . to alleviate these problems, . . . the congressional objective of balanced coverage of public issues would be seriously threatened."[799] Besides, under a constitutionally commanded and government supervised right-of-access system, the FCC "would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group ha[d] had sufficient opportunity to present its viewpoint and whether a particular viewpoint ha[d] already been sufficiently aired," which would create "the risk of an enlargement of Government control over the content of broadcast discussion of public issues."[800]

[I290] Although public broadcasting, as a general matter, does not lend itself to scrutiny under the "public forum" doctrine, candidate debates present the narrow exception to the rule.[801] Of course, "in many cases, it is not feasible for the broadcaster to allow unlimited access to a candidate debate. Yet . . . a broadcaster cannot grant or deny access to a candidate debate on the basis of whether it agrees with a candidate's views. Viewpoint discrimination in this context would present not a 'calculated risk,' . . . but an inevitability of skewing the electoral dialogue."[802] To be consistent with the First Amendment, the exclusion of a speaker from a debate, which is a "nonpublic forum," must be a "reasonable, viewpoint-neutral exercise of [the broadcaster's] journalistic discretion."[803] For example, it is reasonable for a broadcaster to exclude from a debate a candidate who has "generated no appreciable public interest."[804]

[I291] In *CBS v. FCC*, the Court upheld a statute allowing the FCC to revoke any broadcasting station license for willful or repeated failure to allow reasonable access to

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799 Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 123–24 (1973).

800 *Id.* at 126–27.

801 *See, in extenso*, para. I345.

802 Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676 (1998).

803 *Id.*

804 *Id.* at 682.

broadcast airtime for candidates seeking federal elective office. The provision made "a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." In addition, it defined a sufficiently limited right of "reasonable access," so that "the discretion of broadcasters to present their views on any issue or to carry any particular type of programming" was not impaired.[805]

[I292] In *McConnell*, the Court upheld, on their face, the provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) that required broadcasters to keep publicly available records of politically related broadcasting requests. The provision, which called for broadcasters to keep records of broadcast requests "made by or on behalf of any candidate," imposed upon a licensee a small administrative burden. And it was supported by significant governmental interests in verifying that licensees complied with their statutory obligations to allow political candidates "equal time" and to sell such time at the "lowest unit charge;" in evaluating whether they processed candidate requests in an evenhanded fashion to help assure broadcasting fairness; in making the public aware of how much candidates spent on broadcast messages; and in providing an independently compiled set of data for verifying candidates' compliance with statutory disclosure requirements and source limitations. The provision requiring broadcasters to keep records of requests (made by anyone) to broadcast messages referring either to a "legally qualified candidate" or to "any election to Federal office," served similar governmental interests and imposed only a small incremental burden. Finally the "issue request" requirements—which called for broadcasters to keep records of requests (made by anyone) to broadcast messages related to a "national legislative issue of public importance," or a "political matter of national importance"—seemed likely to help determine whether broadcasters were fulfilling their obligations under the FCC's regulations to afford reasonable opportunity for the discussion of conflicting views on important public issues or whether they too heavily favored entertainment, discriminating against public affairs broadcasts. Whether these requirements imposed disproportionate administrative burdens would depend on how the FCC would interpret and apply them. Hence, without the greater information any such challenge would likely provide, the Court could not say that the provisions' administrative burdens were so great, or their justifications so minimal, as to warrant finding them facially unconstitutional.[806]

b. Cable TV[807]

[I293] Cable television[808] provides to its subscribers news, information, and entertainment. Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and oper-

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[805] Columbia Broad. Sys. v. Fed. Communications Comm'n, 453 U.S. 367, 396–97 (1981).

[806] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 235–38, 240–46 (2003).

[807] *See also* paras. I151 *et seq. (sexually explicit speech on cable television).*

[808] "Cable systems rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers. Cable systems make this connection much like telephone companies, using cable or optical fibers strung above-ground or buried in ducts to reach the homes or businesses of subscribers." *See* Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 627–28 (1994).

ators[809] "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats."[810] Hence, "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[811]

[I294] The rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation does not apply in the context of cable regulation, which "does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, there is no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases [of the Court] is inapt when determining the First Amendment validity of cable regulation. . . . [Hence,] the physical characteristics [of cable systems] do not require the alteration of settled principles of the First Amendment jurisprudence."[812]

[I295] "This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech."[813] "Although a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium. . . . When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch. The potential for abuse of this private power over a central avenue of communication cannot be overlooked. . . . The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[814] "Cable televi-

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[809] "The cable television industry includes both cable operators (those who own the physical cable network and transmit the cable signal to the viewer) and cable programmers (those who produce television programs and sell or license them to cable operators). . . . Although cable operators may create some of their own programming, most of their programming is drawn from outside sources. These outside sources include not only local or distant broadcast stations, but also many national and regional cable programming networks." *See* Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 628–29 (1994).

[810] Los Angeles v. Preferred Communications, 476 U.S. 488, 494 (1986).

[811] Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 636 (1994) *(Turner I), citing* Leathers v. Medlock, 499 U.S. 439, 444 (1991).

[812] Turner Broad Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 639 (1994). The Court also found that the mere assertion of dysfunction or failure in the cable market, without more, was not sufficient to shield a speech regulation from the First Amendment standards applicable to non-broadcast media. *Id.* at 639–40.

[813] *Id.*, at 639.

[814] *Id.*, at 656–57.

sion, like broadcast media, presents unique problems, which inform [the Court's] assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts."[815]

[I296] Congress enacted the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable television industry. Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, endangered the ability of over-the-air broadcast television stations to compete for a viewing audience, and thus for necessary operating revenues. At issue in *Turner I* was the constitutionality of the so-called "must-carry" provisions, contained in Sections 4 and 5 of the Cable Act, which required cable operators to carry the signals of a specified number of local broadcast television stations.[816] "The must-carry provisions ha[d] the potential to interfere with protected speech in two ways. First, the provisions restrain[ed] cable operators' editorial discretion in creating programming packages 'by reduce[ing] the number of channels over which they exercise[d] unfettered control.' Second, the rules 'render[ed] it more difficult for cable programmers to compete for carriage on the limited channels remaining.'"[817] *Turner I* found that these provisions did not distinguish favored speech from disfavored speech on the basis of the ideas or views expressed, but it was a content-neutral regulation designed "to prevent cable operators from exploiting their economic power to the detriment of broadcasters" and "to ensure that all Americans, especially those unable to subscribe to cable, ha[d] access to free television programming—whatever its content."[818] Further, the Court held that, under the intermediate level of scrutiny applicable to content-neutral regulations, "must-carry" would be sustained if it were shown to further an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions did not "burden substantially more speech than [wa]s necessary to further those interests." Must-carry provisions were designed to "serve three interrelated interests: (1) preserving the benefits

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[815] United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000).

[816] Section 4 required carriage of "local commercial television stations," defined to include all full power television broadcasters, other than those qualifying as "non-commercial educational" stations under section 5, that operated within the same television market as the cable system. Cable systems with more than 12 active channels, and more than 300 subscribers, were required to set aside up to one-third of their channels for commercial broadcast stations that requested carriage. Cable systems with more than 300 subscribers, but only 12 or fewer active channels, should carry the signals of three commercial broadcast stations. Subject to a few exceptions, a cable operator could not charge a fee for carrying broadcast signals in fulfillment of its must-carry obligations. Section 5 of the Act imposed similar requirements regarding the carriage of local public broadcast television stations, referred to in the Act as local "non-commercial educational television stations." Taken together, thus, Sections 4 and 5 subjected all but the smallest cable systems nationwide to must-carry obligations, and they conferred must-carry privileges on all full power broadcasters operating within the same television market as a qualified cable system. *See* Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 632 (1994) *Turner I).*

[817] *See* Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 520 U.S. 180, 214 (1997) *(Turner II), quoting* Turner Broad. Sys. v. Fed. Communications Comm'n, 512 U.S. 622, 637 (1994) *(Turner I).* "Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *See* Turner I, *supra*, at 655.

[818] Turner Broad. Sys. v. Fed. Communications Comm'n, 512 U.S. 622, 649 (1994) *(Turner I).*

of free, over-the-air local broadcast television; (2) promoting the widespread dissemination of information from a multiplicity of sources; and (3) promoting fair competition in the market for television programming."[819] Although these interests were important in the abstract, a four-Justice plurality concluded genuine issues of material fact remained regarding whether "the economic health of local broadcasting [wa]s in genuine jeopardy and need of the protections afforded by must-carry" and whether must-carry burdened substantially more speech than was necessary to further the government's legitimate interests.[820]

[I297] In *Turner II*, the Court reaffirmed that must-carry served the above important governmental interests. Forty percent of American households continued to rely on over-the-air signals for television programming. Despite the growing importance of cable television and alternative technologies, broadcasting was "demonstrably a principal source of information and entertainment for a great part" of the population. The Court identified a corresponding "governmental purpose of the highest order" in ensuring public access to "a multiplicity of information sources." Moreover, the Court noted that government has an interest in "eliminating restraints on fair competition . . . , even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment."[821] Considering the expanded record of the case, the Court found that the must-carry provisions served the aforesaid governmental interests in a direct and effective way. Congress had reasonably concluded from the substantial body of evidence before it that attaining cable carriage would be of increasing importance to ensuring broadcasters' economic viability, and that, absent legislative action, the free local off-air broadcast system was endangered. Such evidence amply indicated that a broadcast station's viability depended, to a material extent, on its ability to secure cable carriage; broadcast stations had fallen into bankruptcy, curtailed their operations, and suffered serious reductions in operating revenues as a result of adverse carriage decisions by cable systems; and stations without carriage encountered severe difficulties obtaining financing for operations. Further, the Court held that the must-carry provisions were narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable. Evidence adduced on remand indicated the vast majority of cable operators had not been affected in a significant manner by must-carry. Cable operators were able to satisfy their must-carry obligations 87 percent of the time using previously unused channel capacity; 94.5 percent of the 11,628 cable systems nationwide did not have to drop any programming in order to fulfill their must-carry obligations; the remaining 5.5 percent had to drop an average of only 1.22 services from their programming; and cable operators nationwide carried 99.8 percent of the programming they had carried before enactment of must-carry. And the possibilities that must-carry would prohibit dropping a broadcaster even if the cable operator had no anti-competitive motives or if the broadcaster would survive without cable access were not "so prevalent as to render must-carry substantially overbroad." In addition, given "the considerable expense and delay inherent in antitrust litigation,

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819 *Id.* at 662–63.

820 *Id.* at 665. Justice Stevens would have found the statute valid on the record then before the Court, but he agreed to remand the case to ensure a judgment of the Court. *Id.* at 674. Accordingly, the case was returned to the district dourt for further proceedings.

821 Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 520 U.S. 180, 190 (1997) *(Turner II), quoting* Turner Broad. Sys. v. Fed. Communications Comm'n, 512 U.S. 622, 663 (1994) *(Turner I).*

and the great disparities in wealth and sophistication between the average independent broadcast station and average cable system operator, . . . a system of antitrust enforcement or an administrative complaint procedure to protect broadcasters from cable operators' anticompetitive conduct . . . would [be an] inadequate substitute[e] for guaranteed carriage."[822]

c. Internet[823]

[I298] The Internet, an international network of interconnected computers, is a unique and wholly new medium of worldwide human communication. "It is the outgrowth of what began in 1969 as a military program called 'ARPANET,' which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. . . . Individuals can obtain access to the Internet from many different sources, generally hosts themselves or entities with a host affiliation. . . . Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. . . . [The main ones] are electronic mail ('e-mail'), automatic mailing list services ('mail exploders'), 'newsgroups,' 'chat rooms,' and the 'World Wide Web.' All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium—known as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."[824] "The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. . . . Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial 'search engine' in an effort to locate sites on a subject of interest. . . . Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information. . . . No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web."[825] "The Internet is not as 'invasive' as radio

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[822] Turner Broad. Sys. v. Fed. Communications Comm'n, 520 U.S. 180, 208–25 (1997) *(Turner II)*. The Court also found that other suggestions—such as a leased-access regime requiring cable operators to set aside channels for both broadcasters and cable programmers to use at a regulated price or subsidies for broadcasters—were not adequate alternatives to must-carry for achieving the government's aims.

[823] *Sexually explicit speech* on the Internet is discussed in paras. I157 *et seq.*

[824] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849–51 (1997).

[825] *Id.* at 852–53.

or television. . . . [C]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"[826] Moreover, "unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds."[827] Hence, the Court has found "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[828]

[826] *Id.* at 869.
[827] *Id.* at 870.
[828] *Id.*

PART II: FREE SPEECH PLUS CONDUCT

A. IN GENERAL

[I299] "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. . . . It may not, however, proscribe particular conduct *because* it has expressive elements. '[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription. A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.'"[829]

[I300] In *United States v. O'Brien*, the Court established the standard for judging the validity of content-neutral restrictions on expressive conduct. Under *O'Brien*, such a regulation will be sustained "if it furthers an important governmental interest [that is] unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[830]

B. TIME, PLACE, OR MANNER RESTRICTIONS

[I301] The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. "[E]ven in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[831]

[I302] "The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. . . . Government regulation of expressive activity is content-neutral so long as it is justified without reference to the content of the regulated speech."[832]

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[829] Texas v. Johnson, 491 U.S. 397, 406 (1989).

The line distinguishing "expressive conduct" from "pure speech" is sometimes hazy. In *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001), the Court noted that the acts of "disclosing" and "publishing" information fall within the category of "speech," as distinct from the category of expressive conduct, and, subsequently, it held that the delivery of a tape recording is the kind of "speech" that the First Amendment protects, since the purpose of such a delivery is to provide the recipient with the text of recorded statements.

[830] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[831] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), *quoting* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[832] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). *See, in extenso*, paras. I39 *et seq.*

[I303] "[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests, but . . . it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"[833] "[T]his standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. 'The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted. . . . [Moreover,] the validity of [such a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case."[834] Further, "even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must 'leave open ample alternative channels for communication.'"[835]

[I304] "Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. [For instance, where, under a content-neutral permit scheme,] the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content."[836] The Court has "thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review."[837] That a municipal ordinance describes grounds on which the city "may" deny a permit does not mean that it allows the city to waive requirements for some favored speakers; such a waiver would be unconstitutional, but an abuse of this kind "must be dealt with if and when a pattern of unlawful favoritism appears," rather than by insisting upon a rigid, no-waiver application of the permit requirements.[838]

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[833] Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989), *quoting* United States v. Albertini, 472 U.S. 675, 689 (1985).

[834] Ward, *id.* at 799–801, *quoting* Albertini, *id.* at 689. In the latter case, the Court stated that "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. . . . Regulations that burden speech incidentally or control the time, place, and manner of expression, . . . must be evaluated in terms of their general effect." *See* Albertini, *supra*, at 688–89.

[835] City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994), *quoting* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[836] Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002), *citing* Forsyth County v. Nationalist Movement, 505 U.S. 123, 131 (1992).

[837] Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002), *citing* Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

[838] Thomas v. Chicago Park Dist., 534 U.S. 316, 324–25 (2002).

[I305] The Court has pointed out that there are essential differences between an injunction and a generally applicable time, place, or manner ordinance. "Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree."[839] "Injunctions . . . can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred. . . . [However,] [i]njunctions also carry greater risks of censorship and discriminatory application than do general ordinances."[840] Considering these differences, the Court has held that, "when evaluating a content-neutral injunction, the standard time, place, and manner analysis is not sufficiently rigorous. [Instead the Court asks] whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[841]

C. EXPRESSIVE ACTIVITY ON PROPERTY OWNED OR CONTROLLED BY THE GOVERNMENT (THE "PUBLIC FORUM" DOCTRINE)

1. Types of Fora—Standards of Review

[I306] "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[842] "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[843] The government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[844] But that "does not mean that it can restrict speech in whatever way it likes."[845] "The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints."[846] For example, in *Jews for Jesus,* the Court unanimously struck down a regulation that prohibited "all First Amendment activities" in the Los Angeles International Airport, because no conceivable governmental interest would justify such a sweeping ban.[847]

[I307] "[T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.

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[839] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764 (1994). Under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a "cognizable danger of recurrent violation." *See* United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953).

[840] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764–65 (1994).

[841] *Id.* at 765.

[842] United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981).

[843] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799–800 (1985).

[844] Greer v. Spock, 424 U.S. 828, 836 (1976), *quoting* Adderley v. Florida, 385 U.S. 39, 47 (1966).

[845] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998).

[846] United States v. Kokinda, 497 U.S. 720, 725 (1990) (plurality opinion).

[847] Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987).

Accordingly, the extent to which the Government can control access depends on the character of the property at issue."[848] In *Perry*, the Court announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to government property. There, the Court identified three types of fora: the traditional public forum, the public forum created by government designation, and the non-public forum.[849]

[I308] Traditional public fora are those places that, "by long tradition or by government fiat, have been devoted to assembly and debate."[850] Public streets, sidewalks, and parks fall into this category.[851] "In these quintessential public for[a], the government may not prohibit all communicative activity."[852] "Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from [such fora] only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[853] "The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[854]

[I309] Second, "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[855] "Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will."[856] "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. . . . Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. . . . The

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[848] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985).

[849] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44–46 (1983).

[850] *Id.* at 45.

[851] A public street or sidewalk does not lose its status as a traditional public forum simply because it runs through a residential neighborhood. *See* Frisby v. Schultz, 487 U.S. 474, 480 (1988). Similarly, public streets and sidewalks around an abortion clinic are traditional public fora. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764 (1994).

[852] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[853] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985).

[854] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

The suggestion that the government has a high burden in justifying speech restrictions relating to traditional public fora made its first appearance in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515–16 (1939). Justice Roberts, concluding that individuals have a right to use "streets and parks for communication of views," reasoned that such a right flowed from the fact that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and *discussing* public questions." The Court has rejected "the view that traditional public forum status extends beyond its historic confines;" the doctrines surrounding traditional public fora may not be extended to situations where such history is lacking. *See* Arkansas Educ. Television Comm. v. Forbes, 523 U.S. 666, 678 (1998).

[855] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985).

[856] United States v. Grace, 461 U.S. 171, 177 (1983), *citing* Greer v. Spock, 424 U.S. 828, 836 (1976).

Court has also examined the nature and location of the property and its compatibility with expressive activity to discern the government's intent."[857] For instance, *Widmar* held that "a state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use. . . . The policy evidenced a clear intent to create a public forum, not withstanding the University's erroneous conclusion that the Establishment Clause required the exclusion of groups meeting for religious purposes."[858] Similarly, the Court found a public forum where a municipal auditorium and a city-leased theater were "designed for and dedicated to expressive activities."[859] Moreover, "[t]o create a forum of this type, the government must intend to make the property 'generally available' . . . to a class of speakers."[860] In *Widmar*, for example, a state university created a public forum for registered student groups by implementing a policy that expressly made its meeting facilities "generally open" to such groups.[861] "A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers."[862] In *Perry*, for instance, the Court held a school district's internal mail system was not a designated public forum, even though selected speakers were able to gain access to it.[863] Indeed, the Court has clearly distinguished "between 'general access,' . . . which indicates the property is a designated public forum, and 'selective access,' . . . which indicates the property is a nonpublic forum. On one hand, the government creates a designated public forum when it makes its property generally available to a certain class of speakers. . . . On the other hand, the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.' . . . [This] distinction between general and selective access furthers First Amendment interests. By recognizing the distinction, [the Court] encourage[s] the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers."[864]

[I310] "Although a State is not required to indefinitely retain the open character of a designated public forum, as long as it does so, it is bound by the same standards as

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[857] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985). "In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum." *Id.* at 804. "[T]he location of property has bearing, because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction." *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 680 (1992), *citing* United States v. Grace, 461 U.S. 171, 179–80 (1983).

[858] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802–03 (1985), *discussing* Widmar v. Vincent, 454 U.S. 263, 267 (1981).

[859] Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975).

[860] Arkansas Educ. Television Comm. v. Forbes, 523 U.S. 666, 678 (1998).

[861] Widmar v. Vincent, 454 U.S. 263, 267 (1981).

[862] Arkansas Educ. Television Comm. v. Forbes, 523 U.S. 666, 679 (1998).

[863] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

[864] Arkansas Educ. Television Comm. v. Forbes, 523 U.S. 666, 679–80 (1998).

apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition [of access to a designated public forum open for indiscriminate public use for communicative purposes] must be narrowly drawn to effectuate a compelling state interest."[865] In a case involving a *limited* public forum, "[t]he necessities of confining the forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. . . . Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' . . . nor may it discriminate against speech on the basis of its viewpoint. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, the Court has observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."[866] Relatedly, the Court also has held that the constitutional right of access to a limited public forum, reserved to a specific class of speakers, extends only to "other entities of similar character."[867]

[I311] Finally, other government properties are either non-public fora or not fora at all. Limitations on expressive activity conducted on non-public fora must survive only a much more limited review. The government can restrict access to a non-public forum "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."[868] The restriction "need only be reasonable; it need not be the most reasonable or the only reasonable limitation."[869] The Court has said that a restriction on speech in a non-public forum is "reasonable" when it is consistent with the government's "legitimate interest in preserving the property for the use to which it is lawfully dedicated."[870] Moreover, the Court has

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[865] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

[866] Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 829–30 (1995).

[867] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983).

[868] Arkansas Educ. Television Comm. v. Forbes, 523 U.S. 666, 677–78 (1998), *quoting* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985).

[869] Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 683 (1992).

[870] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983). The Court does not require that proof be present to justify the denial of access to a non-public forum on grounds that the proposed use may disrupt the property's intended function. *Id.* at 52, n.12. Nevertheless, the Court has required some explanation as to why certain speech is inconsistent with the intended use of the forum. In *Cornelius*, for example, the Court held that it was reasonable to exclude political advocacy groups from a fundraising campaign targeted at federal employees in part because "the record amply support[ed] an inference" that the participation of those groups would have jeopardized the success of the campaign. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 810 (1985).

"Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum, but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983). "[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn

emphasized that the non-public-forum analysis "concerns government's authority to provide assistance to certain persons in communicating with other persons who would not, as listeners, be acting for the government;" one's claim that government is constitutionally obliged to listen to him involves entirely different considerations from those on which resolution of non-public-forum cases turn.[871]

[I312] "In summary, traditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers. The government is free to open additional properties for expressive use by the general public or by a particular class of speakers, thereby creating designated public fora. Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all."[872] Regulation of speech activity on public fora is examined under strict scrutiny. "[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation, since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved."[873] "[R]egulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness."[874] Thus, "the government may—without further justification—restrict use to those who participate in the forum's official business."[875]

[I313] "[A]s an initial matter, a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns. [However,] forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum, [the Court] focuse[s] on the *access sought* by the speaker. When speakers seek general access to public property, the forum encompasses that property. . . . In cases in which access to a particular means of communication is sought, [the Court has] taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property."[876] For example, in *Lehman*, where petitioners sought to compel the city to permit political advertising on city-owned buses, the Court treated the advertising spaces on the buses as the forum.[877] And *Rosenberger* found a university's student activity fund, a *non-tangible* channel of communication, to be a limited public forum.[878]

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are reasonable in light of the purpose served by the forum and are viewpoint-neutral." *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985).

871 Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 282 (1984).

872 Arkansas Educ. Television Comm. v. Forbes, 523 U.S. 666, 678 (1998).

873 Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 650–51 (1981).

874 United States v. Kokinda, 497 U.S. 720, 727 (1990) (plurality opinion), *citing* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

875 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53 (1983).

876 Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 801 (1985) (emphasis added).

877 Lehman v. City of Shaker Heights, 418 U.S. 298, 300 (1974).

878 Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 829–30 (1995). Generally the Court has been quite reluctant to find even limited public fora in *non-tangible* channels of communication. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 804 (1985) (a charity drive aimed at federal employees is not a limited public forum); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47–48 (1983) (a school's internal mail system is not a limited public forum).

2. Permit Requirement

[I314] A statute requiring a permit and a fee before authorizing public speaking, parades, or assemblies in public fora is a prior restraint on speech. "Although there is a 'heavy presumption' against the validity of a prior restraint, . . . the Court has recognized that government, in order to regulate competing uses of public for[a], may impose a permit requirement on those wishing to hold a march, parade, or rally."[879] Such a scheme, however, must meet certain constitutional requirements. "[A]ny permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. . . . [Further,] [i]t may not delegate overly broad licensing discretion to a government official. . . . A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' . . . To curtail that risk, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.' . . . The reasoning is simple: if the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion' . . . by the licensing authority, 'the danger of censorship and of abridgment of . . . precious First Amendment freedoms is too great' to be permitted."[880]

[I315] In exercise of its power to license parades on public streets, a state may charge a *license fee*, reasonably adjusted to the occasion, for meeting administrative and police expenses.[881] But a statutory scheme under which the decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the unbridled discretion of the administrator, who is not required to rely on objective, reasonable, and definite standards or provide any explanation for his decision, is unconstitutional.[882]

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[879] Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992), *citing* Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

[880] Forsyth County v. Nationalist Movement, 505 U.S. 123, 130–31 (1992). *See, in extenso*, paras. I12 *et seq.*, I18 *et seq.*

[881] Cox v. New Hampshire, 312 U.S. 569, 576–77 (1941).

[882] Forsyth County v. Nationalist Movement, 505 U.S. 123, 130–33 (1992). *See also* para. I111. In *Collin v. Smith*, 578 F.2d 1197, 1208 (7th Cir. 1978), *cert. denied*, Smith v. Collin, 439 U.S. 916 (1978), the Seventh Circuit held that a village ordinance requiring a parade or public assembly applicant to obtain $300,000 in public liability insurance and $50,000 in property damage insurance could not constitutionally be applied to prohibit a demonstration by members of the National Socialist party in a predominately Jewish village. In so holding, the court noted that the requirement was subject to discretionary waiver explicitly or by village co-sponsorship, and that appellees had proved in the district court that they could not obtain the requisite insurance, which would typically be unavailable to those very controversial groups as to which the village's interest in having insurance would presumably be the greatest.

3. Particular Applications

a. Court Grounds and Adjacent Sidewalks[883]

[I316] *Grace* held that the Supreme Court building and grounds fit within the description of non-public forum property. "Although the property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities. . . . [And] the property is not transformed into 'public forum' property merely because the public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified hours."[884] However, the public sidewalks surrounding the Court are "indistinguishable from any other sidewalks in Washington, D.C.," and constitute public fora, given that there is "no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave."[885] In *Grace*, the Court examined the constitutionality of a federal statute, as applied to the public sidewalks surrounding the Supreme Court, that prohibited among other things, the "display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" in the U.S. Supreme Court building and on its grounds. The Court held that the ban on the specified communicative activity, on the public sidewalks around the Court grounds, could not be justified as a reasonable place restriction, because it had an insufficient nexus with any of the public interests that might be thought to undergird the provision. The Court did not "denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds," but it was not convinced that "a total ban on carrying a flag, banner, or device on the public sidewalks substantially serve[d] these purposes." There was no suggestion, for example, that peaceful picketing or leafletting "in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." A total ban on such expressive conduct was "no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the [Court] building than on any other sidewalks in the city." Nor did the challenged prohibition sufficiently serve the averred purpose of protecting the Court from outside influence or preventing it from appearing to the public that the Court was subject to such influence, since, as noted above, the public sidewalks surrounding the Court grounds are no different than other public sidewalks in the city.[886]

b. "No-Campaign Zone" Around Polling Places

[I317] *Burson* sustained a state statute, applied only on election day, that prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. Both the plurality and dissent applied strict scrutiny, because the law was a facially content-based restriction on political speech in a public forum. In light of the logical connection between electioneering and the state's compelling interest in preventing voter intimidation and election fraud—an inherent

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883 *See also* paras. I357, I364.

884 United States v. Grace, 461 U.S. 171, 178 (1983).

885 *Id.* at 179–80.

886 *Id.* at 182–83.

connection borne out by a long history and a widespread and time-tested consensus among the 50 states—a four-Justice plurality found that it was faced with one of those rare cases in which the use of a facially content-based restriction was justified by interests unrelated to the suppression of ideas. The plurality concluded that the legislation survived strict scrutiny because it served the above compelling state interest, and it was narrowly tailored to accomplish that goal, since the minor geographic limitation prescribed by the statute did not constitute a significant impingement on First Amendment rights.[887]

c. Military Bases—Streets and Sidewalks Located Within Military Reservations

[I318] Military bases generally are not public fora. In *Flower*, the Court summarily reversed the conviction of a civilian for entering a military reservation after his having been ordered not to do so. At the time of his arrest, the petitioner had been quietly distributing leaflets on New Braunfels Avenue, within the limits of Fort Sam Houston. No sentry was posted anywhere along the street, which was open to unrestricted civilian traffic 24 hours a day. The Court determined New Braunfels Avenue was "a completely open street," and that the military had "abandoned any claim that it ha[d] special interests in who walk[ed], talk[ed], or distribute[d] leaflets on the avenue." Under those circumstances, the base commandant could "no more order [Flower] off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street."[888]

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[887] Burson v. Freeman, 504 U.S. 191, 198–211 (1992). Relatedly, the plurality noted that the Court "never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question. . . . Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout. Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud 'would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures [. . .] should be permitted to respond to potential deficiencies in the electoral process with foresight, rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.'" *Id.* at 208–09, *quoting* Munro v. Socialist Workers Party, 479 U.S. 189, 195–96 (1986). Justice Scalia concurred in the judgment, reasoning that the statute, though content-based, was constitutional was a reasonable, viewpoint-neutral regulation of a non-public forum. *Id.* at 214–16.

The three dissenters noted, *inter alia*, that the statute was underinclusive, because it did not restrict other types of speech, such as charitable and commercial solicitation or exit polling, within the 100-foot zone, which "presents at least as great a potential interference with orderly access to the polls as does the distribution of campaign leaflets, the display of campaign posters, or the wearing of campaign buttons." *See id.* at 223–24. The plurality rejected this position, saying that "there is ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses. States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Id.* at 207.

[888] Flower v. United States, 407 U.S. 197, 198 (1972) *(per curiam)*.

[I319] *Greer* clarified that the significance of the opinion in *Flower* was limited by the unusual facts underlying the earlier decision. *Greer* made clear that there is "no generalized constitutional right to make political speeches or distribute leaflets" on military bases, even if they are open to the public. In that case, the Court held that, even though certain parts of the Fort Dix were open to the public (civilian vehicular traffic was permitted on paved roads within the reservation, and civilian pedestrian traffic was permitted on both roads and footpaths), they still did not constitute a public forum in light of the "historically unquestioned power of [a] commanding officer summarily to exclude civilians from the area of his command." And "[t]he fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not, of itself, serve to convert Fort Dix into a public forum or to confer upon political candidates a First Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever." The Court then proceeded to uphold a regulation banning the distribution of literature without the prior approval of the base commander. In so doing, the Court emphasized that the regulation on leafletting did not authorize the Fort Dix authorities to prohibit the distribution of "conventional political campaign literature." Rather, the only publications that a military commander might disapprove were those that he found to constitute "a clear danger to [military] loyalty, discipline, or morale."[889]

[I320] *Albertini* considered respondent's conviction for re-entering a military base (Hickam), during the base's annual open house for Armed Forces Day, after being subject to an order barring him from entering that establishment based on his previous improper conduct on the base (respondent had destroyed secret Air Force documents by pouring animal blood on them). The Court first noted that Hickam did not constitute a public forum merely because the base was used to communicate ideas or information during the open house. Further, it held that, whether or not Hickam constituted a public forum on the day of the open house, the exclusion of respondent did not violate the First Amendment. Respondent conceded that the commander of Hickam could exclude him from the closed base, but contended this power was extinguished when the public was invited to enter on Armed Forces Day. The Court did not agree that "the historically unquestioned power of [a] commanding officer to exclude civilians from the area of his command" should be analyzed in the same manner as government regulation of a traditional public forum simply because an open house was held at Hickam. "The fact that respondent had previously received a valid bar letter distinguished him from the general public and provided a reasonable grounds for excluding him from the base. That justification did not become less weighty when other persons were allowed to enter. Indeed, given the large number of people present during an open house, the need to preserve security by excluding those who ha[d] previously received bar letters could become even more important, because the military [might] be unable to monitor closely who [came] and [went.]" Under these considerations, the Court said that, "[w]here a bar letter is issued on valid grounds, a person may not claim immunity from its prohibition on entry merely because the military has temporarily opened a military facility to the public." Nor did the general exclusion of recipients of bar letters from

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[889] Greer v. Spock, 424 U.S. 828, 838–40, n.10 (1976).

military open houses violate the First Amendment. The relevant regulation was content-neutral and served a significant government interest by barring entry to a military base by persons whose previous conduct demonstrated that they were a threat to security. And "nothing in the First Amendment requires military commanders to wait until persons subject to a valid bar order have entered a military base to see if they will conduct themselves properly during an open house."[890]

d. Prisons

[I321] Jailhouse grounds do not constitute public fora. *Adderley* held that "demonstrators could be barred from jailhouse grounds not ordinarily open to the public, at least where the demonstration obstructed the jail driveway and interfered with the functioning of the jail."[891] In *Jones*, prisoners challenged the constitutionality of prison regulations prohibiting prisoners from soliciting other inmates to join a prisoners' labor union and barring union meetings and bulk mailings concerning the union from outside sources. The Court upheld the regulations in the face of a First Amendment challenge on the basis that the First Amendment activity was incompatible with reasonable considerations of penal management. The Court also rejected the claim that the grant of access to the Jaycees and Alcoholics Anonymous had transformed the prison into a public forum. The Court analogized a prison to a military base, stating that a "prison may be no more easily converted into a public forum than a military base," and found that prison officials could treat the union differently from other organizations such, as the Jaycees and Alcoholics Anonymous, for meetings and for bulk mailing purposes, because the union had "the avowed intent to pursue an adversary relationship with the prison officials," and its chartered purpose was illegal under state law. The Court concluded that "[t]here is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence."[892]

e. Public Libraries

[I322] *Brown v. Louisiana* held that the First Amendment protected the use of a public library as a site for a silent and peaceful protest by five young black men against discrimination. There was no finding by the Court that the library was a public forum. Nevertheless, the Court pointed out that state regulation of libraries and other public facilities must be reasonable and non-discriminatory, and may not be used as a pretext for punishing those who exercise their constitutional rights.[893]

[I323] Internet access in public libraries is neither a "traditional" nor a "designated" public forum. First, this resource did not exist until quite recently. Second, "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a

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890 United States v. Albertini, 472 U.S. 675, 686–89 (1985).

891 *See* Grayned v. City of Rockford, 408 U.S. 104, 121, n.49 (1972), *discussing* Adderley v. Florida, 385 U.S. 39, 41–42 (1966).

892 Jones v. N. Carolina Prisoners' Union, 433 U.S. 119, 132–36 (1977).

893 Brown v. Louisiana, 383 U.S. 131, 143 (1966).

public forum for the authors of books to speak. It provides Internet access, not to 'encourage a diversity of views from private speakers,' . . . but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[894]

f. Airport Terminals

[I324] *Jews for Jesus* struck down a resolution banning all "First Amendment activities" within the Central Terminal Area at Los Angeles International Airport. The resolution "reache[d] the universe of expressive activity . . . [and did] not merely regulate expressive activity in the Central Terminal Area that might create problems such as congestion or the disruption of the activities of those who used [the airport.] . . . [I]t prohibit[ed] even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enter[ed the airport] might be found to violate the resolution by engaging in some 'First Amendment activit[y].'" The Court thought it obvious that, even if the airport were a non-public forum, "no conceivable governmental interest would justify such an absolute prohibition of speech."[895]

[I325] *International Society for Krishna Consciousness v. Lee* involved a regulation forbidding, *inter alia*, the repetitive solicitation of money within the terminal buildings of the three major airports in the New York City area. The Court held that an airport terminal operated by a public authority is a non-public forum, and thus a ban on solicitation need only satisfy a reasonableness standard. "Reflecting the general growth of the air travel industry, airport terminals have only recently achieved their contemporary size and character. . . . Moreover, even within the rather short history of air transport, it is only in recent years that it has become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities. . . . Thus, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity." Nor had the particular New York terminals "been intentionally opened by their operators to such activity."[896] Moreover, the argument that speech activities historically occurred at "transportation nodes," such as rail and bus stations, wharves, and Ellis Island, was of little import for two reasons. First, many of these sites traditionally have had private ownership. Second, "the relevant unit for [the Court's] inquiry [wa]s an airport, not 'transportation nodes' generally." As the Court stressed, "[w]hen new methods of transportation develop, new methods for accommodating that transportation are also likely to be needed. And with

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[894] United States v. Am. Library Ass'n, 539 U.S. 194, 206 (2003).

[895] Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574–75 (1987). Additionally, the Court found no apparent saving construction of the resolution. The suggestion that the resolution was not substantially overbroad because it was intended to reach only expressive activity unrelated to airport-related purposes was unpersuasive. "Much nondisruptive speech . . . may not be 'airport related,' but is still protected speech even in a nonpublic forum." Moreover, the vagueness of the suggested construction—which would result in giving airport officials the power to decide in the first instance whether a given activity was airport-related—presented serious constitutional difficulty. *Id.* at 575–76.

[896] Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 680 (1992).

each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity. To make a category of 'transportation nodes,' therefore, would unjustifiably elide what may prove to be critical differences of which the courts should rightfully take account. The 'security magnet' for example, is an airport commonplace that lacks a counterpart in bus terminals and train stations. . . . To blithely equate airports with other transportation centers, therefore, would be a mistake."[897] Further, the Court held that the challenged ban on solicitation was reasonable. "'Solicitation requires action by those who would respond: the individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card.' . . . Passengers who wish to avoid the solicitor may have to alter their path, slowing both themselves and those around them. The result is that the normal flow of traffic is impeded. . . . This is especially so in an airport, where air travelers, who are often weighted down by cumbersome baggage may be hurrying to catch a plane or to arrange ground transportation. . . . Delays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours' worth of subsequent inconvenience."[898] "In addition, face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation. . . . The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. . . . Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly."[899] The Port Authority of New York and New Jersey had decided that its interest in monitoring such activities could best be accomplished by limiting solicitation and distribution to the sidewalk areas outside the terminals. "Thus the resulting access of those who would solicit the general public [wa]s quite complete." The Court concluded that "[t]he inconveniences to passengers and the burdens on Port Authority officials flowing from solicitation activity [might] seem small, but, viewed against the fact that pedestrian congestion is one of the greatest problems facing the three [New York] terminals, . . . the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive."[900]

[I326] The companion case, *Lee v. International Society for Krishna Consciousness*, invalidated the leafletting ban in the interior of New York airport terminals. Justice O'Connor held that the regulation banning the "continuous or repetitive distribution of printed or written material" could not be upheld as reasonable on the record of the case. As O'Connor noted, "leafletting does not entail the same kinds of problems presented by face-to-face solicitation. Specifically, 'one need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand. The distribution of

[897] *Id.* at 681–82.
[898] *Id.* at 683–84.
[899] *Id.* at 684.
[900] *Id.* at 685.

literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time.'"[901] Moreover, the Port Authority had not offered any justifications or record evidence to support its ban on the distribution of pamphlets alone. Relatedly, Justice O"Connor pointed out that it was still open for the Port Authority to promulgate regulations of the time, place, and manner of leafletting. For example such activity could restricted to a "relatively uncongested part of the airport terminals."[902] For similar reasons, four other members of the Court, who held that the airport terminals are public fora, had no difficulty deciding that the regulation could not survive strict scrutiny, since it was not drawn in narrow terms, and it did not leave open ample alternative channels for communication.[903]

g. Property Owned or Controlled by the U.S. Postal Service

i. Mail Boxes—Mail Regulations[904]

[I327] The Constitution provides Congress the power "To establish Post Offices and post Roads" and "To make all Laws which shall be necessary and proper" for executing this task (Article I, Section 8). This provision authorizes "not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. . . . [The postal power of Congress includes] [t]he right to designate what shall be carried[, which] necessarily involves the right to determine what shall be excluded."[905] However broad this power may be, it may not, nevertheless, be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment.[906] "The United States may give up the post office when it sees fit, but, while it carries it on, the use of the mails is [a] part of free speech."[907]

[I328] In *Greenburgh*, the Court sustained a federal statute making it unlawful for persons to deposit unstamped "mailable matter" in a letterbox approved by the U.S. Postal Service as an "authorized depository" of the mail. "[W]hen a letterbox is so designated, it becomes an essential part of the Postal Service's nationwide system for the delivery and receipt of mail. In effect, the postal customer, although he pays for the physical components of the 'authorized depository,' agrees to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his mail. "The Court held that "a letterbox, once designated an 'authorized depository,' does not at the same time undergo a transformation into a 'public forum' of some limited nature

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901 Lee v. Int'l Soc'y for Krishna Consciousness, 505 U.S. 830 (1992) *(per curiam), in conjunction with* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 690 (1992), *quoting* United States v. Kokinda, 497 U.S. 720, 734 (1990) (plurality opinion).

902 Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 692 (1992).

903 *Id.* at 703.

904 *See also* paras. G37, G111, G154 *(search of mail)*; para. I25 *(prior restraints)*; paras. I125, I 136 *(ban on the distribution of obscene materials or child pornography through the mails)*; para. I180 *(prohibition on the mailing of unsolicited advertisements for contraceptives).*

905 *Ex parte* Jackson, 96 U.S. 727, 732 (1878).

906 United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 126 (1981).

907 Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965).

to which the First Amendment guarantees access to all comers," noting that the government "has power to preserve the property under its control for the use to which it is lawfully dedicated." Moreover, the prohibition at issue was reasonable, for it "protect[ed] mail revenues while at the same time facilitating the secure and efficient delivery of the mails."[908]

[I329] "Use of the postal power to regulate material that is not fraudulent or obscene raises grave constitutional questions."[909] *Hannegan* involved a statute providing that, in order to be admitted as second class mail, a publication "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts." The Court held that, under the foregoing provision, the Postmaster General could not deny subsidies to certain periodicals on the ground that they were "morally improper and not for the public welfare and the public good." The provision should be taken as establishing standards that related "to the format of the publication and to the nature of its contents, but not to their quality, worth, or value."[910]

[I330] In *Lamont*, the Court held that a statute permitting the government to hold "communist political propaganda" arriving in the mails from abroad, unless the addressee affirmatively requested in writing that it be delivered to him, placed an unjustifiable burden on the addressee's First Amendment right. This requirement was "almost certain to have a deterrent effect, especially with respect to those who ha[d] sensitive positions. . . . Public officials like schoolteachers who ha[d] no tenure might think they would invite disaster if they read what the Federal Government [said] contain[ed] the seeds of treason. Apart from them, any addressee [wa]s likely to feel some inhibition in sending for literature which federal officials ha[d] condemned as 'communist political propaganda.'" [Such a] regime is at war with the uninhibited, robust, and wide-open debate and discussion that are contemplated by the First Amendment."[911] By contrast, when an agent of a foreign principal in the United States mails any "political propaganda," a statutory term defined in a broad and neutral, rather than pejorative, manner as including misleading advocacy, as well as advocacy materials that are completely accurate and merit the closest attention and the highest respect, he may be required to make certain disclosures, regarding the source of such materials, which would better enable the public to evaluate the import of the propaganda.[912]

[I331] Given the right of every person "to be let alone," a vendor does not have a constitutional right to send unwanted material into someone's home, and "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." Thus, in *Rowan*, a unanimous Court upheld the statutory right of a homeowner to direct the local post office to stop delivery of unwanted materials that the householder viewed as "erotically arousing or sexually provocative."[913]

[I332] In *Consolidated Edison*, the Court invalidated a state order prohibiting a privately owned utility company from discussing controversial political issues in its billing

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908 United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 128–30 (1981).

909 Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 741, n.17 (1978).

910 Hannegan v. Esquire, 327 U.S. 146, 153–58 (1946).

911 Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965).

912 Meese v. Keene, 481 U.S. 465, 477–81 (1987).

913 Rowan v. United States Post Office Dep't, 397 U.S. 728, 736–38 (1970).

envelopes. The order was content-based, since it prohibited public discussion of an entire topic. Further, it was not a narrowly drawn means of serving a compelling state interest. The prohibition could not be justified as being necessary to avoid forcing the company's views on a captive audience, since customers might escape exposure to objectionable material simply by throwing the bill insert into a wastebasket. Nor was the prohibition warranted as being necessary to allocate, in the public interest, the limited space in the billing envelope, there being nothing in the record to show that the bill inserts at issue would preclude the inclusion of other inserts that the utility company might be ordered lawfully to include in the billing envelope. Finally, the prohibition was not necessary to ensure that ratepayers did not subsidize the cost of the bill inserts, since there was no basis on the record to assume that the state could not exclude the cost of the inserts from the utility's rate base.[914]

ii. Postal Sidewalks

[I333] In *Kokinda*, the Court upheld a regulation banning solicitation on a sidewalk near the entrance to a U.S. Post Office. The sidewalk was the sole means by which customers might travel from the parking lot to the post office building and lay entirely on Postal Service property. A four-Justice plurality decided that the postal sidewalk was a non-public forum. The sidewalk at issue did not have the characteristics of public sidewalks traditionally open to expressive activity. It was not a public passageway; rather, it led only from the parking area to the front door of the post office. Thus, it had been "constructed solely to provide for the passage of individuals engaged in postal business." Nor had the Postal Service "expressly dedicated its sidewalk to any expressive activity." No postal service regulation opened postal sidewalks to any First Amendment activity. Although individuals or groups had been permitted to leaflet, speak, and picket on postal premises, "a regulation prohibiting disruption . . . and a practice of allowing some speech activities on postal property do not add up to the dedication of such property to speech activities, [since] '[t]he government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'"[915] Further, it was not unreasonable for the Postal Service to prohibit solicitation on the ground that it was disruptive of business. "Solicitation impedes the normal flow of traffic. . . . Solicitors can achieve their goal only by stopping a passerby momentarily or for longer periods as money is given or exchanged for literature or other items."[916] Moreover, the categorical ban of solicitation on postal premises was based on the Postal Service's long, real-world experience, which showed that, because of continual demands from a wide variety of groups, administering a program of permits and approvals had distracted postal facility managers from their primary jobs. In short, the Postal Service reasonably "prohibited the use of its property and resources where the intrusion create[d] significant interference with Congress' mandate to ensure the most effective and efficient distribution of the mails."[917]

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914 Consol. Edison Co. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 537–43 (1980).

915 United States v. Kokinda, 497 U.S. 720, 730 (1990) (plurality opinion), *quoting* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985).

916 *Id.* at 733–34.

917 *Id.* at 735. Justice Kennedy, agreed that the regulation did not violate the First Amendment, but he concluded that it was unnecessary to determine whether the sidewalk was a non-public forum, since the regulation met the traditional standards applied to time, place, and manner restrictions of protected expression. *Id.* at 737–39.

h. School Newspaper—School Facilities [918]

[I334] "The public schools do not possess all of the attributes of streets, parks, and other traditional public for[a] that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' . . . Hence, school facilities may be deemed to be public for[a] only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations. . . . If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."[919] In light of these considerations, *Hazelwood* held that a school-sponsored newspaper, the production of which was part of the educational curriculum and a regular classroom activity under the journalism teacher's control as to almost every aspect of publication, did not constitute a public forum, since the school officials did not evince any intent to open the paper's pages to indiscriminate use by its student reporters and editors or by the student body generally. Instead, they reserved the forum for its intended purpose, "as a supervised learning experience for journalism students." Accordingly, "school officials were entitled to regulate the [paper's] contents in any reasonable manner."[920]

i. School's Internal Mail System

[I335] In *Perry*, the Court upheld a school board's contractual agreement allowing the union representing its teachers to make use of the school mail system in connection with the discharge of the union's exclusive representative duties without providing equal access to rival unions. The school mailboxes and inter-school delivery system were not open for use by the general public. Permission to use the system to communicate with teachers should be secured from the individual building principal. There was no evidence in the record demonstrating that this permission was granted as a matter of course to all who sought to distribute material. The schools did allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations, to use the facilities. However, this type of selective access does not transform government property into a public forum. In light of these considerations, the Court held that the school district's internal mail system was a non-public forum. Further, the preferential treatment of the union that represented the district's teachers was justified by reference to the collective bargaining process. And exclusion of rival unions could "reasonably be considered a means of insuring labor peace within the schools. The policy served to prevent the District's schools from becoming a battlefield for inter-union squabbles." Finally, the reasonableness of the limitations on a rival union's access to the school mail system was also supported by the substantial alternative channels that remained open for union-teacher communication to take place. These means ranged "from bulletin boards to meeting facilities to the United States mail." Moreover, under

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[918] *See also* paras. H127 *et seq. (religious speech).*

[919] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).

[920] *Id.* at 270.

state law, a rival teacher group was assured of equal access to all modes of communication while a representation election was in progress.[921]

j. School Administration Meetings

[I336] *Knight* involved a statute granting state employees, such as college faculty, the right to "meet and confer" with their employers on matters related to employment that were outside the scope of mandatory bargaining. However, if state employees forming an appropriate bargaining unit selected an exclusive representative for mandatory bargaining, their employer could "meet and confer" on non-mandatory subjects only with that representative. Twenty Minnesota community college faculty instructors challenged the constitutionality of the latter provision. Appellees' principal claim was that they had a right to force officers of the state, acting in an official policy-making capacity, to listen to them in this particular formal setting. The Court rejected the claim. It held that a "meet and confer" session was not a public forum, noting that "college administration meetings convened to obtain faculty advice on policy questions have neither by long tradition nor by government designation been open for general public participation." Moreover, the non-public-forum analysis was largely irrelevant to assessing appellees' constitutional claim, since the non-public-forum cases "concern government's authority to provide assistance to certain persons in communicating with other persons who would not, as listeners, be acting for the government." Further, the Court stressed that "[t]he Constitution does not grant to members of the public generally or to any specially affected class of citizens a right to be heard by public bodies making decisions of policy." Finally the Court found that appellees' exclusion from "meet and confer" sessions did not deny them equal protection of the laws in violation of the Fourteenth Amendment, for "[t]he State has a legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions," and permitting selection of "meet and confer" representatives to be made by the exclusive representative is a rational means of serving that interest.[922]

[I337] The rights at issue in *Knight* were wholly unlike those at stake in *Madison*, where the Court held that a public forum for citizen involvement had been created by a state statute providing for open school board meetings. There, the Wisconsin Employment Relations Commission had ordered a school board to prohibit school employees, other than union representatives, from speaking at its meetings on matters subject to collective bargaining between the board and the union. While recognizing the power of a state to limit school board meetings to certain subject matter, the Court held it could not confine the forum "to one category of interested individuals." The Court concluded that, "[w]hatever its duties as an employer, when a school board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech."[923]

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[921] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47–53 (1983).

[922] Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 280–83, 291 (1984).

[923] Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 174–76, n.6 (1976).

k. Charity Drive in the Federal Workplace

[I338] In *Cornelius*, the Court held the Combined Federal Campaign (CFC), a charity drive aimed at federal employees, was not a designated public forum, principally because "[t]he Government's consistent policy ha[d] been to limit participation in the CFC to 'appropriate' [i.e., charitable, rather than political] voluntary agencies and to require agencies seeking admission to obtain permission from federal and local [CFC] officials." In addition, the historical background of the FCC indicated that the Campaign was designed to minimize the disruption to the workplace that had resulted from unlimited *ad hoc* solicitation activities by lessening the amount of expressive activity occurring on federal property. "In light of the Government policy in creating the CFC and its practice in limiting access," the Court found that the CFC was a non-public forum.[924] The Court then held government's reasons for excluding the "National Association for the Advancement of Colored People—Legal Defense and Educational Fund Inc." from the CFC satisfied the reasonableness standard. The government "could reasonably conclude that a dollar directly spent on providing food and shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy. Moreover, avoiding the appearance of political favoritism is a valid justification for limiting speech in a non-public forum."[925] And the record supported the position that respondents' participation in the CFC would be detrimental to the CFC and disruptive of the federal workplace. The Court concluded that "[t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a non-public forum and hinder its effectiveness for its intended purpose."[926]

l. Public Fairgrounds

[I339] A state fair is "a limited public forum, in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion."[927] "[T]here are significant differences between a street and state fairgrounds. A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment. A state fair is a temporary event attracting great numbers of visitors who come to the event for a short period to see and experience the host of exhibits and attractions at the fair. The flow of the crowd and demands of safety are more pressing in the context of the fair."[928] Considering that "a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective,"[929] *Heffron v. International Society for Krishna Consciousness (ISKCON)* upheld a regulation prohibiting the sale or distribution on the state fairgrounds of any merchandise, including printed or written material, except from fixed locations (in that case, booths), because that served "the

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924 Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 804–06 (1985) (four-to-three decision).

925 *Id.* at 809.

926 *Id.* at 811.

927 Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 655 (1981).

928 *Id.* at 651.

929 *Id.* at 650.

State's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds."[930] In so holding, the Court noted that the justification for the regulation could not be measured solely on the basis of the disorder that would result from granting members of a particular religious group an exemption from the prohibition, for "church members do not have solicitation rights in a public forum superior to those of members of other religious groups or other social, political, or charitable organizations seeking to distribute information, sell wares, or solicit funds at a state fair." Hence, any such exemption could not be meaningfully limited to a particular religious group, and, as applied to similarly situated groups, would prevent the state from furthering its important concern with managing the flow of the crowd. Further, alternative fora for the expression of respondents' protected speech existed, since the regulation did not prevent ISKCON from distributing religious literature anywhere outside the fairgrounds, nor did it exclude ISKCON from the fairgrounds. Its members might mingle with the crowd and orally propagate their views, and ISKCON could also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds. Hence, the regulation was a permissible restriction on the place and manner of ISKCON's distribution, sales, and solicitation activities.[931]

m. Advertising Space

i. Advertising on City Buses

[I340] *Lehman* upheld a city policy that permitted commercial advertising, but prohibited political advertising, on city buses. The evidence revealed that during the 26 years of public operation, the municipal transit system, pursuant to city council action, had not accepted or permitted any political or public issue advertising on its vehicles. A four-Justice plurality concluded that the advertising spaces in the city transit system was not a First Amendment forum, because "the city's use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum."[932] Further, the challenged city policy was reasonable, since it sought "to minimize chances of ause, the appearance of favoritism, and the risk of imposing upon a captive audience."[933]

ii. Advertising on Utility Poles

[I341] In *Vincent*, the Court approved a municipal prohibition on signs attached to utility poles. In doing so, it declined to apply "public forum" analysis. First, appellees failed to demonstrate the existence of a traditional right of access to utility poles for pur-

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[930] *Id.* at 652.

[931] *Id.* at 652–55.

[932] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 804 (1985), *discussing* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

[933] Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974). Justice Douglas concurred in the judgment on the narrow ground that petitioner had no constitutional right to force his message upon a captive audience. *Id.* at 308. Four members of the Court dissented on the ground that since the city had created a forum for the dissemination of information and expression of ideas by accepting and displaying commercial and public service advertisements on its rapid transit vehicles, the city was barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content. *Id.* at 310.

poses of their communication comparable to that recognized for public streets and parks. Further, the Court noted that lampposts can, of course, be used as signposts, but "the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." Given the city's legitimate interest in eliminating visual clatter, the viewpoint neutrality of the regulation in question, and the availability of alternative channels of communication, the prohibition was constitutional under the standard or review applicable to non-public fora.[934]

n. Government Funding of Expressive Activities

[I342] In *Rosenberger*, a student organization at the University of Virginia was denied funding from a Student Activity Fund (SAF) for printing expenses, because its publication, Wide Awake, offered a Christian viewpoint. The purpose of the SAF was to support a broad range of extracurricular student activities that were related to the educational purpose of the University. The class of its beneficiaries included "student news, information, opinion, entertainment, or academic communications media groups." The Court noted that the SAF was "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles [we]re applicable."[935] Considering that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint, the Court held that the denial of funding was unconstitutional.[936]

[I343] In *National Endowment for the Arts (NEA) v. Finley*, the Court entertained a facial challenge to a content-based program of public arts funding. In doing so, the Court declined to apply "limited public forum" analysis in this specific context. "Although the scarcity of NEA funding d[id] not distinguish this case from *Rosenberger*, . . . the competitive process according to which the grants [we]re allocated d[id.]" The Court stressed that, "[i]n the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately encourage a diversity of views from private speakers. . . . The NEA's mandate [wa]s to make aesthetic judgments, and the inherently con-

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[934] Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 814–15 (1984).

[935] Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 830 (1995).

[936] *Id.* at 829–32. The University feared that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause. The Court rejected the argument, holding that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent any mistaken impression that the student newspapers speak for the University. *Id.* at 841.

While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, *Southworth* considered the antecedent question whether a public university may require its students to pay a fee that creates the mechanism for the extracurricular speech in the first instance. There the Court held that, "[w]hen a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. . . . [V]iewpoint neutrality is the justification for requiring the student to pay the fee in the first instance, and for ensuring the integrity of the program's operation once the funds have been collected. [Hence, a state university] may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle." *See* Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 233–34 (2000).

tent-based 'excellence' threshold for NEA support se[t] it apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations that were 'related to the educational purpose of the University' . . .—and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater."[937] Subsequently, the Court held that the challenged provision, as long as it was applied on a viewpoint-neutral basis, did not violate the First Amendment.[938]

o. Broadcasting Stations

[I344] Claims of access to a broadcasting station under the "public forum" doctrine "could obstruct the legitimate purposes of television or radio broadcasters. Were the doctrine given sweeping application in this context, courts 'would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired.' . . . 'The result would be a further erosion of the journalistic discretion of broadcasters,' transferring 'control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals' who bring suit under [the forum cases.] . . . In effect, we would 'exchange public trustee broadcasting, with all its limitations, for a system of self-appointed editorial commentators.'"[939]

[I345] "This is not to say the First Amendment would bar the legislative imposition of neutral rules for access to public broadcasting. Instead, [the Court has said] that, in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming. Although public forum principles do not generally apply to a public television station's editorial judgments regarding the private speech it presents to its viewers, candidate debates present the narrow exception to the rule. For two reasons, a candidate debate is different from other programming. First, unlike . . . other broadcasts, the debate [i]s by design a forum for political speech of the candidates. Consistent with the long tradition of such debates, the implicit representation of the broadcaster [i]s that the views expressed [a]re those of the candidates, not its own. The very purpose of the debate [i]s to allow the expression of those views with minimal intrusion by the broadcaster. . . . Second, . . . candidate debates are of exceptional significance in the electoral process. . . . Deliberation on the positions and qualifications of candidates is integral to [the democratic] system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates."[940] The Court has held that a candidate debate is a non-public forum, when it does "not have an open microphone format," but the public broadcaster makes "candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate." Indeed, "'[s]uch selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.'"[941] Hence, a broadcaster's decision to exclude a candidate from a debate

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937 Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 586 (1998).

938 *Id.* at 587.

939 Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674–75 (1998), *quoting* Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 124–25, 127 (1973).

940 Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 675–76 (1998).

941 *Id.* at 680, *quoting* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985).

is consistent with the First Amendment, if it is a reasonable, viewpoint-neutral exercise of journalistic discretion. A general lack of public support for a candidate is a reasonable, viewpoint-neutral criterion for the exercise of journalistic discretion in the debate context.[942]

p. Camping in Parks

[I346] In *Clark*, the Court held that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in Washington, D.C., in connection with a demonstration intended to call attention to the plight of the homeless. Assuming, *arguendo*, that sleeping can be expressive conduct, the Court concluded that the content-neutral regulation forbidding sleeping was defensible either as a time, place, or manner restriction or as a regulation of symbolic conduct, for it "narrowly focuse[d] on the Government's substantial interest in maintaining the parks in the heart of [the country's] Capital in an attractive and intact condition, readily available to the millions of people who wished to see and enjoy them by their presence. To permit camping—using these areas as living accommodations—would be totally inimical to these purposes."[943]

q. Anti-Noise Regulations

[I347] In *Kovacs*, "the Court rejected the notion that a city is powerless to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance. In upholding an ordinance that prohibited loud and raucous sound trucks, the Court held in that case that the state had a substantial interest in protecting its citizens from unwelcome noise."[944]

[I348] "[T]he nature of a place [and] the pattern of its normal activities" are important in reviewing the constitutionality of anti-noise regulations. *Madsen* held that protestors could be prohibited from using sound amplification equipment within 300 feet of the residences of an abortion clinic staff. In reaching this conclusion, the Court noted that the government might simply demand that picketers turn down the volume if the protests overwhelmed the neighborhood.[945]

[I349] Noise control is particularly important not only in residential areas but also around hospitals and medical facilities, where patients and their relatives "need a restful, uncluttered, relaxing, and helpful atmosphere." And the First Amendment "does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." Hence, in response to high noise levels outside an abortion clinic, a state court may restrain protestors from "singing, chanting, whistling,

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942 *Id.* at 682–83.

943 Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984).

944 Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984), *discussing* Kovacs v. Cooper, 336 U.S. 77, 87–89, 97–98 (1949). The *Kovacs* plurality also rejected a vagueness claim, noting that the words "loud and raucous," though abstract, "have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." *Id.* at 79.

945 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772, 774 (1994).

shouting, yelling, using bullhorns, auto horns, sound amplification equipment or other sounds . . . within earshot of the patients inside the clinic, during the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods." Such restrictions burden no more speech than necessary to ensure the health and well-being of the patients at the clinic.[946]

[I350] "Noisy demonstrations that disrupt or are incompatible with normal school activities" may be prohibited.[947] An ordinance prohibiting a person, while on grounds adjacent to a building in which a school is in session, from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session is not unconstitutionally vague or overbroad.[948]

[I351] *Ward v. Rock Against Racism* arose from a New York City's regulation that required the city to control the sound level of musical concerts in Central Park. More specifically the regulation required performers to use sound amplification equipment and a sound technician provided by the city. The city's justification was to make the performances satisfactory to the audience without intruding upon those who used the park or lived in its vicinity. This justification was content-neutral. Although "[a]ny governmental attempt to serve purely aesthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns," the city had "disclaimed in express terms any interest in imposing its own view of appropriate sound mix on performers. To the contrary [it] require[d] its sound technician to defer to the wishes of event sponsors concerning sound mix. . . . [T]he city's concern with sound quality extend[ed] only to the clearly content-neutral goals of ensuring adequate sound amplification and avoiding the volume problems associated with inadequate sound mix." Further, the regulation was narrowly tailored to serve significant governmental interests. The city had a substantial interest in protecting citizens from unwelcome noise. And it had a substantial interest in ensuring the sufficiency of sound amplification at musical events in order to allow citizens to enjoy the performances in the park. The city's substantial interests in limiting sound volume was "served in a direct and effective way by the requirement that its technician control the mixing board. . . . Absent this requirement, this interest would have been served less well, as [wa]s evidenced by the excessive noise complaints generated by . . . past concerts." Furthermore, in the absence of evidence that the guideline had a substantial deleterious effect on the ability of performers to achieve the quality of sound they desired, there was no merit to the allegation that the guideline was substantially broader than necessary to achieve the city's legitimate ends. Finally, the regulation left open ample alternative channels of communication, since it continued to permit musical concerts in the park and had "no effect on the quantity or content of that expression beyond regulating the extent of amplification." And "[t]hat the city's limitations on volume [might] reduce to some degree the potential audience for respondent's speech [wa]s of no consequence, for there ha[d] been no showing that the remaining avenues of communication [we]re inadequate." Subsequently, the Court held that the regulation was a reasonable regulation of the place and manner of protected speech.[949]

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946 *Id.* at 772–73.

947 Grayned v. City of Rockford, 408 U.S. 104, 120 (1972).

948 *Id.* at 107–21.

949 Ward v. Rock Against Racism, 491 U.S. 781, 792–93, 796–97, 800, 802–03 (1989). The Court also rejected the suggestion that the sound amplification regulation constituted a prior

r. Religious Speech on Public Property

[I352] The interest of the state in avoiding an Establishment Clause violation may be a compelling one, justifying a prohibition of religious speech in public fora.[950] Nevertheless, the Court has held, on various occasions, that permitting use of public property for religious purposes would not be incompatible with the Establishment Clause.[951]

D. PARTICULAR TYPES OF EXPRESSIVE CONDUCT

1. Assembly[952]

[I353] The right "peaceably to assemble, and to petition the Government for a redress of grievances" is specifically protected by the First Amendment. "From the outset, the right of assembly was regarded not only as an independent right, but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen."[953] "The right of peaceable assembly is a right cognate to those of free speech and free press, and is equally fundamental."[954] "People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may 'assembl[e] for any lawful purpose.'"[955]

[I354] As a matter of principle, the government has no power to restrict assembly activities, such as marching, parading, or picketing, because of their message. The Court's cases "make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted. For example, two parades cannot march on the same street simultaneously, and government may allow only one. . . . A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason [may] be prohibited. . . . If over-amplified loudspeakers assault the citizenry, government may turn them down. . . . [And] where demonstrations turn violent, they lose their protected quality as expression under the First Amendment."[956]

[I355] *Hague* struck down a city ordinance that required a license from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if, in his opinion, the refusal would prevent "riots, disturbances or disorderly assemblage." The ordinance was void, on its face, because it could be made the instrument of arbitrary suppression of free

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restraint (*see, in extenso*, para. I17), and that it placed unbridled discretion in the hands of city officials charged with enforcing it.

950 *See* Widmar v. Vincent, 454 U.S. 263, 271 (1981); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760–62 (1995).

951 *See, in extenso*, paras. H127 *et seq.*

952 *See also* para. E72 *("void for vagueness" doctrine)*; paras. I301 *et seq. (time, place, or manner restrictions)*; paras. I306 *et seq. ("public forum" doctrine)*; paras. I18 *et seq. (permit requirement)*; para. I111 *(permit fee)*; paras. I101, I109 *et seq. (unwelcome speech, hostile audiences)*; para. I120, n.333 *(nazi demonstrations)*.

953 Richmond Newspapers v. Virginia, 448 U.S. 555, 577 (1980) (plurality opinion).

954 De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

955 Richmond Newspapers v. Virginia, 448 U.S. 555, 578 (1980) (plurality opinion), *citing* Hague v. Comm. for Indus. Org., 307 U.S. 496, 519 (1939) (opinion of Stone, J.).

956 Grayned v. City of Rockford, 408 U.S. 104, 115–16 (1972).

expression of views on public affairs; "uncontrolled official suppression of the privilege [of peaceable assembly] cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."[957] Similarly, *Shuttlesworth* invalidated a municipal ordinance that conferred upon a city commission the power to refuse a parade permit if it believed "the public welfare, peace, safety, health, decency, good order, morals or convenience" required that it be refused. The Court ruled that "a law subjecting the exercise of the freedom of assembly to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."[958]

[I356] "Peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held, but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." Under these considerations, *De Jonge* held that, on stipulated facts that the Communist Party advocated criminal syndicalism, a Communist addressing a Communist rally could be found guilty of no offense so long as no violence or crime was urged at the meeting.[959]

[I357] "[M]ere public intolerance or animosity cannot be the basis for abridgment" of the constitutional freedom of assembly.[960] *Edwards v. South Carolina* reversed the convictions of civil rights demonstrators who had assembled on the grounds of the South Carolina State House, an area of two city blocks not lawfully proscribed by state law. In reaching that conclusion, the Court held that the state could not define a criminal offense so as to permit conviction of the petitioners if their speech "stirred people to anger, invited public dispute, or brought about a condition of unrest."[961] Likewise, in *Cox v. Louisiana*, the Court ruled that a state could not infringe the right of free speech and free assembly by convicting demonstrators under a "disturbing the peace" ordinance where all that the students in that case did was to protest segregation and discrimination against blacks by peaceably assembling and marching to a courthouse where they sang, prayed, and listened to a speech urging a "sit in" at segregated lunch counters.[962]

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957 Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939) (opinion of Roberts, J.).
958 Shuttlesworth v. Birmingham, 394 U.S. 147, 150–51 (1969).
959 De Jonge v. Oregon, 299 U.S. 353, 365–66 (1937).
960 Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971).
961 Edwards v. S. Carolina, 372 U.S. 229, 238 (1963).
962 Cox v. Louisiana, 379 U.S. 536, 544–52 (1965).

2. Picketing

a. In General

[I358] Like so many other kinds of expression, picketing is "a mixture of conduct and communication."[963] "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence, those aspects of picketing may make it the subject of restrictive regulation."[964]

b. Residences or Dwellings

[I359] In *Carey v. Brown*, the Court examined a state statute that generally barred picketing of residences or dwellings but exempted from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute." Noting that public streets and sidewalks in residential neighborhoods are public fora, the Court concluded that the statute violated the Equal Protection Clause of the Fourteenth Amendment, because it discriminated between lawful and unlawful conduct based on the content of the picketers' messages. That discrimination was impermissible, because it accorded preferential treatment to expression concerning one particular subject matter—labor disputes—while prohibiting discussion of all other issues. The Court recognized the state's interest in preserving privacy by prohibiting residential picketing, but this interest could not sustain the statute, for the challenged provision made "no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest," and, more fundamentally, "nothing in the content-based labor-nonlabor distinction ha[d] any bearing whatsoever on privacy."[965]

[I360] *Frisby* upheld a content-neutral municipal ordinance prohibiting picketing focused on, and taking place in front of, a particular residence. The ordinance served the significant government interest in the protection of residential privacy. As the Court stressed, "'[t]he State's interest in protecting the wellbeing, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.' . . . [And] [o]ne important aspect of residential privacy is protection of the unwilling listener."[966]

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963 Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 580 (1988), *quoting* Nat'l Labor Relations Bd. v. Retail Store Employees, 447 U.S. 607, 619 (1980) (concurring opinion of Stevens, J.).

964 Teamsters Union v. Vogt, 354 U.S. 284, 289 (1957), *quoting* Bakery and Pastry Drivers Local v. Wohl, 315 U.S. 769, 776–77 (1942) (concurring opinion of Douglas, J.). For example, in the labor context, it is the conduct element, rather than the particular idea being expressed, that "often provides the most persuasive deterrent to third persons about to enter a business establishment." *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 580 (1988), *quoting* Nat'l Labor Relations Bd. v. Retail Store Employees, 447 U.S. 607, 619 (1980) (concurring opinion of Stevens, J.).

965 Carey v. Brown, 447 U.S. 455, 460–61, 465 (1980). Similarly, the state's interest in providing special protection for labor protests could not, without more, justify the labor picketing exemption, since labor picketing is no more deserving of First Amendment protection than are public protests over other issues. *Id.* at 466–67.

966 Frisby v. Schultz, 487 U.S. 474, 484 (1988), *quoting* Carey v. Brown, 447 U.S. 455, 471 (1980).

Moreover, the statute was narrowly tailored to serve that interest, since, although its ban was complete, it targeted and eliminated no more than the exact source of the "evil" it sought to remedy: offensive and disturbing picketing focused on a "captive" home audience. The ordinance also left open ample alternative channels of communication. Protestors could enter residential neighborhoods, alone or in groups, even marching; they might go door-to-door to proselytize their views or distribute literature; and they might contact residents through the mails or by telephone, short of harassment. The residential picketing ordinance, the Court concluded, permitted the more general dissemination of a message to the targeted audience.[967]

[I361] *Madsen* struck down a state court order that prohibited picketing or demonstrating within 300 feet of the residences of an abortion clinic staff. In so holding, the Court noted that the record of the case did not contain sufficient justification for this broad ban; it appeared that "a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result" of protecting residential privacy. By contrast, the Court upheld the portion of the injunction that prohibited picketers from using sound amplification equipment within 300 feet of the residences of clinic staff.[968]

c. Schools

[I362] *Mosley* arose out of a challenge to a Chicago ordinance that prohibited picketing in front of any school other than one "involved in a labor dispute." The Court held that this content-based ordinance violated the Equal Protection Clause, because it impermissibly distinguished between labor picketing and non-labor peaceful picketing, without any showing that the latter was "clearly more disruptive" than the former.[969] Moreover, *Grayned* upheld a statutory ban on willful making, on grounds adjacent to a school, of any noise disturbing the good order of the school session.[970]

d. Courthouses [971]

[I363] In *Cox II*, the Court held that persons could be constitutionally prohibited from picketing "in or near" a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice." In reaching this conclusion, the Court noted, *inter alia*, that "[a] State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence."[972]

[I364] In *Cameron*, the Court upheld a statute prohibiting picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses." The Court concluded that the statute clearly and precisely delineated its reach in words of common understanding and was not impermissibly over-

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967 *Id.* at 484–88.

968 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774–75 (1994).

969 Police Dep't of Chicago v. Mosley, 408 U.S. 92, 100 (1972).

970 Grayned v. City of Rockford, 408 U.S. 104, 107–21 (1972).

971 *See also* para. I316.

972 Cox v. Louisiana, 379 U.S. 559, 562 (1965) *(Cox II)*. The Court also found that the statutory provision at issue was not impermissibly vague (*see* para. E72).

broad, since prohibition of expressive conduct, which had the above effect, bore "no necessary relationship to the freedom to distribute information or opinion."[973]

e. Embasssies

[I365] In *Boos*, the Court considered the constitutionality of a District of Columbia law making it unlawful, within 500 feet of a foreign embassy, either to display any sign tending to bring the foreign government into "public odium" or "public disrepute" (display clause), or to congregate and refuse to obey a police dispersal order (congregation clause). The display clause was invalidated as facially violative of the First Amendment, since it was a content-based restriction on political speech in a public forum, which was not narrowly tailored to serve a compelling state interest. Assuming, without deciding, that protecting the dignity of foreign diplomats by shielding them from speech critical of their governments was a "compelling" interest, for First Amendment purposes, the Court found that the ready availability of a significantly less restrictive alternative—18 U.S.C. Section 112, which subjected to criminal punishment willful acts or attempts to "intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties"—demonstrated that the display clause was not sufficiently narrowly tailored to withstand exacting scrutiny. In so holding, the Court noted that it could rely on the judgment of Congress, "the body primarily responsible for implementing [international law] obligations," that Section 112 adequately satisfied the government's interest in protecting diplomatic personnel.[974] Further, the congregation clause, standing alone, was problematic both because it applied "to *any* congregation within 500 feet of an embassy for *any* reason, and because it appear[ed] to place no limits at all on the dispersal authority of the police." These difficulties, however, had been alleviated by the court of appeals' narrowing construction that the clause permitted dispersal only of congregations that were directed at an embassy and only when the police reasonably believed that the embassy's "security or peace" was threatened. So narrowed, the congregation clause withstood First Amendment overbreadth scrutiny. It did "not reach a substantial amount of constitutionally protected conduct; it merely regulate[d] the place and manner of certain demonstrations. . . . [It was] site-specific . . . [and did] not prohibit peaceful congregations." Nor was the clause, as narrowed, impermissibly vague simply because the court of appeals had not defined or limited the word "peace." Given the "particular context" for which the clause had been crafted, it was "apparent that the 'prohibited quantum of disturbance' [wa]s determined by whether normal embassy activities ha[d] been or [we]re about to be disrupted."[975]

f. Abortion Clinics—Health Care Facilities

[I366] Public streets and sidewalks around a clinic are traditional public fora. In *Madsen*, a Florida state court had issued a permanent injunction enjoining specified organizations and individuals from blocking or interfering with clinic access and from

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973 Cameron v. Johnson, 390 U.S. 611, 616–17 (1968).

974 Boos v. Barry, 485 U.S. 312, 324–29 (1988).

975 *Id.* at 330–32.

physically abusing people entering or leaving the abortion clinic. Six months after the injunction issued, the court found that protesters still impeded access by demonstrating on the street and in the driveways, and that sidewalk counselors approached entering vehicles in an effort to hand literature to the occupants. In the face of this evidence, the court issued a broader injunction that enjoined the defendant protesters from "physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting" anyone entering or leaving the clinic; from "congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within 36 feet of the property line of the Clinic;" from approaching anyone "seeking the services of the Clinic who is within 300 feet of the clinic, unless the person indicates a desire to communicate;" and from making any noise or displaying any image that could be heard or seen inside the clinic. After determining that the injunction was not a prior restraint[976] and was content-neutral, the Court held that the proper test for evaluating content-neutral injunctions under the First Amendment was "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[977] The Florida supreme court had concluded that the injunction was based on a number of governmental interests: protecting a woman's freedom to seek pregnancy-related services, ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting the medical privacy of patients whose psychological and physical well-being were threatened as they were held "captive" by medical circumstance. The Court held that the combination of these interests was "quite sufficient to justify an appropriately tailored injunction" to protect unimpeded access to the clinic by way of public streets and sidewalks. Further, the Court found that some of the injunction's provisions burdened more speech than necessary to serve these interests, and that others did not. First, the Court upheld the 36-foot buffer zone as applied to the street, sidewalks, and driveways as a way of ensuring access to the clinic and the free flow of traffic. It explained that the trial court had few other options to protect access to the clinic: allowing protesters to remain on the sidewalks and in the clinic driveway was not a valid option because of their past conduct, and allowing them to stand in the street would obviously block vehicular traffic. Relatedly, it stated that, even under heightened review, "some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties." However, the inclusion of private property on the back and side of the clinic in the 36-foot buffer zone raised different concerns. "Absent evidence that petitioners standing on the private property ha[d] obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, this portion of the buffer zone fail[ed] to serve the significant government interests relied on by the Florida Supreme Court." Moreover, the Court struck down the 300-foot no-approach zone around the clinic, stating that it was "difficult to justify a prohibition on all uninvited approaches, regardless of how peaceful the contact [might] be. . . . Absent evidence that the protesters' speech [wa]s independently proscribable (i.e., "fighting words" or threats), or [wa]s so infused with violence as to be indistinguishable from a threat of physical harm, this provision [could] not stand," since, as a general matter, in public debate, citizens must tolerate offensive speech. Similarly, the broad prohibition on all "images observable" by patients inside the clinic burdened more speech than necessary to achieve the purpose of "limiting threats to clinic patients

976 *See* para. I30.
977 *See* para. I41.

or their families." And if this blanket ban "was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable. But it [wa]s much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more [wa]s required to avoid seeing placards through the windows of the clinic."[978] By contrast, the noise restrictions imposed by the state court order burdened no more speech than necessary to ensure the health and well-being of the patients at the clinic.[979]

[I367] *Schenck*, a case factually similar to *Madsen*, involved an injunction that banned "demonstrating within 15 feet . . . of . . . doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of [abortion clinic] facilities ('fixed buffer zones'), or within 15 feet of any person or vehicle seeking access to or leaving such facilities ('floating buffer zones')". The Court upheld the fixed buffer zones, finding that they were "necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots [could] do so." As in *Madsen*, the record showed that protesters purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots. Based on this conduct the district court "was entitled to conclude that the only way to ensure access was to move back the demonstrations away from the driveways and parking lot entrances." Similarly, sidewalk counselors followed and crowded people right up to the doorways of the clinics (and sometimes beyond) and then tended to stay in the doorways, shouting at the individuals who had managed to get inside. In addition, defendants' harassment of the local police made it far from certain that the police would be able to quickly and effectively counteract protesters who blocked doorways or threatened the safety of entering patients and employees. For these reasons a prophylactic measure was appropriate. "Although one [might] quibble about whether 15 feet [wa]s too great or too small a distance if the goal [wa]s to ensure access, [the Court] defer[red] to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear."[980] By contrast, the *floating* buffer zones were struck down, because they burdened more speech than was necessary to serve the governmental interests identified in *Madsen*. Such zones around people prevented defendants—except for sidewalk counselors tolerated by the targeted individual—"from communicating a message from a normal conversational distance or handing out leaflets on the public sidewalks. This [wa]s a broad prohibition, both because of the type of speech restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks." The Court held that the fact that this broad speech prohibition "floated" rendered it unsustainable on the record of the case. Protesters on the public sidewalks who wished to communicate their message to a targeted individual and to remain as close as possible (while maintaining an acceptable conversational distance) should move as the individual moved, maintaining 15 feet of separation. But this would be difficult to accomplish at, e.g., one of the respondent clinics that was bordered by a

978 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762–74 (1994).

979 *See* para. I349.

980 Schenck v. Pro-Choice Network of W. New York, 519 U.S. 357, 380–82 (1997).

17-foot-wide sidewalk. This meant that protesters who wished to walk alongside an individual entering or leaving the clinic were pushed into the street, unless the individual walked a straight line on the outer edges of the sidewalk. Protesters could presumably walk 15 feet behind the individual, or 15 feet in front of the individual, while walking backwards. But then they would be faced with the problem of watching out for other individuals entering or leaving the clinic and heading the opposite way from the individual they had targeted. "With clinic escorts leaving the clinic to pick up incoming patients and entering the clinic to drop them off, it would be quite difficult for a protester who wishe[d] to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty le[d] to a substantial risk that much more speech [would] be burdened than the injunction by its terms prohibit[ed.]" Likewise the Court struck down the floating buffer zones around vehicles. Nothing in the record contradicted "the common sense notion that a more limited injunction— . . . keep[ing] protesters away from driveways and parking lot entrances (as the fixed buffer zones d[id]) and off the streets, for instance—would be sufficient to ensure that drivers [would] not be confused about how to enter the clinic and [would] be able to gain access to its driveways and parking lots safely and easily. In contrast, the 15-foot floating buffer zones would restrict the speech of those who simply line[d] the sidewalk or curb in an effort to chant, shout, or hold signs peacefully."[981]

[I368] *Hill v. Colorado* sustained a state statute making it unlawful for any person within 100 feet of a health care facility's entrance to "knowingly approach" within eight feet of another person, without that person's consent, in order to pass "a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling with [that] person." First, the Court noted that the state's interest in protecting its citizens' health and safety "may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests. . . . Moreover, as with every exercise of a State's police powers, rules providing specific guidance to enforcement authorities serve the interest in evenhanded application of the law."[982] Also, the statute dealt not with restricting a speaker's right to address a willing audience, but with protecting listeners from unwanted communication. Further, the Court found that the challenged provision was a content-neutral time, place, and manner regulation. First, it was "a regulation of the places where some speech [might] occur, . . . not a regulation of speech." Second, as the state supreme court had held, the statute's restrictions applied equally to all demonstrators, regardless of viewpoint, and the statutory language made no reference to the content of the speech. Third, "the State's interests in protecting access and privacy, and providing the police with clear guidelines, [we]re unrelated to the content of the demonstrators' speech." In addition, the regulation was narrowly tailored to serve the state's significant and legitimate governmental interests, and it left open ample alternative communication channels. The three types of communication regulated by the statute were the display of signs, leafletting, and oral speech. "The 8-foot separation between the speaker and the audience should not have any adverse impact on the readers' ability to read signs displayed by demonstrators. In fact, the separation might actually aid the pedestrians' ability to see the signs by preventing others from surrounding them and impeding their view. [Besides,] the statute place[d] no limitations on the number, size, text, or images of the

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981 *Id.* at 377–80.

982 Hill v. Colorado, 530 U.S. 703, 715 (2000).

placards. And . . . the 8-foot zone d[id] not affect demonstrators with signs who remain[ed] in place." With respect to oral statements, "the distance certainly [could] make it more difficult for a speaker to be heard, particularly if the level of background noise [wa]s high and other speakers [we]re competing for the pedestrian's attention." Nevertheless, the statute did not suffer from the failings of the "floating buffer zone" rejected in *Schenck*, since the eight-foot zone allowed the speaker to communicate "at a normal conversational distance." Additionally, the statute allowed the speaker to remain in one place, and other individuals could pass within eight feet of the protester without causing the protester to violate the statute. Finally, there was a "knowing" requirement that protected speakers who thought they were keeping pace with the targeted individual at the proscribed distance from inadvertently violating the statute. The burden on the ability to distribute handbills was more serious because "it seem[ed] possible that an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients. The statute d[id] not, however, prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians [could] easily accept." Hence, the Colorado statute adequately protected the right of leafletters to win the attention of passersby and to "reach the minds of willing listeners."[983]

g. Business Places—Labor Picketing

[I369] Government may not ban all picketing of places of lawful business.[984] A municipal ordinance making it unlawful for any person to carry or display any sign, banner, or badge in the vicinity of any place of business for the purpose of inducing others to refrain from buying or working there or for any person to picket in the vicinity of any place of business for such purpose is unconstitutional.[985] Nor may a court enjoin peaceful labor picketing, based on a state's common law policy against picketing when there is no immediate dispute between employer and employee.[986]

[I370] Nevertheless, a series of cases have established "a broad field in which a State, in enforcing a [valid economic or social] policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, c[an] constitutionally enjoin peaceful labor picketing aimed at preventing effectuation of that policy."[987] In *Giboney v. Empire Storage & Ice*, a union, seeking to organize peddlers, picketed a wholesale dealer to induce it to refrain from selling to non-union peddlers. The state courts, finding that such an agreement would constitute a conspiracy in restraint of trade in violation of the state anti-trust laws, enjoined the picketing. The Court affirmed unanimously, rejecting

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983 *Id.* at 716, 719–20, 725–28. The Court also held that the statute was not impermissibly vague and overbroad. *Id.* at 730–33.

984 *See* Thornhill v. Alabama, 310 U.S. 88, 96–106 (1940).

985 Carlson v. California, 310 U.S. 106, 111–13 (1940).

986 Am. Fed'n of Labor v. Swing, 312 U.S. 321, 323–26 (1941). By contrast, a state may make it unlawful "for any person acting in concert with one or more other persons, to assemble at or near any place where a labor dispute exists and by *force or violence* prevent or attempt to prevent any person from engaging in any lawful vocation." *See* Cole v. Arkansas, 338 U.S. 345, 353–54 (1949) (emphasis added).

987 Am. Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 230 (1974), *quoting* Teamsters Union v. Vogt, 354 U.S. 284, 293 (1957).

the claim that the foregoing injunction was an unconstitutional abridgment of free speech, because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. In so doing, the Court noted that the record of the case did "not permit this publicizing to be treated in isolation, [f]or . . . the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus, all ofappellants' activities . . . constituted a single and integrated course of conduct, which was in violation of Missouri's valid law." The Court therefore concluded that it was clear that appellants "were doing more than exercising a right of free speech or press. . . . They were exercising their economic power, together with that of their allies, to compel Empire to abide by union, rather than by state, regulation of trade."[988]

[I371] The following term, the Court decided a group of cases applying and elaborating on the theory of *Giboney*. In *Hughes v. Superior Court*, the Court held that the Fourteenth Amendment did not bar a state court from using the injunction to prohibit picketing of a place of business, where the picketing was aimed solely at securing compliance with a demand that the employees of the enterprise concerned be hired in proportion to the racial origins of its customers. In so holding, the Court stated that it could not "construe the Due Process Clause as prohibiting California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy." The Court also found it immaterial that the state policy had been expressed by the judiciary, rather than by the legislature.[989]

[I372] On the same day, the Court decided *Teamsters Union v. Hanke*, holding that a state was not restrained by the Fourteenth Amendment from enjoining picketing of a business, conducted by the owner himself without employees, in order to secure compliance with a demand to become a union shop. Although there was no one opinion for the Court, its decision was another instance of the affirmance of an injunction against picketing, because it directed against a valid public policy of the state.[990]

[I373] A third case, *Building Service Employees v. Gazzam*, was decided the same day. Following an unsuccessful attempt at unionization of a small hotel and refusal by the owner to sign a contract with the union as bargaining agent, the union began to picket the hotel with signs stating that the owner was unfair to organized labor. The state, finding that the object of the picketing was in violation of its statutory policy against employer coercion of employees' choice of bargaining representative, enjoined picketing for such purpose. The Court affirmed, noting that the unlawful objective of the picketing was an adequate basis for the decree in question.[991]

[I374] In *Plumbers Union v. Graham*, a state court had enjoined, as a violation of its "Right to Work" law, picketing that advertised that non-union men were being employed on a building job. The Court found that there was evidence in the record supporting a conclusion that a substantial purpose of the picketing was to put pressure on the general contractor to eliminate non-union men from the job, and held that the injunction

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988 Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 497–98, 503 (1949).

989 Hughes v. Superior Court, 339 U.S. 460, 466 (1950).

990 Teamsters Union v. Hanke, 339 U.S. 470 (1950).

991 Bldg. Serv. Employees v. Gazzam, 339 U.S. 532, 539 (1950).

was not in conflict with the Fourteenth Amendment.[992] Similarly, *Teamsters Union v. Vogt* held that, consistent with the Fourteenth Amendment, a state may enjoin peaceful picketing the purpose of which is to coerce an employer to put pressure on his employees to join a union in violation of the declared policy of the state.[993]

[I375] Under *Retail Store Employees*, Congress may constitutionally "prohibit secondary picketing calculated to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." The plurality reasoned that "[s]uch picketing spreads labor discord by coercing a neutral party to join the fray."[994]

[I376] In *Mobile*, a state court had issued an injunction against picketing of a foreign-flag ship by maritime unions that were protesting, as sub-standard, the wages paid the foreign crewmen who manned the ship. The Court held that the state could ban such "efforts by third parties to induce employees to cease performing services essential to the conduct of their employer's business." In reaching that conclusion, the Court indicated that the state policy against "wrongful interference" with respondents' businesses was "quite analogous to the federal policy of prohibiting secondary boycotts, and [wa]s based on similar considerations." Moreover, the state's policy appeared "to be based on the state interest in preserving its economy against the stagnation that could be produced by pickets' disruption of the businesses of employers with whom they ha[d] no primary dispute."[995]

3. Leafletting[996]

[I377] Pamphlets have proved most effective instruments in the dissemination of opinion. The freedom of speech and press embraces the right to distribute literature[997] and necessarily protects the right to receive it.[998] Hence, an ordinance forbidding the distribution of literature of any kind, without the written permission of a city official, is unconstitutional.[999] The privilege may not be withdrawn even in the interest of minimizing litter or in preventing fraud. As *Schneider v. State* explained, punishing those who actually litter or perpetrate frauds is an adequate and much less intrusive means to serve those significant interests.[1000]

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992 Plumbers Union v. Graham, 345 U.S. 192, 193–201 (1953).

993 Teamsters Union v. Vogt, 354 U.S. 284, 294–95 (1957).

994 Nat'l Labor Relations Bd. v. Retail Store Employees Union, 447 U.S. 607, 616 (1980), (plurality opinion); *cf. id.* at 617–18 (Blackmun, J., concurring); *id.* at 619 (Stevens, J., concurring).

995 Am. Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 230–31 (1974).

996 *See also* paras. I386 *et seq. (door-to-door pamphleteering)*; para. I326 *(leafleting in airport terminals)*; para. I368 *(leafleting around health care facilities).*

997 Lovell v. Griffin, 303 U.S. 444, 452 (1938).

998 Martin v. Struthers, 319 U.S. 141, 143 (1943).

999 Lovell v. Griffin, 303 U.S. 444, 450–52 (1938). The Court's opinion pointed out that the ordinance was not limited to literature that was obscene or offensive to public morals or that advocated unlawful conduct, placed no limit on the privilege of distribution in the interest of public order, was not aimed to prevent molestation of inhabitants or misuse or littering of streets, and was without limitation as to time or place of distribution. *Id.* at 451.

1000 Schneider v. State (Town of Irvington), 308 U.S. 147, 162, 164 (1939).

[I378] Yet the peace, good order, and safety of the community may require regulation of the time, place, and manner of distribution.[1001] "For example, a person may not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors cannot not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who do not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty, since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."[1002] And no one supposes that "a city need permit a man with a communicable disease to distribute leaflets on the street or to homes, or that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities."[1003]

4. Financial Solicitation[1004]

[I379] The First Amendment protects the right to engage in charitable solicitation. "[C]haritable appeals for funds involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation, but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that, without solicitation, the flow of such information and advocacy would likely cease. . . . Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with as a variety of purely commercial speech."[1005]

[I380] *Cantwell* struck down a state statute forbidding the solicitation of contributions of anything of value by religious, charitable, or philanthropic causes without obtaining official approval. As the Court recognized, "a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time, place and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." However, the Court could not sustain a licensing system for reli-

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[1001] Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

[1002] Schneider v. State (Town of Irvington), 308 U.S. 147, 160–61 (1939).

[1003] Martin v. Struthers, 319 U.S. 141, 143 (1943).

[1004] *See also* paras. I386 *et seq. (door-to-door solicitation)*; para. I325 *(ban on solicitation of funds in airport terminals)*; para. I333 *(prohibition of solicitation on a postal sidewalk)*; para. I338 *(exclusion from participation in an annual charitable fundraising drive conducted in the federal workplace)*; para. I502 *(corporate solicitation of contributions to a segregated fund established for the purpose of contributing to candidates for public office)*; paras. I167 *et seq. (solicitation of business).*

[1005] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).

gious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed non-religious.[1006]

[I381] The Court has three times considered prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level. Each time, the Court held the prophylactic measures unconstitutional. In *Schaumburg*, the Court invalidated a village ordinance that prohibited charitable organizations from soliciting contributions unless they used at least 75 percent of their receipts directly for the charitable purpose of the organization. The ordinance defined "charitable purposes" to exclude salaries and commissions paid to solicitors, and the administrative expenses of the charity, including salaries. Because the percentage limitation restricted the ways in which charities might engage in solicitation activity, the Court concluded that it was a "direct and substantial limitation on protected activity that [could not] be sustained unless it serve[d] a sufficiently strong, subordinating interest that the Village [wa]s entitled to protect" and constituted a "narrowly drawn regulatio[n] designed to serve [such an] interes[t] without unnecessarily interfering with First Amendment freedoms."[1007] Although the Court recognized that the village had legitimate interests "in protecting the public from fraud, crime, and undue annoyance," it rejected the limitation because it was not a precisely tailored means of accommodating those interests. The village of Schaumburg's principal justification for the ordinance was fraud prevention. Any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead, Schaumburg submitted, was not a charitable, but a commercial, for-profit enterprise; to permit such an organization to represent itself as a charity, the village urged, was fraudulent. The Court agreed with Schaumburg that fraud prevention ranks as a substantial governmental interest, but concluded that the 75-percent requirement promoted that interest "only peripherally." Spending more than 25 percent of an organization's receipts on fundraising, salaries, and overhead, the Court explained, does not reliably indicate that the enterprise is commercial rather than charitable. Such spending may be altogether appropriate for "organizations . . . primarily engaged in research, advocacy, or public education . . . that use their own paid staff to carry out these functions as well as to solicit financial support." Moreover, the village's legitimate interest in preventing fraud could be better served by measures less intrusive than a direct prohibition on solicitation. For instance, the village could punish fraud directly and could require disclosure of the finances of a charitable organization so that a member of the public could make an informed decision about whether to contribute. The Court also found little connection between the percentage limitation and the protection of public safety or residential privacy. Both goals were better furthered by provisions addressed directly to the asserted interest—such as a prohibition on the use of convicted felons as solicitors and a provision allowing homeowners to post signs barring solicitors from their property.[1008]

[I382] Four years later, in *Munson*, the Court invalidated a Maryland law that prohibited charitable organizations from soliciting if they paid or agreed to pay, as expenses, more than 25 percent of the amount raised. Unlike the inflexible ordinance in *Schaumburg*, the Maryland law authorized a waiver of the 25-percent limitation "where [it] would effectively prevent the charitable organization from raising contributions."

[1006] Cantwell v. Connecticut, 310 U.S. 296, 306–07 (1940).

[1007] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636–37 (1980).

[1008] *Id.* at 636–39.

The Court held that the waiver provision did not save the statute. No reason other than financial necessity warranted a waiver. The statute provided no shelter for a charity that incurred high solicitation costs, because it chose to disseminate information as part of its fundraising. Nor did it shield a charity whose high solicitation costs stemmed from the unpopularity of its cause. The statute's fatal flaw was that "it operate[d] on the fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." The possibility of a waiver might decrease the number of impermissible applications of the statute, but it did nothing to remedy the statute's fundamental defect.[1009]

[I383] The North Carolina charitable solicitation controls at issue in *Riley* directly regulated professional fundraisers. North Carolina's law prohibited professional fundraisers from retaining an "unreasonable" or "excessive" fee. Fees up to 20 percent of the gross receipts collected were deemed reasonable; fees between 20 percent and 35 percent were deemed unreasonable if the state showed that the solicitation did not involve advocacy or dissemination of information. Fees exceeding 35 percent were presumed unreasonable, but the fundraiser could rebut the presumption by showing either that the solicitation involved advocacy or information dissemination, or that, absent the higher fee, the charity's ability to raise money or communicate would be significantly diminished. Relying on *Schaumburg* and *Munson*, the Court's decision in *Riley* invalidated North Carolina's endeavor to rein in charitable solicitors' fees. The Court stressed, once again, that "the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." Moreover, the Court noted that, "[e]ven if [it] agreed that some form of a percentage-based measure could be used, in part, to test for fraud, [it] could not agree to a measure that requires the speaker to prove 'reasonableness' case by case based upon what is at best a loose inference that the fee might be too high." Under the state statute in question, once a *prima facie* showing of unreasonableness was made, the fundraiser should rebut the showing. Proof that the solicitation involved the advocacy or dissemination of information was not alone sufficient; it was merely a factor added to the calculus submitted to the factfinder, who might still decide that the costs incurred or the fundraiser's profit were excessive. Similarly, the statute was "impermissibly insensitive to the realities faced by small or unpopular charities, which must often pay more than 35% of the gross receipts collected to the fundraiser due to the difficulty of attracting donors." Again, the burden was placed on the fundraiser in such cases to rebut the presumption of unreasonableness. Hence, fundraisers would "be faced with the knowledge that every campaign incurring fees in excess of 35%, and many campaigns with fees between 20% and 35%, [would] subject them to potential litigation over the 'reasonableness' of the fee. And, of course, in every such case, the fundraiser [should] bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe[d] that the fee [wa]s in fact fair. This scheme [would] necessarily chill speech in direct contravention of the First Amendment's dictates. . . . This chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease

[1009] Sec'y of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 963–68 (1984). The Court rejected the state's argument that restraints on the relationship between the charity and the fundraiser were mere "economic regulations" free of First Amendment implication. Rather, it viewed the law as "a direct restriction on the amount of money a charity can spend on fundraising activity" and, therefore, "a direct restriction on protected First Amendment activity." *Id.* at 967, and n.16.

engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which [would] ultimately reduce the quantity of expression."[1010] The *Riley* Court also found that "the State's generalized interest in unilaterally imposing its notions of fairness on the fundraising contract [wa]s both constitutionally invalid and insufficiently related to a percentage-based test." The state's additional interest in regulating the fairness of the fee could rest on either of two positions: (1) that charitable organizations were economically unable to negotiate fair or reasonable contracts without governmental assistance; or (2) that charities were incapable of deciding for themselves the most effective way to exercise their First Amendment rights. The Court rejected the first argument, because it was based on the erroneous premise that the challenged provision was simply an economic regulation, with no First Amendment implication, and therefore should be tested only for rationality. The state's remaining justification was equally unsound. "'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.' . . . To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."[1011] The Court perceived no reason to engraft an exception to this settled rule for charities. In addition, there were several legitimate reasons why a charity might reject the state's overarching measure of a fundraising drive's legitimacy—the percentage of gross receipts remitted to the charity. "For example, a charity might choose a particular type of fundraising drive, or a particular solicitor, expecting to receive a large sum as measured by total dollars, rather than the percentage of dollars remitted. Or, a solicitation may be designed to sacrifice short-term gains in order to achieve long-term, collateral, or non-cash benefits. To illustrate, a charity may choose to engage in the advocacy or dissemination of information during a solicitation, or may seek the introduction of the charity's officers to the philanthropic community during a special event (e.g., an awards dinner). Consequently, even if the State had a valid interest in protecting charities from their own naivete or economic weakness, the statute would not be narrowly tailored to achieve it."[1012]

[I384] *Riley* presented a further issue. North Carolina law required professional fundraisers to disclose to potential donors, before asking for money, the percentage of the prior year's charitable contributions the fundraisers had actually turned over to charity. This provision was a content-based regulation, subject to exacting First Amendment scrutiny. The state defended this disclosure requirement as a proper means to dispel public misperception that the money donated were going in greater-than-actual proportion to benefit charity. However, the Court condemned the measure as an "unduly burdensome" prophylactic rule. The state's rule, *Riley* emphasized, presumed that "the charity derives no benefit from funds collected but not turned over to it. Yet this is not necessarily so. For example, . . . where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself." Relatedly, the Court also noted that North Carolina required professional fundraisers to disclose their professional status. That disclosure effectively

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[1010] Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 789, 793–94 (1988).
[1011] *Id.* at 791, *quoting* Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).
[1012] *Id.* at. 791–92.

notified contributors that a portion of the money they donated would underwrite solicitation costs. A concerned donor could ask how much of the contribution would be turned over to the charity, and under North Carolina law, fundraisers would be obliged to provide that information. The compelled disclosure, thus, would "almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent. First, this provision necessarily discriminate[d] against small or unpopular charities, which must usually rely on professional fundraisers. Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful. . . . Second, in the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone." However, "more benign and narrowly tailored options," which would not chill solicitation altogether, were available. For example, the Court suggested, the state might "itself publish the detailed financial disclosure forms it require[d] professional fundraisers to file," and it could "vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements."[1013]

[I385] The Court's opinions in *Schaumburg*, *Munson*, and *Riley* took care to leave a corridor open for fraud actions to guard the public against false or misleading charitable solicitations. "In contrast to the prior restraints inspected in those cases, a properly tailored fraud action targeting specific fraudulent representations . . . falls on the constitutional side of the line between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process. . . . Of prime importance, and in contrast to a prior restraint on solicitation, or a regulation that imposes on fundraisers an uphill burden to prove their conduct lawful, in a properly tailored fraud action the State bears the full burden of proof." A state statute under which, in order to prove a defendant liable for fraud, the complainant must show by clear and convincing evidence that the defendant knowingly made a false representation of a material fact, that such representation was made with the intent to mislead the listener, and that the representation succeeded in doing so, is consistent with the Constitution, since proof requirements of this order provide sufficient breathing room for protected speech. While the percentage of fundraising proceeds turned over to a charity is not an accurate measure of the amount of funds used "for" a charitable purpose, a fundraiser may be prohibited from attracting donations "by misleading potential donors into believing that a substantial portion of their contributions would fund specific programs or services, knowing full well that is not the case." Hence, a fundraiser, who is to retain 85 percent of the proceeds of his fundraising endeavors, may be held liable for defrauding members of the public by falsely representing that a "significant amount of each dollar donated will be paid over to a charitable nonprofit organization for its charitable purposes," while in fact the fundraiser knows that 15 cents or less of each dollar will be available for those purposes.[1014]

[1013] *Id.* at 795–800.

[1014] Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 619–22 (2003).

5. Door-to-Door Canvassing, Pamphleteering, and Soliciting

[I386] "While door-to-door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. . . . [Many] religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. . . . [D]oor-to-door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door-to-door distribution of circulars is essential to the poorly financed causes of little people."[1015]

[I387] In *Schneider v. State*, a canvasser for a religious society, who passed out booklets from door to door and asked for contributions, was arrested and convicted under an ordinance that prohibited canvassing, soliciting, or distribution of circulars from house to house without a permit, the issuance of which rested much in the discretion of public officials. The state courts thought that the ordinance was valid as a protection against fraudulent solicitations. The Court disagreed, noting that the ordinance applied not only to religious canvassers but also to one who wished to present his views on political, social, or economic questions, and holding that the city could not, in the name of preventing fraudulent appeals, subject door-to-door advocacy and the communication of views to the discretionary permit requirement.[1016]

[I388] In *Martin v. Struthers*, a municipal ordinance that made it a crime for a solicitor or canvasser to knock on the front door of a resident's home, or ring the doorbell, was held invalid as applied to the free distribution of dodgers advertising a religious meeting. The Court recognized peaceful enjoyment of the home and crime prevention as legitimate interests served by the ordinance, noting that "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." However, these justifications for the challenged prohibition were not deemed sufficient, since the city could punish those who called at a home after having been warned by the occupant to keep off, and, in addition, could, "by identification devices, control the abuse of the privilege by criminals posing as canvassers." Such a regulation would "respect the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those . . . choos[ing] to exclude such distributors from the home."[1017]

[I389] *Breard* involved an ordinance making it criminal to enter premises without an invitation to sell goods, wares, and merchandise. The ordinance was sustained as applied to door-to-door solicitation of magazine subscriptions. In so holding, the Court noted that the sale of literature introduced "a commercial feature," that the householder's interest in privacy outweighed any rights of the publisher to distribute magazines by uninvited entry on private property, and that subscriptions might be made by anyone interested in receiving the magazines without the annoyances of house-to-house canvassing. Although *Martin v. Struthers* had struck down a similar ordinance as applied to

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[1015] Martin v. Struthers, 319 U.S. 141, 145–46 (1943).

[1016] Schneider v. State (Town of Irvington), 308 U.S. 147, 163–64 (1939).

[1017] Martin v. Struthers, 319 U.S. 141, 144, 148–49 (1943).

the distribution of free religious literature, the *Breard* Court distinguished that case on the ground that the information distributed there was religious in nature, and that the distribution was non-commercial.[1018]

[I390] *Hynes* invalidated a city ordinance requiring advance notice to be given to the local police department by "[a]ny person (including representatives of Borough Civic Groups and Organizations) desiring to canvass, solicit or call from house to house . . . for a recognized charitable cause . . . or . . . political campaign or cause . . . in writing, for identification only." Based on its review of prior cases, the Court held that soliciting and canvassing from door to door were subject to reasonable regulation so as to protect the citizens against crime and "undue annoyance," but that the First Amendment required such controls to be drawn with "narrow specificity." The Court found it intolerably unclear what "Civic Groups and Organizations" were encompassed, what was meant by a "recognized charitable cause," and what was required by way of "identification." Further, "[t]o the extent that these ambiguities and the failure to explain what 'identification' [wa]s required [ga]ve police the effective power to grant or deny permission to canvass for political causes, the ordinance suffer[ed] in its practical effect from the vice condemned" in *Schneider*.[1019]

[I391] *Watchtower Bible & Tract Society* dealt with a village ordinance that, *inter alia*, prohibited "canvassers" from "going in and upon" private residential property to promote any "cause" without first obtaining a permit from the mayor's office by completing and signing a registration form. The Court admitted that the interests the ordinance assertedly served—the prevention of fraud and crime and the protection of residents' privacy—were "important and that the Village may seek to safeguard them through some form of regulation of solicitation activity. However, the amount of speech covered by the ordinance raised serious concerns. Had its provisions been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting its residents' privacy and preventing fraud." Yet, the village's administration of its ordinance unquestionably demonstrated that it applied to a significant number of non-commercial "canvassers" promoting a wide variety of "causes," such as "Camp Fire Girls," "Political Candidates," "Jehovah's Witnesses," and "Persons Affiliated with Stratton Church." As the Court stressed, "[e]ven if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure" from First Amendment principles. "Three obvious examples illustrate the pernicious effect of such a permit requirement. First, . . . there are a significant number of persons who support causes anonymously. 'The decision to favor anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.' . . . The requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity. . . . [Such a requirement] may well be justified in some situations—for example, by the special state interest in protecting the integrity of a ballot-initiative process, or by the interest in preventing fraudulent commercial

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[1018] Breard v. Alexandria, 341 U.S. 622, 642–45 (1951). This case was decided at a time when commercial advertisement was not constitutionally protected. Hence, it is doubtful if it is still good law.

[1019] Hynes v. Mayor of Oradell, 425 U.S. 610, 616–22 (1976).

transactions [—but may preclude circulators from canvassing for] unpopular causes unrelated to commercial transactions or to any special interest in protecting the electoral process."[1020] "Second, requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views. . . . [Indeed,] there are a significant number of persons whose religious scruples will prevent them from applying for such a license. There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door to door advocacy, that they would prefer silence to speech licensed by a petty official."[1021] "Third, there is a significant amount of spontaneous speech that is effectively banned by such a permit scheme. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission."[1022] The breadth and unprecedented nature of the challenged regulation did not alone render the ordinance invalid. Also central to the Court's conclusion that the ordinance at issue did not pass First Amendment scrutiny was that it was not tailored to the village's stated interests. "Even if the interest in preventing fraud could adequately support the ordinance insofar as it applie[d] to commercial transactions and the solicitation of funds, that interest provide[d] no support for its application to Jehovah's Witnesses, to political campaigns, or to enlisting support for unpopular causes." The village's argument that the ordinance was nonetheless valid because it served the two additional interests of protecting residents' privacy and the prevention of crime was unpersuasive. As to the former, an unchallenged ordinance section authorizing residents to post "No Solicitation" signs, coupled with their unquestioned right to refuse to engage in conversation with unwelcome visitors, provided ample protection for unwilling listeners. As to the latter, it seemed "unlikely that the lack of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance," for example, by asking for directions or permission to use the telephone, or posing as surveyors, and, in any event, there was no evidence in the record of "a special crime problem related to door to door solicitation."[1023] Under these considerations, the Court held that the village regulation, as applied to religious proselytizing, anonymous political speech, and the distribution of handbills, transgressed the First Amendment.

6. *Display of Signs*[1024]

[I392] "While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, cause visual clutter, displace alternative uses for land, and pose other problems that legitimately call for regulation."[1025] "[The Court's] decisions identify two analytically distinct grounds

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[1020] Watchtower Bible & Tract Soc'y of New York, v. Vill. of Stratton, 536 U.S. 150, 166–67 (2002).

[1021] *Id.* at 167.

[1022] *Id.*

[1023] *Id.* at 168–69.

[1024] *See also* para. I189 *("for sale" signs)*; para. I368 *(display of signs near health care facilities).*

[1025] City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994).

for challenging the constitutionality of a municipal ordinance regulating the display of signs. One is that the measure in effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages. . . . Alternatively, such provisions are subject to attack on the ground that they simply prohibit too much protected speech."[1026]

[I393] *Metromedia* involved a San Diego ordinance that imposed substantial prohibitions on the erection of outdoor advertising displays within the city. The stated purpose of the ordinance was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the city." The ordinance permitted on-site commercial advertising, but forbade other commercial advertising and non-commercial advertising using fixed-structure signs, unless permitted by one of the ordinance's 12 specified exceptions, such as temporary political campaign signs. The Court concluded that the City's interest in traffic safety and its aesthetic interest in preventing "visual clutter" could justify a prohibition of off-site commercial billboards, even though similar on-site signs were allowed.[1027] Nevertheless, the Court's judgment, supported by two different lines of reasoning, invalidated the city's general ban on signs carrying non-commercial advertising. According to a four-member plurality, the ordinance impermissibly discriminated on the basis of content by permitting on-site commercial speech while broadly prohibiting non-commercial messages; a "city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." Furthermore, the ordinance contained exceptions permitting various kinds of non-commercial signs, whether on property where goods and services were offered or not, which would otherwise be within the general ban. "Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. . . . With respect to noncommercial speech, a city may not choose the appropriate subjects for public discourse. . . . Because some noncommercial messages [might] be conveyed on billboards throughout the commercial and industrial zones, San Diego [should] similarly allow billboards conveying other noncommercial messages throughout those zones."[1028] On the other hand, Justice Brennan, joined by Justice Blackmun, concluded that the practical effect of the San Diego ordinance was to eliminate the billboard as an effective medium of communication for noncommercial messages, and that the city had failed to make the strong showing needed to justify such content-neutral prohibitions of particular media of communication.[1029]

[I394] *Vincent* upheld a Los Angeles ordinance that prohibited all signs on public property in the interest of avoiding visual clutter. The Court noted that a "city's inter-

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[1026] *Id.* at 51–52.

[1027] *See, in extenso*, para. I190.

[1028] Metromedia, Inc. v. San Diego, 453 U.S. 490, 513–15 (1981). The plurality also noted that the ordinance could not be appropriately characterized as a reasonable "time, place, and manner" restriction, because (1) it distinguished in several ways between permissible and impermissible signs at a particular location by reference to their content; (2) it did not leave open ample alternative channels for communication of the information, given that many businesses and politicians and other persons relied upon outdoor advertising because other forms of advertising were insufficient, inappropriate and prohibitively expensive. *Id.* at 515–16.

[1029] *Id.* at 525–27.

est in attempting to preserve or improve the quality of urban life is one that must be accorded high respect," and that visual blight was created by the medium of expression itself. The Court rejected the argument that the validity of the city's aesthetic interest had been compromised by failing to extend the ban to private property, reasoning that the "private citizen's interest in controlling the use of his own property justifie[d] the disparate treatment." And even if some visual blight remained, a partial, content-neutral ban might nevertheless enhance the city's appearance. Moreover, the Court found that the category of speech in question was not "a uniquely valuable or important mode of communication," and that there were ample alternative modes of communication in Los Angeles.[1030]

[I395] In *City of Ladue v. Gilleo*, the Court held that Ladue could not prohibit homeowner Gilleo's display of a small sign, on her lawn or in a window, opposing war in the Persian Gulf. This case involved a city ordinance that prohibited homeowners from displaying any signs on their property except "residence identification" signs, "for sale" signs, and signs warning of safety hazards. The ordinance also permitted commercial establishments, churches, and non-profit organizations to erect certain signs that were not allowed at residences. Although the ordinance was supported by the city's interest in minimizing the visual clutter associated with signs, it was invalidated, because the local government had "almost completely foreclosed a venerable means of communication that is both unique and important." As the Court pointed out, "residential signs have long been an important and distinct medium of expression. . . . Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the 'speaker,' . . . [which] is an important component of many attempts to persuade. A sign advocating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a ten-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. . . . [In addition,] [r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. . . . Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means. [Additionally, the principle of] individual liberty in the home . . . has special resonance when the government seeks to constrain a person's ability to speak there. . . . Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, . . . its need to regulate temperate speech from the home is surely much less pressing."[1031] In light of these considerations, the Court concluded that more temperate measures could, in large part, satisfy Ladue's stated regulatory needs without harm to the First Amendment rights of its citizens. In so holding,

[1030] Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805–12 (1984). The Court also rejected as misplaced respondents' reliance on public forum principles. *Id.* at 813–15.

[1031] City of Ladue v. Gilleo, 512 U.S. 43, 55–58 (1994).

the Court noted that "different considerations might well apply in the case of signs (whether political or otherwise) displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property."[1032]

7. Symbolic Conduct[1033]

a. In General

[I396] The First Amendment affords protection to symbolic or expressive conduct. "Symbolism is a primitive but effective way of communicating ideas."[1034] The Court has acknowledged that "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First Amendment.' In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Court asks] whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"[1035] For example, the Court has recognized the expressive nature of a sit-in by blacks in a "whites only" area to protest segregation;[1036] of students' wearing of black armbands to protest American involvement in Vietnam;[1037] of the wearing of American military uniforms in a dramatic presentation criticizing the country's military presence in Vietnam;[1038] of taping a peace sign to an American flag, triggered by the Cambodian incursion;[1039] of picketing about a wide variety of causes;[1040] of a St. Patrick's Day-Evacuation Day parade;[1041] and even marching, walking, or parading in uniforms displaying the swastika.[1042]

[I397] "When 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[1043] Under *O'Brien*, government regulation of expressive conduct "is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[1044] The *O'Brien* test "is little, if any, different from the standard applied to time, place, or man-

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[1032] *Id.* at 58, n.17.

[1033] *See also* paras. I143, I 144 *(nude dancing)*; para. I346 *(sleeping in parks)*.

[1034] W. Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

[1035] Texas v. Johnson, 491 U.S. 397, 404 (1989), *quoting* Spence v. Washington, 418 U.S. 405, 409–11 (1974) *(per curiam)*.

[1036] Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

[1037] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969). *See* para. I212.

[1038] Schacht v. United States, 398 U.S. 58, 62–63 (1970).

[1039] Spence v. Washington, 418 U.S. 405, 409–10 (1974) *(per curiam)*.

[1040] *See, e.g.*, Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308, 313–14 (1968); United States v. Grace, 461 U.S. 171, 176 (1983).

[1041] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

[1042] *Id.* at 569, *citing* Nat'l Socialist Party of Am. v. Skokie, 432 U.S. 43, 44 (1977) *(per curiam)*.

[1043] United States v. O'Brien, 391 U.S. 367, 376 (1968).

[1044] *Id.* at 377.

ner restrictions."[1045] "Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression. It would be odd to insist on a higher standard for limitations aimed at regulable conduct and having only an incidental impact on speech."[1046] In so holding, the Court has "highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule."[1047]

[I398] *Arcara* involved a statute authorizing closure of an adult bookstore found to be used as a place for prostitution and lewdness. The state court had held that the *O'Brien* test was applicable to this case, because such a closure order would also impose an incidental burden upon bookselling activities. Noting that the sexual activity carried on in that case "manifest[ed] absolutely no element of protected expression," the Court made clear that *O'Brien* has no relevance to a statute directed at imposing sanctions on nonexpressive activity. "[T]he enforcement of a public health regulation of general application against the physical premises in which [one] happen[s] to sell books . . . [is] directed at unlawful conduct having nothing to do with books or other expressive activity. Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises." The Court concluded that the statute in question "properly sought to protect the environment of the community by directing the sanction at premises knowingly used for lawless activities."[1048]

[I399] *O'Brien* addressed a defendant's claim that the First Amendment prohibited his prosecution and conviction for burning his draft card, because his act was "symbolic speech" engaged in as a demonstration against the war in Vietnam and against the draft. Even on the assumption that the alleged communicative element in O'Brien's conduct was sufficient to bring into play the First Amendment, the Court sustained the conviction. The Court found that the government regulation prohibiting the destruction of draft cards was aimed at maintaining the integrity of the Selective Service System. "[T]he continuing availability to each registrant of his Selective Service certificates substantially further[ed] the smooth and proper functioning of the system that Congress ha[d] established to raise armies." Thus the regulation at issue served the governement's "vital interest in having a system for raising armies that would function with maximum efficiency and would be capable of easily and quickly responding to continually changing circumstances." Moreover, there was no alternative means that "would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law [prohibiting] their willful mutilation or destruction." Hence, O'Brien had been constitutionally convicted for the non-communicative impact of his conduct.[1049]

[I400] The *O'Brien* case is therefore "unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly

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[1045] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984).

[1046] *Id.* at 298, n.8.

[1047] Texas v. Johnson, 491 U.S. 397, 407 (1989). If the government interest is related to the content of the expression, then the regulation of communicative conduct falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard. *See* Texas v. Johnson, 491 U.S. 397, 403 (1989).

[1048] Arcara v. Cloud Books, Inc. 478 U.S. 697, 705, 707 (1986).

[1049] United States v. O'Brien, 391 U.S. 367, 381–82 (1968).

integral to the conduct is itself thought to be harmful."[1050] In *Stromberg*, for example, the Court struck down a statutory phrase that punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." "Since the statute there was aimed at suppressing communication, it could not be sustained as a regulation of noncommunicative conduct."[1051]

[I401] *Schacht* invalidated a federal statute permitting actors to wear an American military uniform portraying a member of an armed force in a theater or motion picture production only "if the portrayal does not tend to discredit that armed force." The street skit in which Schacht wore the Army uniform as a costume was designed, in his view, to expose the evil of the American presence in Vietnam and was part of a larger, peaceful anti-war demonstration. The Court found that, although a statute making it an offense to wear American military uniforms without authority would be valid, the challenged prohibition, sensitive to the viewpoint of speech, could not stand.[1052]

b. Contemptuous Treatment of the American Flag[1053]

[I402] In *Street*, the Court held that a state may not criminally punish a person for uttering words critical of the American flag. Rejecting the argument that the conviction could be sustained on the ground that Street had failed to show the respect for the national symbol, which may properly be demanded of every citizen, the Court concluded that the constitutionally guaranteed "freedom to be intellectually diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass "the freedom to express publicly one's opinions about [the American] flag, including those opinions which are defiant or contemptuous."[1054]

[I403] In *Spence*, the Court reversed the conviction of a college student who had displayed the flag with a peace symbol affixed to it by means of removable black tape from the window of his apartment. The Court found that this was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. "Given the protected character of [Spence's] expression, and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired," the conviction could not stand.[1055]

[I404] In *Texas v. Johnson*, the Court held, by a five-to-four vote, that a Texas statute criminalizing the desecration of venerated objects, including the U.S. flag, was unconstitutional as applied to an individual who had set such a flag on fire as a means of political protest. The Texas statute provided that "[a] person commits an offense if he intentionally or knowingly desecrates . . . [a] national flag," where "desecrate" meant to "deface, damage, or otherwise physically mistreat in a way that the actor knows will

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[1050] *Id.* at 382.

[1051] *Id.* at 382, *discussing* Stromberg v. California, 283 U.S. 359 (1931).

[1052] Schacht v. United States, 398 U.S. 58, 61–63 (1970).

[1053] *See also* para. E67 *("void for vagueness" doctrine)*; para. H5 *(refusal to salute the flag)*.

[1054] Street v. New York, 394 U.S. 576, 593 (1969). There, appellant, having heard a news broadcast of the shooting of James Meredith, a civil rights leader, had said "We don't need no damn flag. If they let that happen to Meredith, we don't need an American flag."

[1055] Spence v. Washington, 418 U.S. 405, 415 (1974) *(per curiam)*. Appellant had been convicted under a law that forbade the public exhibition of a flag that was distorted or marked.

seriously offend one or more persons likely to observe or discover his action." The state asserted an interest "in preserving the flag as a symbol of nationhood and national unity." The Court pointed out that "the government's interest in preserving the flag's special symbolic value [wa]s directly related to expression" in the case of Johnson's burning of the flag. The state, apparently, was concerned that such conduct would "lead people to believe either that the flag d[id] not stand for nationhood and national unity, but instead reflect[ed] other, less positive concepts, or that the concepts reflect[ed] in the flag d[id] not in fact exist." As the Court stressed, "[t]hese concerns blossom only when a person's treatment of the flag communicates some message, and thus are related 'to the suppression of free expression' within the meaning of *O'Brien*." Hence, the Court rejected the state's contention that it ought to apply the *O'Brien* test. Further, it held that the state's legitimate interest in preserving the flag as a symbol of nationhood and national unity did not justify Johnson's conviction. Texas conceded that the law was not aimed at protecting the physical integrity of the flag in all circumstances, but it reached only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. "Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct." This restriction on Johnson's political expression was content-based and therefore subject to "the most exacting scrutiny." The Court stressed that the "government may not prohibit the expression of an idea merely because society finds the idea offensive or disagreeable," even where the American flag is involved. The principle that "the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea." A state may not foster its own view of the flag by prohibiting expressive conduct relating to it, since "the government may [not] permit designated symbols to be used to communicate a limited set of messages." The Court declined, therefore, to create for the flag an exception to these principles protected by the First Amendment. In so doing, the Court noted that the flag's special role and deservedly cherished place in the American society would be strengthened, not weakened, by its decision, which was "a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that . . . toleration of criticism such as Johnson's is a sign and source of [the country's] strength."[1056]

[I405] *Eichman* involved the Flag Protection Act of 1989, which criminalized the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a U.S. flag, except conduct related to the disposal of a "worn or soiled" flag. Appellees were prosecuted for violating the Act—some for knowingly burning several flags while protesting various aspects of the government's policies and others, in a separate incident, for knowingly burning a flag while protesting the Act's passage. The Court found that appellees' prosecution was inconsistent with the First Amendment. The Court first declined to reconsider its rejection in *Johnson* of the claim that flag-burning, as a mode of political expression, does not enjoy the First Amendment's full protection. The government contended the Flag Protection Act was constitutional, because, unlike the statute addressed in *Johnson*, the Act did not target expressive conduct on the basis of the content of its message. The

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[1056] Texas v. Johnson, 491 U.S. 397, 410–19 (1989). Chief Justice Rehnquist noted, in his dissenting opinion, that the American flag "has occupied a unique position as the symbol of [the American] Nation, a uniqueness that justifies a governmental prohibition against flag burning," considering that such a form of political expression is "no essential part of any exposition of ideas." *Id.* at 422, 430.

government asserted an interest in "protect[ing] the physical integrity of the flag under all circumstances" in order to safeguard the flag's identity "as the unique and unalloyed symbol of the Nation." The Court rejected this argument. Although the Act, unlike the Texas law, contained no explicit content-based limitation on the scope of prohibited conduct, the government's asserted interest was "related to the suppression, and concerned with the content, of free expression." The government's interest in protecting the "physical integrity" of a privately owned flag rested upon "a perceived need to preserve the flag's status as a symbol of [the] Nation and certain national ideals." This interest was "implicated only when a person's treatment of the flag communicate[d] a message to others that [wa]s inconsistent with those ideals." Moreover, the precise language of the Act's prohibitions suggested "a focus on those acts likely to damage the flag's symbolic value." Thus, the Act suffered from the same fundamental flaw as the Texas law, and, for the reasons stated in *Johnson*, the government's asserted interest could not justify its infringement on First Amendment rights.[1057]

8. Access to Private Property for Speech Activities[1058]

[I406] Many people in the United States live in company-owned towns, which are freely accessible and open to the people in the area and those passing through and do not function differently from any other town. These people, just as residents or visitors of municipalities, retain a strong interest "in the functioning of the community in such manner that the channels of communication remain free." The managers appointed by the corporation that owns or possesses a town cannot curtail the liberty of speech and press of these people consistently with the purposes of the constitutional guarantees, and a state statute, which enforces such action by criminally punishing those who attempt to distribute literature, clearly violates the First and Fourteenth Amendments to the Constitution. Under these considerations, *Marsh v. Alabama* struck down a state trespass law insofar as the state had attempted to impose penal sanctions on those distributing religious literature on the streets of a company town, contrary to regulations of the town's management.[1059]

[1057] United States v. Eichman, 496 U.S. 310, 315–19 (1990). The four dissenters first noted that "certain methods of expression may be prohibited if (a) the prohibition is supported by a legitimate societal interest that is unrelated to suppression of the ideas the speaker desires to express; (b) the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means; and (c) the interest in allowing the speaker complete freedom of choice among alternative methods of expression is less important than the societal interest supporting the prohibition." Further, they said that the federal government has a legitimate interest in protecting the symbolic value of the American flag, which has "at least these two components: in times of national crisis, it inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance; at all times, it serves as a reminder of the paramount importance of pursuing the ideals that characterize of [the American] society, . . . the ideas of liberty, equality, and tolerance." The dissent concluded that the government may "protect the symbolic value of the flag without regard to the specific content of the flag burners' speech." *Id.* at 319–21.

[1058] *See also* para. I281 *(access to the press)*; paras. I288–I291, I296, I297 *(access to the electronic media)*.

[1059] Marsh v. Alabama, 326 U.S. 501, 507–09 (1946). *See also Tucker v. Texas*, 326 U.S. 517 (1946), involving the distribution of religious literature in a village owned by the United States under a congressional program designed to provide housing for workers engaged in national

[I407] *Logan Valley* extended *Marsh* to a shopping center situation, in a context where the First Amendment activity was related to the shopping center's operations. In so doing, the Court stressed, *inter alia*, that the general public had unrestricted access to the mall.[1060] Nevertheless, four years later, *Lloyd* substantially repudiated the rationale of *Logan Valley*, which was eventually overruled in *Hudgens*. *Lloyd* dealt with the question whether, under the federal Constitution, a privately owned shopping center may prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. The shopping center had adopted a strict policy against the distribution of handbills within the building complex and its malls, and it made no exceptions to this rule. Respondents in *Lloyd* argued that, because the shopping center was open to the public, the First Amendment prevented the private owner from enforcing the handbilling restriction on shopping center premises. In rejecting this claim, the Court stated that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes," and that "[t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." At the same time, the Court distinguished *Marsh* by noting that the basis on which the *Marsh* decision rested was that "the property involved encompassed an area that, for all practical purposes, . . . had all the attributes of a town, and was exactly like any other town in Alabama."[1061] Further, *Hudgens* concluded that the reasoning of *Lloyd* could not be squared with the reasoning of *Logan Valley*, and held that union representatives may not trespass on privately owned areas of shopping centers to engage in protected activities such as peaceful picketing.[1062]

[I408] The Court's reasoning in *Lloyd*, however, "does not, *ex proprio vigore*, limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[1063] *PruneYard* illustrated the point in a case where the state of California had interpreted its own Constitution to afford a right of access to private

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defense activities, where the village was freely accessible and open to the public and had all the characteristics of a typical American town.

[1060] Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 316–25 (1968). The case involved labor picketing of a supermarket located in a large shopping center complex.

[1061] Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551, 563, 569 (1972). In this opinion the Court "did not say that it was overruling the *Logan Valley* decision. Indeed, a substantial portion of the Court's opinion in *Lloyd* was devoted to pointing out the differences between the two cases, noting particularly that, in contrast to the handbilling in *Lloyd*, the picketing in *Logan Valley* had been specifically directed to a store in the shopping center, and the pickets had had no other reasonable opportunity to reach their intended audience." *See* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 517–18 (1976).

[1062] Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 518–21 (1976). The Court emphasized that, if a large self-contained shopping center were the functional equivalent of a municipality, as *Logan Valley* had held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content. Consequently, if the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in *Hudgens* did not have a First Amendment right to enter the shopping center for the purpose of advertising their strike in front of their employer's store located in the mall.

[1063] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81, 81 (1980).

shopping centers for the reasonable exercise of speech and petitioning. While acknowledging that the First Amendment does not itself grant a right of access to private fora, the Court upheld the state-created right against a First Amendment challenge. It reasoned that *Wooley*[1064] does not prohibit such a right of access, because the views of those taking advantage of the right would not likely be identified with those of the owners, the State was not dictating any specific message, and the owners were free to disavow any connection to the message by posting disclaimers. The Court similarly distinguished *Barnette*,[1065] stating that the right of access did not compel the owners to affirm their belief in government orthodoxy, and left them free to publicly dissociate themselves from the views of the speakers. Finally, it distinguished *Tornillo*,[1066] on the ground that the right of access did not constitute a content-based penalty that would dampen the vigor and limit the variety of public debate.[1067]

[1064] *See* para. H5.
[1065] *See* para. H5.
[1066] *See* para. I281.
[1067] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81, 85–88 (1980).

PART III: FREEDOM OF EXPRESSIVE ASSOCIATION

A. GENERAL CONSIDERATIONS[1068]

[I409] In *NAACP v. Alabama*, the Court recognized a First Amendment right "to engage in association for the advancement of beliefs and ideas[;] . . . it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters."[1069] "While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition."[1070] "That right is protected because it promotes and may well be essential to the '[e]ffective advocacy of both public and private points of view, particularly controversial ones' that the First Amendment is designed to foster."[1071] And "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[1072] However, the freedom of expressive association is not absolute; it can be overridden by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[1073]

[I410] "To determine whether a group is protected by the First Amendment's expressive associational right, [it must be determined] whether the group engages in 'expressive association. The First Amendment's protection of expressive association is not reserved for advocacy groups. . . . Associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment."[1074] "But, to come within its ambit, a group must engage in some form of expression, whether it be public or private. . . . 'Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.'"[1075] By contrast, the opportunities of adults and minors to dance with one another, which might be described as "associational" in common parlance, do not involve the sort of "expressive association" that the First Amendment protects. Moreover,

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[1068] As to the distinction between freedom of expressive association and *freedom of commercial association, see* Roberts v. United States Jaycees, 468 U.S. 609, 634–38 (1984) (concurring opinion of Justice O'Connor, finding "only minimal constitutional protection of the freedom of commercial association" and that an association whose "activities are not predominantly of the type protected by the First Amendment" is subject to "rationally related state regulation of its membership and other associational activities;" these positions were cited with approval in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 473, n.16 (1997)).

[1069] Nat'l Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449, 460 (1958).

[1070] Healy v. James, 408 U.S. 169, 181 (1972).

[1071] Runyon v. McCrary, 427 U.S. 160, 175 (1976), *quoting* Nat'l Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449, 460 (1958).

[1072] Nat'l Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449, 460 (1958).

[1073] Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

[1074] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 655 (2000).

[1075] *Id.* at 648, 650, *quoting* Roberts v. United States Jaycees, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

the Constitution does not recognize a generalized right of "social association" that includes chance encounters in dancehalls.[1076]

[I411] Moreover, the Court has stressed that "the First Amendment does not require that every member of a group agree on every issue in order for the group's policy to be expressive association.'"[1077] Nor is it "the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[1078]

[I412] "[G]roups which themselves are neither engaged in subversive or other illegal or improper activities nor demonstrated to have any substantial connections with such activities are to be protected in their rights of free and private association."[1079] Denial of official recognition, without justification, to such organizations may abridge the First Amendment guarantees.[1080] "But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in [the context of collective bargaining,] to recognize [any] association and bargain with it."[1081] Nor does the Constitution require the government to furnish funds to maximize the exercise of the right of association or to minimize any resulting economic hardship.[1082]

B. GUILT OR LIABILITY BY ASSOCIATION

[I413] "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."[1083] Men or women, "in adhering to a political party

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[1076] City of Dallas v. Stanglin, 490 U.S. 19, 24–25 (1989). Regarding the right to *"intimate association," see* para. F3.

[1077] Boy Scouts of Am. v. Dale, 530 U.S. 640, 655 (2000).

[1078] *Id.* at 651.

[1079] Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 557–58 (1963). The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994).

[1080] Healy v. James, 408 U.S. 169, 181–84 (1972). There, the Court found that a state college's *denial of recognition* to a student organization was a *form of prior restraint*, denying to the organization the use of campus facilities for meetings and other appropriate purposes, as well as the use of campus bulletin boards and the school newspaper.

[1081] Smith v. Arkansas State Highway Employees, 441 U.S. 463, 465 (1979) *(per curiam)*. There, the Court rejected a public employees' union argument that its First Amendment rights were abridged, because the public employer required employees' grievances to be filed directly with the employer and refused to recognize the union's communications concerning its members' grievances. *See also* Minnesota Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 286–87 (1984).

Similarly the Constitution does not afford labor unions the right to compel private employers to engage in a dialogue, or even to listen. *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 313 (1979).

[1082] *See Lyng v. Automobile Workers*, 485 U.S. 360, 368 (1988), involving Congress' refusal to extend food stamp benefits to those on strike. Denying such benefits made it harder for strikers to maintain themselves and their families during the strike and exerted pressure on them to abandon their union. Exercising the right to strike inevitably risked economic hardship, but the Court was not inclined to hold that the right of association required the government to minimize that result by qualifying the striker for food stamps.

[1083] Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 908 (1982).

or other organization, . . . do not subscribe unqualifiedly to all of its platforms or asserted principles."[1084] "[A] blanket prohibition of association with a group having both legal and illegal aims [would pose] a real danger that legitimate political expression or association would be impaired."[1085] Besides, "membership [in an association] may be innocent. A [person] may have joined a proscribed organization unaware of its activities and purposes. . . . [And] [a]t the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends."[1086] Under these considerations, the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization.[1087] "'[G]uilt by association' alone, without [establishing] that an individual's association poses the threat feared by the Government," is inconsistent with the First Amendment.[1088] "[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."[1089] "The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."[1090] Similarly, "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[1091]

C. ASSOCIATIONAL PRIVACY

[I414] The Court has recognized the vital relationship between freedom to associate and privacy in one's associations. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[1092] At the same time, however, the government has power adequately to inform itself in order to act and protect its legiti-

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[1084] Schneiderman v. United States, 320 U.S. 118, 136 (1943).

[1085] Scales v. United States, 367 U.S. 203, 229 (1961).

[1086] Wieman v. Updegraff, 344 U.S. 183, 190–91 (1952) (indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power).

[1087] *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 606–08 (1967); Elfbrandt v. Russell, 384 U.S. 11, 15–19 (1966); Aptheker v. Sec'y of State, 378 U.S. 500, 509–11 (1964); Scales v. United States, 367 U.S. 203, 222, 229–30 (1961); Noto v. United States, 367 U.S. 290, 299–300 (1961).

[1088] United States v. Robel, 389 U.S. 258, 265–266 (1967).

[1089] Keyishian v. Bd. of Regents, 385 U.S. 589, 608 (1967).

[1090] Healy v. James, 408 U.S. 169, 186 (1972). In *Dawson v. Delaware*, 503 U.S. 159, 165 (1992), the Court held that the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment (*see, in extenso*, para. H20).

[1091] Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982). In that case, African-American citizens boycotted Caucasian merchants in Claiborne County, Mississippi, and the merchants sued under state law to recover losses from the boycott.

[1092] Nat'l Ass'n for the Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

mate and vital interests. Government intrusion into the area of constitutionally protected associational privacy is valid if the government "convincingly show[s] a substantial relation between the information sought and a subject of overriding and compelling [governmental] interest."[1093]

[I415] Compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association. Compelled disclosure of an organization's membership is "likely to affect adversely the ability of [the association] and its members to pursue their collective effort to foster beliefs which they have the right to advocate, in that it may induce members to withdraw from the [a]ssociation and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."[1094] The Court has held that an organization can raise the privacy rights of its members, because litigation initiated by those members would disclose their identity and destroy the very privacy they seek to protect.[1095]

[I416] In *National Association for the Advancement of Colored People (NAACP) v. Alabama*, the Attorney General of Alabama had brought an equity suit to enjoin NAACP from conducting further activities within, and to oust it from, the state on the grounds of its non-compliance with Alabama's foreign corporation registration statute. The Attorney General sought, and the state court ordered, production of lists of the Association's rank-and-file members as pertinent to the issues whether the NAACP was conducting intra-state business in violation of the statute and whether the extent of that business justified its permanent ouster from the state. Noting that NAACP had admitted its presence and conduct of activities in Alabama during almost 40 years, and that it had offered to comply in all respects with the qualification statute, the Court found itself unable to perceive that the disclosure of the names of NAACP's rank-and-file members had a substantial bearing upon any issue presented to the Alabama courts.[1096]

[I417] *Bates* involved the conviction of custodians of records of branches of the NAACP for failure to comply with provisions of local regulations that required organizations operating within the municipality to file with a municipal official, *inter alia*, financial statements showing the names of all their members and contributors. These regulations were amendments to ordinances levying license taxes on persons engaging in businesses, occupations, or professions within municipal limits. Finding that the occupation taxes were based on the nature of the activity or enterprise conducted, not upon earnings or income, and, moreover, that there had been no showing that the NAACP branches were engaged in activity taxable under the ordinances or had ever been

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[1093] Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963). *See also* California Bankers Ass'n v. Shultz, 416 U.S. 21, 55 (1974).

A citizen does not have the right to answer fraudulently a question about his associational ties that the government should not have asked. *See* Dennis v. United States, 384 U.S. 855, 866–67 (1966); Bryson v. United States, 396 U.S. 64, 72 (1969).

[1094] Nat'l Ass'n for the Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462–63 (1958). For instance, revelation of the identity of an association's members may expose them "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462.

[1095] *Id.* at 459–60.

[1096] Nat'l Ass'n for the Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464–65 (1958).

regarded by tax authorities as subject to taxation under the ordinances, the Court concluded that it could find no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the NAACP.[1097]

[I418] *Shelton* involved an Arkansas statute that, as an incident of the state's attempt to control the activities of a class of individuals (the teachers in its public schools and publicly supported institutions of higher learning), required the individuals to disclose the associations to which they belonged. The statute's purported justification lay in its furtherance of the state's effective selection of teaching personnel; to subserve this end, it attempted to ask every one of its teachers to disclose every single organization with which he or she had been associated over a five-year period. The *ratio decidendi* of the Court's decision was the absence of substantial connection between the breadth of disclosure demanded and the purpose that disclosure was asserted to serve. The Court struck the legislation down, finding that "[m]any such associational relationships could have no possible bearing upon the teacher's occupational competence or fitness," and hence that "[t]he statute's comprehensive interference with associational freedom [went] far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."[1098]

[I419] *Communist Party* differed from *NAACP, Bates*, and *Shelton* in the magnitude of the public interests that the registration and disclosure provisions of the Subversive Activities Control Act of 1950 were designed to protect and in the pertinence that disclosure bore to the protection of those interests. Congress had found that there existed a world Communist movement, foreign controlled, whose purpose it was, by whatever means necessary, to establish Communist totalitarian dictatorship in the countries throughout the world and that had already succeeded in supplanting governments in other countries. Hence, secrecy or the concealment of foreign-dominated organizations, which worked primarily to advance the objectives of the Communist movement, was considered to be a threat to public safety and to the effective, free functioning of the national institutions of the United States. These legislative findings were the product of extensive investigation by committees of Congress over more than a decade and a half; they could not be dismissed as unfounded or irrational imaginings. These considerations led the Court to uphold the Act insofar as it required Communist action organizations to file a registration statement containing the names and addresses of its officers and members and a listing of their aliases. In addition, the Court found that disclosure both of the financial transactions of a Communist action organization and of the identity of the organs of publication that it controlled might not unreasonably have been regarded by Congress as necessary to the objective which the Act sought to achieve: "to bring foreign-dominated organizations out into the open, where the public [could] evaluate their activities informedly against the revealed background of their character, nature, and connections."[1099]

[1097] Bates v. Little Rock, 361 U.S. 516, 525–27 (1960).

[1098] Shelton v. Tucker, 364 U.S. 479, 488–90 (1960). *See also Schneider v. Smith*, 390 U.S. 17, 22–27 (1968), where the Court, in order to avoid constitutional questions concerning the associational freedom, held that the statutory phrase "to safeguard . . . from sabotage or other subversive acts" referred only to actions and did not authorize an unlimited and indiscriminate search of the employee's associational past.

[1099] Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 93–104 (1961).

[I420] "[A]s regards the questioning of public employees relative to Communist Party membership, it has . . . been held that the interest in not subjecting speech and association to the deterrence of subsequent disclosure is outweighed by the State's interest in ascertaining the fitness of the employee for the post he holds, and hence that such questioning does not infringe constitutional protections."[1100] Likewise, "Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association, and may exclude an applicant for refusal to answer."[1101] "[T]he State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, [is] clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure" of Communist Party membership.[1102]

[I421] Considering that Congress has wide power to legislate in the field of communist activity concerning advocacy of or preparation for violent overthrow of the government, and to conduct appropriate investigations in aid thereof, the Court has held that a congressional investigation of communist infiltration into educational institutions or basic industries embraces the right of a congressional investigating committee to ask a witness questions about his membership in the Communist Party. And a witness who refuses to answer such questions may be indicted and convicted for contempt of Congress; these questions are certainly pertinent to the investigatory inquiry, since a member of the Communist Party might possess information that would substantially aid a congressional committee in its legislative investigation.[1103]

[I422] "The prior holdings that governmental interest in controlling subversion and the particular character of the Communist Party and its objectives outweigh the right of individual Communists to conceal party membership or affiliations by no means require the wholly different conclusion that other groups—concededly legitimate—automatically forfeit their rights to privacy of association simply because the general subject matter of the legislative inquiry is Communist subversion or infiltration."[1104] In *Gibson*, the president of the Miami Branch of the NAACP, was adjudged in contempt and sentenced to fine and imprisonment for refusing to divulge contents of the membership records of that branch to a committee created by the Florida legislature, which was investigating the infiltration of Communists into various organizations and sought to ascertain whether 14 persons previously identified as Communists or members of Communist front or affiliated organizations were members of the Miami Branch of the NAACP. The Court found that, in essence, there was "merely indirect, less than unequivocal, and mostly hearsay testimony" that, in years past, some 14 people, who had been asserted to be, or to have been, Communists or members of Communist front or "affiliated organizations" had attended occasional meetings of the Miami branch of the

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[1100] Konigsberg v. State Bar, 366 U.S. 36, 52 (1961), *citing* Garner v. Bd. of Public Works of Los Angeles, 341 U.S. 716, 720 (1951); Beilan v. Bd. of Educ., 357 U.S. 399, 405–06 (1958).

[1101] Law Students Research Council v. Wadmond, 401 U.S. 154, 165–66 (1971), *citing* Konigsberg v. State Bar, 366 U.S. 36, 46–47 (1961).

[1102] Konigsberg v. State Bar, 366 U.S. 36, 52 (1961). *See also* para. I413 *(guilt by association).* The fact that there is no independent evidence that an applicant to practice law has ever been a member of the Communist Party does not prevent the state, acting in good faith, from making this inquiry in an investigation of this kind. *See In re* Anastaplo, 366 U.S. 82, 89–90 (1961).

[1103] *See* Barenblatt v. United States, 360 U.S. 109, 125–34 (1959); Wilkinson v. United States, 365 U.S. 399, 413–15 (1961); Braden v. United States, 365 U.S. 431, 433–35 (1961).

[1104] Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 544–57 (1963).

NAACP "and/or" had been members of that branch, which had a total membership of about 1,000. Concluding that the record of the case was insufficient to demonstrate the existence of any substantial relationship between the NAACP and subversive or Communist activities, the Court vacated the challenged conviction as violative of the constitutional right of free and private association.[1105]

[I423] However, in *Uphaus*, the Court upheld the right of the state of New Hampshire, in connection with an investigation of whether "subversive" persons were within the state, to obtain a list of guests who had attended a "World Fellowship" summer camp located in the state. The Court found that there was demonstrated a sufficient connection between subversive activity and the World Fellowship, itself, to justify discovery of the guest list.[1106] By contrast, no such "nexus" between appellant and subversive activities was found in *DeGregory*. This case stemmed from an investigation by the Attorney General of New Hampshire, under a statute enacted in 1957, authorizing him to investigate whenever he had information he deemed reasonable relating to "violations" covering a wide range of "subversive" activities designed to overthrow the constitutional form of the state's government. DeGregory testified that he had not been involved with the Communist Party since 1957 and had no knowledge of Communist activities during that period, but he refused to disclose information relating to his political associations of an earlier day. The Court noted that the record of the case was devoid of any evidence that there was any Communist movement in New Hampshire. There was "no showing whatsoever of present danger of sedition against the State itself, the only area to which the authority of the State extend[ed.]" Hence, New Hampshire's interest was held to be "too remote and conjectural to override" the guarantees of the First Amendment.[1107]

[I424] In *Bryant v. Zimmerman*, Court held that Bryant's alleged right of membership in the Ku Klux Klan was not offended by a state statute requiring filing with the Secretary of State of the constitution and bylaws, rules and regulations, membership oath, roster of members and list of officers of every association of 20 or more members having as a condition of membership an oath. The statute made it unlawful to become or remain a member of such an association with knowledge that it had failed to comply with the filing requirement. Exceptions for labor unions and benevolent orders indicated that the measure was directed primarily at the Ku Klux Klan. Compelling disclosure of membership lists and other information by organizations of the character of the Klan, the Court found, was reasonable both as a means for providing the state with knowledge of the activities of those organizations within its borders and because "requiring this information to be supplied for the public files [would] operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required."[1108] Thus, the decision was based "on

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[1105] *Id.* at 544–57.

[1106] Uphaus v. Wyman, 360 U.S. 72, 78–81 (1959). Moreover, the claim to associational privacy was held to be "tenuous, at best," since the disputed list was already a matter of public record by virtue of a generally applicable New Hampshire law requiring that places of accommodation, including the camp in question, maintain a guest register open to public authorities.

[1107] DeGregory v. Attorney Gen. of New Hampshire, 383 U.S. 825, 829–30 (1966).

[1108] New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 72–73 (1928).

the particular character of the Klan's activities, involving acts of unlawful intimidation and violence,"[1109] and on the danger involved in the Klan's covert operation.[1110]

[I425] The Court also has upheld statutory reporting provisions with respect to lobbying expenses,[1111] campaign financing,[1112] and dissemination of foreign political propaganda.[1113]

D. RESTRICTIONS ON PARTICULAR ASSOCIATIONAL ACTIVITIES

1. Boycott [1114]

[I426] "The right of the States to regulate economic activity [cannot] justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."[1115] *NAACP v. Claiborne Hardware* arose after African-American citizens boycotted Caucasian merchants in Claiborne County, Mississippi. These citizens "banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect." The boycott was launched at a meeting of a local branch of the NAACP attended by several hundred persons. Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was supported by speeches and non-violent picketing. Non-participants repeatedly were urged to join the common cause, both through public address and through personal solicitation. The Court noted that through exercise of these First Amendment rights, petitioners had "sought to bring about political, social, and economic change" and concluded that the non-violent elements of petitioners' activities were entitled to the protection of the Constitution.[1116]

[I427] Nevertheless, "[a] nonviolent and totally voluntary boycott may have a disruptive effect on . . . economic conditions. Th[e] Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. . . . [Hence,] as part of Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife," a labor union may be prohibited from inducing employees to refuse to use, manufacture, process, transport, or otherwise handle or work on goods with the object of forcing any person to cease doing business with any other person.[1117]

[1109] *See* Nat'l Ass'n for the Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449, 465 (1958).

[1110] *See* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 101 (1961).

[1111] *See* para. I197.

[1112] *See* paras. I509 *et seq.*

[1113] *See* para. I330.

[1114] *See also* para. I375 *(secondary labor picketing).*

[1115] Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 914 (1982).

[1116] *Id.* at 907–15.

[1117] *Id.* at 912, *citing* Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212,

[I428] In *Superior Court Trial Lawyers Association*, the Court held that a boycott by a group of lawyers, whose members had collectively refused to represent indigent criminal defendants without greater compensation, was not immunized from anti-trust regulation by the First Amendment. The Court noted that "the association's efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation—like similar activities in *Claiborne Hardware*—were of course activities fully protected by the First Amendment." However, the boycott at issue in *Claiborne Hardware*, differed in a decisive respect; although the boycotters there "intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits, but by the aim of vindicating constitutional rights of equality and freedom," which "are preconditions of the free market, not commodities to be haggled over within it." The same could not be said of attorney's fees. "No matter how altruistic the motives of the lawyers' association [might] have been, [its] immediate objective [wa]s to increase the price that they would be paid for their services. Such an economic boycott is well within" the government's power to regulate.[1118]

2. Litigation

[I429] That the states have broad power to regulate the practice of law is beyond question. "Without denying the power of the State to take measures to correct the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference that potentially are present in solicitation of prospective clients by lawyers, [the Court has stressed] that 'broad rules framed to protect the public and to preserve respect for the administration of justice' must not work a significant impairment of 'the value of associational freedoms,'"[1119] which encompasses the right of individuals "to act collectively to obtain affordable and effective legal representation."[1120]

[I430] In *NAACP v. Button*, the supreme court of appeals of Virginia had held that the activities of members and staff attorneys of the National Association for the Advancement of Colored People (NAACP) constituted "solicitation of legal business" in viola-

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222–23, n.20 (1982). In the latter case, petitioner (ILA), as a protest against the Russian invasion of Afghanistan, refused to handle cargoes arriving from, or destined for, the Soviet Union. As a result, respondent's shipments and business were disrupted completely. The Court held that petitioner's boycott was an illegal secondary boycott under the National Labor Relations Act, the application of which to the ILA's activity in this case would not infringe upon the First Amendment rights of the ILA and its members. *See id.* at 226–27.

[1118] Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426–28, n.10 (1990). The lawyers' association contended that, just as the *Claiborne Hardware* boycott sought to secure constitutional rights to equality and freedom, its boycott sought to vindicate the Sixth Amendment rights of indigent defendants. In rejecting this argument, the Court pointed out that *Claiborne Hardware* did not, and could not, "establish a rule immunizing from prosecution any boycott based upon sincere constitutional concerns, [given that] such an exemption would authorize the government's contractors in nearly all areas to circumvent antitrust law on the basis of their own theory of the government's obligations." *See id.* at 427, n.11.

[1119] *In re* Primus, 436 U.S. 412, 426 (1978), *quoting* United Mine Workers of Am., v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967).

[1120] United Transp. Union v. Michigan Bar, 401 U.S. 576, 584 (1971), *citing* United Mine Workers of Am., v. Illinois Bar Ass'n, 389 U.S. 217 (1967).

tion of state law. Although the NAACP representatives and staff attorneys were held to have "a right to peaceably assemble with the members of the branches and other groups to discuss with them and advise them relative to their legal rights in matters concerning racial segregation," the state court found no constitutional protection for efforts to solicit prospective litigants to authorize the filing of suits by NAACP-compensated attorneys. The Court reversed, holding that "the activities of the NAACP, its affiliates and legal staff shown on the record of the case [we]re modes of expression and association protected by the First and Fourteenth Amendments which Virginia [could] not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business." The solicitation of prospective litigants, many of whom were not members of the NAACP, for the purpose of furthering the civil rights objectives of the organization and its members, was held to come within the right "to engage in association for the advancement of beliefs and ideas." Accordingly, the *Button* Court emphasized that government might regulate in the area "only with narrow specificity." The Attorney General of Virginia had argued, *inter alia*, that the law aimed to prevent the evils traditionally associated with common law maintenance, champerty, and barratry. The Court rejected the analogy to the common law offenses because of an absence of proof that malicious intent to stir up litigation or the prospect of pecuniary gain inspired the NAACP-sponsored litigation. The Court concluded that the state had "failed to advance any substantial regulatory interest, in the form of substantive evils flowing from [the NAACP's] activities, which could justify the broad prohibitions which it ha[d] imposed."[1121]

[I431] Subsequent decisions held that the First and Fourteenth Amendments prevent state proscription of a range of solicitation activities by labor unions seeking to provide low-cost, effective legal representation to their members.[1122] *Button* and its progeny thus establish the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."[1123] And lawyers accepting employment under such constitutionally protected plans have a like protection that the state cannot abridge.[1124]

[1121] Nat'l Ass'n for the Advancement of Colored People v. Button, 371 U.S. 415, 428–44 (1963).

[1122] *See* Bhd. of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 5–8 (1964); United Mine Workers of Am., v. Illinois Bar Ass'n, 389 U.S. 217, 221–25 (1967); United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 581–86 (1971).

[1123] United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971); Bates v. State Bar of Arizona, 433 U.S. 350, 376, n.32 (1977). Nevertheless, this principle does not apply to an organization that is a mere sham to cover what is actually nothing more than an attempt by a group of attorneys to evade a valid state rule against solicitation for pecuniary gain. *See In re* Primus, 436 U.S. 412, 428, n.20 (1978).

Such an associational activity is not taken outside of the protection of *Button* because of the non-profit organization's policy of requesting an award of counsel fees destined to go to the central fund of the organization. "Counsel fees are awarded in the discretion of the court, are not drawn from the plaintiff's recovery, and are usually premised on a successful outcome. . . . [Moreover,] [a]lthough such benefit to the organization may increase with the maintenance of successful litigation, the same situation obtains with voluntary contributions and foundation support, which also may rise with the victories of the association in important areas of the law. That possibility, standing alone, offers no basis for equating the work of lawyers associated with the organization with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees." *See In re* Primus, 436 U.S. 412, 429–31 (1978).

[1124] Bhd. of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 8 (1964).

3. In the Prison Context

[I432] In a prison context, an inmate does not retain those First Amendment rights that "are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[1125] "Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution. Equally as obvious, the inmate's 'status as a prisoner' and the operational realities of a prison dictate restrictions on the associational rights among inmates."[1126] "These rights may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment. . . . The case of a prisoners' labor union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots."[1127] In light of the foregoing considerations, *Jones* upheld prison regulations that prohibited prisoners from soliciting other inmates to join a prisoners' labor union and barred union meetings and bulk mailings concerning the Union from outside sources.[1128]

E. THE RIGHT NOT TO ASSOCIATE[1129]

1. Generally

[I433] Freedom of association plainly presupposes a freedom not to associate. But this freedom is not absolute; it may be overridden by "regulations adopted to serve compelling government interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[1130]

2. Compelled Membership

[I434] "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."[1131] A regulation that forces a group to accept

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[1125] Pell v. Procunier, 417 U.S. 817, 822 (1974).

[1126] Jones v. N. Carolina Prisoners' Labor Union, 433 U.S. 119, 125–26 (1977).

[1127] *Id.* at 132–33.

[1128] The Court also noted that losing the cost advantages of bulk mailing did not fundamentally implicate free speech values. *Id.* at 131.

[1129] *See also* paras. I461 *et seq. (political party's right to exclude).*

[1130] *See* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984). A state may take positive steps to protect the individual right not to associate. In *Lincoln Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 529–31 (1949), for example, the Court held that, where a state forbids employers to restrict employment to members of a union, in order to give equal opportunities for remunerative work to union and non-union members, enforcement of that state policy does not abridge the associational rights of unions or their members, despite their claim that a closed shop was indispensable to the right of self-organization and the association of workers into unions.

[1131] Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122, n.22 (1981).

members it does not desire constitutes a substantial intrusion into the internal structure of the association and "may impair the ability of [its] original members to express those views that brought them together."[1132] Nevertheless, a state's anti-discrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy. Indeed, the right to associate does not mean that "in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution."[1133] "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[1134]

[I435] In *Railway Mail Association*, the refusal to admit an applicant to membership in a labor union on account of race was involved. Admission had been refused, in violation of a state statute prohibiting discrimination in membership or union services on account of race, creed, or color. The union claimed that the prohibition offended the Due Process Clause of the Fourteenth Amendment as an interference with its right of selection to membership. However, the Court saw no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color, or creed by an organization, "functioning under the protection of the state, which holds itself out to represent the general business needs of employees."[1135]

[I436] *Runyon v. McCrary* rejected an "as applied" First Amendment challenge to a federal statute providing that "all persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens" and prohibiting private schools from excluding qualified children solely because they were blacks. In doing so, the Court stressed that, while "it may be assumed that parents have a expressive associational right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions, . . . it does not follow that the practice of excluding racial minorities from such institutions is also constitutionally protected." In any event, the Court added, there was "no showing that discontinuance of the discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."[1136]

[I437] In *Hishon v. King & Spalding*, the Court rejected a large commercial law firm's claim to First Amendment protection for alleged gender-based discriminatory partnership decisions for associates of the firm. Although the Court recognized that "the activities of lawyers may make a distinctive contribution . . . to the ideas and beliefs of [the American] society," it found that the firm had "not shown how its ability to fulfill such

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[1132] Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

[1133] New York State Club Ass'n v. New York City, 487 U.S. 1, 13 (1988). *See also* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984), *quoting* Norwood v. Harrison, 413 U.S. 455, 70 (1973) ("[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections").

[1134] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000). A political party has the right to exclude non-members from participating in the process of selecting its nominees for public offices. *See, in extenso*, paras. I456 *et seq.*

[1135] Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93–94 (1945).

[1136] Runyon v. McCrary, 427 U.S. 160, 176 (1976).

a function would be inhibited by a requirement that it consider petitioner for partnership on her merits."[1137]

[I438] *United States Jaycees* involved a non-profit membership organization "designed to inculcate in the individual membership a spirit of genuine Americanism and civic interest, and to provide an avenue for intelligent participation by young men in the affairs of their community." The organization was divided into local chapters, described as "young men's organizations," in which regular membership was restricted to males between the ages of 18 and 35. But Minnesota's Human Rights Act, which applied to the Jaycees, made it unlawful to "deny any person the full and equal enjoyment of a place of public accommodation because of sex." The Jaycees claimed that applying the law to it violated its right to associate—in particular its right to maintain its selective membership policy. The Court rejected that claim, finding that the state's purpose of eliminating discrimination is a compelling state interest that is unrelated to the suppression of ideas, and that Minnesota's law was the least restrictive means of achieving that interest. Jaycees failed to demonstrate that the Act imposed any serious burdens on the male members' freedom of expressive association. Though the Jaycees had taken public positions on a number of diverse issues, and regularly engaged in a variety of activities worthy of constitutional protection under the First Amendment, there was "no basis in the record for concluding that admission of women as full voting members would impede the organization's ability to engage in these protected activities or to disseminate its preferred views." The Act, the Court held, required "no change in the Jaycees' creed of promoting the interest of young men, and it impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." Moreover, the Jaycees already invited women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, "any claim that admission of women as full voting members [would] impair a symbolic message conveyed by the very fact that women [we]re not permitted to vote [wa]s attenuated, at best." And "even if enforcement of the Act cause[d] some incidental abridgment of the Jaycees' protected speech, that effect [wa]s no greater than [wa]s necessary to accomplish the State's legitimate purposes."[1138]

[I439] The Court took a similar approach in *Rotary*. Rotary International, a non-profit corporation, was founded as "an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." It admitted a cross-section of worthy business and community leaders, but refused membership to women. As the group's General Secretary explained, the exclusion of women resulted in an aspect of fellowship that was enjoyed by the male membership. That policy also allowed the organization to operate effectively in foreign countries with varied cultures and social mores. Though California's Civil Rights Act, which applied to Rotary International, prohibited discrimination on the basis of sex, the organization claimed a right to associate, including the right to select its members. As in *Jaycees*, the Court rejected the claim, holding that the evidence failed to demonstrate that admitting women to Rotary Clubs would "affect in any significant way the existing members' ability to carry out their various purposes." Rotary Clubs engaged in a variety of commendable service activities that were protected by the First Amendment. But California's Civil Rights Act did "not require

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[1137] Hishon v. King & Spalding, 467 U.S. 69, 78 (1984).

[1138] Roberts v. United States Jaycees, 468 U.S. 609, 623–28 (1984).

the clubs to abandon or alter any of these activities. It d[id] not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, goodwill, and peace. Nor d[id] it require them to abandon their classification system or admit members who did not reflect a cross-section of the community. Indeed, by opening membership to leading business and professional women in the community, Rotary Clubs [we]re likely to obtain a more representative cross-section of community leaders with a broadened capacity for service." Finally, even if California's law worked "some slight infringement on Rotary members' right of expressive association, that infringement [wa]s justified because it serve[d] the State's compelling interest in eliminating discrimination against women."[1139]

[I440] In *New York State Club Association*, the Court turned back a facial challenge to a state anti-discrimination statute on the assumption that the expressive associational character of a dining club with over 400 members could be sufficiently attenuated to permit application of the law even to such a private organization. However, the Court also recognized the state did not prohibit exclusion of those whose views were at odds with positions that the club's members wished to promote. Instead, the law "merely prevent[ed] an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city consider[ed] to be more legitimate criteria for determining membership." But it was conceivable that "an association might be able to show that it [wa]s organized for specific expressive purposes, and that it [would] not be able to advocate its desired viewpoints nearly as effectively if it could not confine its membership to those who share[d] the same sex, for example, or the same religion."[1140]

[I441] In *Dale*, an adult's position as assistant scoutmaster of a New Jersey troop was revoked when the Boy Scouts learned that he was an avowed homosexual and gay rights activist. Dale filed suit, alleging, *inter alia*, that the Boy Scouts had violated the state statute prohibiting discrimination on the basis of sexual orientation in places of public accommodation. The Court, by a five-to-four vote, held that application of that law would violate the Boy Scouts' First Amendment right of expressive association. The Court gave deference to the Boy Scouts assertions that homosexual conduct was inconsistent with the values embodied in the Scout Oath and Law, particularly those represented by the terms "morally straight" and "clean," and that the organization did not want to promote homosexual conduct as a legitimate form of behavior. And "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message both to the youth members and the world that the Boy Scouts accept[ed] homosexual conduct as a legitimate form of behavior." Consequently, the Court found that a state requirement that the Boy Scouts retain Dale "would significantly burden the organization's right to oppose or disfavor homosexual conduct," and concluded that the state interests embodied in New Jersey's public accommodations law did not justify such a severe intrusion on the freedom of expressive association.[1141]

[I442] A statute that mandates exclusive union representation in collective bargaining proceedings does not contravene the Constitution.[1142] And it is rational for a state to give the exclusive representative a unique role in a "meet and negotiate" process.

[1139] Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548–49 (1987).

[1140] New York State Club Ass'n v. New York City, 487 U.S. 1, 13 (1988).

[1141] Boy Scouts of Am. v. Dale, 530 U.S. 640, 650–59 (2000).

[1142] *See also* para. I446.

"The goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.'" Furthermore, it is rational for the state to do the same in "meet and confer" sessions on employment-related questions not subject to mandatory bargaining. "[T]he goal of basing policy decisions on consideration of the majority view of its employees makes it reasonable for an employer to give only the exclusive representative a particular formal setting in which to offer advice on policy." Employees "may well feel some pressure to join the exclusive representative in order to give them the opportunity to serve on the 'meet and confer' committees or to give them a voice in the representative's adoption of positions on particular issues. That pressure, however, is no different from the pressure they may feel to join [the exclusive representative] because of its unique status in the 'meet and negotiate' process. Moreover, the pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in [the American] system of government; it does not create an unconstitutional inhibition on associational freedom."[1143]

[I443] In *Keller*, the Court upheld against a First Amendment challenge a statute compelling membership in a state bar.[1144] The Court has also approved a federal law authorizing a "union shop" agreement,[1145] in light of the fact that the compulsory enrollment at issue imposed only the duty to pay dues.[1146]

3. Compulsory Fees

a. Compelled Contributions to Trade Unions

i. In General

[I444] In a series of cases, the Court has dealt with the constitutional validity of compelled contributions by employees to trade unions. The Court first addressed the question in *Hanson*, where it recognized the validity of a "union shop" agreement authorized by the Railway Labor Act (RLA). The challenged provision authorized an agreement that compelled union membership, rather than simply the payment of a service fee by a non-member employee. Finding that the concomitants of compulsory union membership authorized by the Act extended only to financial support of the union in its collective bargaining activities, the Court decided that the challenged arrangement did not offend First or Fifth Amendment values. Since, under the Commerce Clause, Congress had the power to identify "[t]he ingredients of industrial peace and stabilized labor-management relations," Congress could determine that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees, who obtained the benefit of union representation, to share its cost. The record in *Hanson* contained no evidence that union dues were used to force ideologi-

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[1143] Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 290–92 (1984). In light of these considerations, the Court also rejected appellees' contention that their exclusion from "meet and confer" sessions denied them equal protection of the laws.

[1144] *See* para. I453.

[1145] Under a union shop agreement, an employee should become a member of the union within a specified period of time after hire and must, as a member, pay whatever union dues and fees are uniformly required.

[1146] *See* para. I444.

cal conformity or otherwise to impair the free expression of employees, and the Court noted that, "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." But the Court squarely concluded that "the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work does not violate the First Amendment."[1147]

[I445] *Hanson* did not directly concern the extent to which union dues collected under a governmentally authorized union-shop agreement may be utilized in support of ideological causes or political campaigns to which reluctant union members are opposed. The Court addressed that issue, under the RLA, in *Street*. Unlike *Hanson*, the record in *Street* was replete with detailed information and specific factual findings that the union dues of dissenting employees had been used to finance the campaigns of candidates for federal and state offices whom the plaintiffs opposed and to promote the propagation of political and economic doctrines, concepts, and ideologies with which they disagreed. The Court recognized that these findings presented constitutional questions of the utmost gravity, not decided in *Hanson*, and therefore considered whether the Act could fairly be construed to avoid these constitutional issues. The Court concluded that the Act could be so construed, since only "the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes [fell within] the reasons . . . accepted by Congress why authority to make union shop agreements was justified."[1148]

[I446] It was not until the decision in *Abood* that the Court addressed the constitutionality of union security provisions in the public employment context. There, some non-union public school teachers challenged an agreement requiring them, as a condition of their employment, to pay a service fee equal in amount to union dues. The objecting teachers alleged that the union's use of their fees to engage in political speech violated their freedom of association guaranteed by the First and Fourteenth Amendments. The Court agreed, and held that objecting teachers could "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative."[1149] In so doing, the Court set out several important propositions. First, it recognized that "[t]o compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests."[1150] "Unions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from indi-

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[1147] Ry. Employees v. Hanson, 351 U.S. 225, 233–38 (1956).

[1148] Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 768 (1961). As the Court made clear, this construction involved "no curtailment of the traditional political activities of the railroad unions. It mean[t] only that those unions [should] not support those activities, against the expressed wishes of a dissenting employee, with his exacted money." *Id.* at 770.

Two years later, in *Railway Clerks v. Allen*, 373 U.S. 113, 118 (1963), another RLA case, the Court reaffirmed that holding. It emphasized the important distinction between a union's political expenditures and "those germane to collective bargaining," with only the latter being properly chargeable to dissenting employees under the statute. Similarly, in *Communications Workers v. Beck*, 487 U.S. 735, 762–63 (1988), the Court held that the National Labor Relations Act authorized the exaction of only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."

[1149] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977).

[1150] *Id.* at 222.

vidual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns."[1151] Second, the Court in *Abood* determined that, as in the private sector, compulsory affiliation with, or monetary support of, a public employment union does not, without more, violate the First Amendment rights of public employees. "The principle of exclusive union representation . . . is a central element in the congressional structuring of industrial relations. . . . The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the workforce and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations. . . . The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. . . . The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged 'fairly and equitably to represent all employees, . . . union and nonunion,' within the relevant unit. . . . A union shop arrangement distributes fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees."[1152] Subsequently, the Court held that compelled contributions to support activities related to collective bargaining are "constitutionally justified by the legislative assessment of the important contribution of the union shop to labor relations established by Congress."[1153] In this connection, the Court indicated that the above considerations, which justify the union shop in the private context, are equally important in the public sector workplace. Consequently, the use of dissenters' assessments "for the purposes of collective bargaining, contract administration, and grievance adjustment," approved under the RLA, was equally permissible when authorized by a state *vis-à-vis* its own workers.[1154] "The Court in *Abood* did not attempt to draw a precise line between permissible assessments for public sector collective bargaining activities and prohibited assessments for ideological activities. It did note, however, that, while a similar line must be drawn in the private sector under the RLA, the distinction in the public sector may be 'somewhat hazier.' . . . This is so because the 'process of establishing a written collective bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval

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[1151] Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 516 (1991).

[1152] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220–22 (1977).

[1153] *Id.* at 222.

[1154] *Id.* at 224–26. The Court also established that the constitutional principles that prevent a state from conditioning public employment upon association with a political party similarly prohibit a public employer "from requiring [an employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public educator." *Id.* at 235.

by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.'"[1155]

[I447] In *Ellis*, the Court examined the legality of burdening objecting employees with six specific union expenses that fell between the extremes identified in *Hanson* and *Street:* a quadrennial convention, litigation not involving the negotiation of agreements or settlement of grievances, union publications, social activities, and general organizing efforts. Construing the Railway Labor Act, the Court held that "when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."[1156] Under this standard, the Court had little trouble in holding that petitioners should help defray the costs of the national conventions at which "the members elect[ed] officers, establish[ed] bargaining goals and priorities, and formulate[d] overall union policy." "Surely," the Court noted, "if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy. Conventions such as those at issue are normal events . . . [and] essential to the union's discharge of its duties as bargaining agent."[1157] "Like conventions, social activities at union meetings are a standard feature of union operations. . . . While these affairs are not central to collective bargaining, they are sufficiently related to it to be charged to all employees; . . . these small expenditures are important to the union's members because they bring about harmonious working relationships, promote closer ties among employees, and create a more pleasant environment for union meetings."[1158] In addition, a magazine "is important to [a] union in carrying out its representational obligations, and a reasonable way of reporting to its constituents. . . . [But] [i]f the union cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing about that activity. By the same token, [the union might charge, under the Act,] objecting employees for reporting to them about those activities it could charge them for doing."[1159] Furthermore, the Court held that organizing expenses could not be charged to objecting employees, noting, *inter alia*, that "[u]sing dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer."[1160] By contrast, "[t]he expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to [dissenters] as a normal incident of the duties of the exclusive

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[1155] Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 517–18 (1991), *quoting* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977).

[1156] Ellis v. Ry. Clerks, 466 U.S. 435, 448 (1984).

[1157] *Id.* at 448–49.

[1158] *Id.* at 449–50.

[1159] *Id.* at 451.

[1160] *Id.* at 452.

representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. [But] [t]he expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees."[1161] Finally, in *Ellis*, the Court also rejected a First Amendment challenge to the use of dissenters' funds for union conventions, publications, and social events. Recognizing that, "by allowing the union shop at all, [it] necessarily countenanced a significant burdening of First Amendment rights," the Court limited its inquiry to "whether the expenses at issue involve[d] additional interference with the First Amendment interests of objecting employees, and, if so, whether they [we]re nonetheless adequately supported by a governmental interest."[1162] Applying that standard to the challenged expenses, the Court found all three to be properly supportable through mandatory assessments. "The dissenting employees in *Ellis* objected to charges relating to union social functions, not because those activities were inherently expressive or ideological in nature, but purely because they were sponsored by the union. Because employees may constitutionally be compelled to affiliate with a union, the Court found that forced contribution to union social events open to all imposed no additional burden on their First Amendment rights. [Moreover,] [a]lthough the challenged expenses for union publications and conventions were clearly communicative in nature, the Court found them to entail little additional infringement of First Amendment rights 'and none that is not justified by the governmental interests behind the union shop itself.'"[1163]

[I448] In *Lehnert*, the Court relied on both public sector and RLA cases to hold that agency fees may be constitutionally assessed by public employee unions, if the chargeable activities "(1) [are] 'germane' to collective bargaining activity; (2) [are] justified by the government's vital policy interest in labor peace and avoiding 'free riders;' and (3) [do] not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."[1164] In the same case, a majority of the Court

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[1161] *Id.* at 453. Although *Ellis* was a statutory case, it must be treated as reflecting the constitutional rule suggested in *Hanson* and later confirmed in *Abood*. *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 555 (1991) (opinion of Scalia, J.).

[1162] Ellis v. Ry. Clerks, 466 U.S. 435, 456 (1984).

[1163] *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 518 (1991), *discussing* Ellis v. Ry. Clerks, 466 U.S. 435, 456 (1984).

[1164] Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991). Four Justices held that, to be constitutional, a charge must *at least* be incurred in performance of the union's statutory duties. *Id.* at 557–58 (opinion of Scalia, J., concurring in judgment in part and dissenting in part). Justice Scalia said: "The first part of the test that the Court announces—that the activities for which reimbursement is sought must be germane to collective bargaining activity—could, if properly elaborated, stand for the proposition set forth above. But it is not elaborated, and the manner in which the Court applies it to the expenditures before us here demonstrates that the Court considers an expenditure 'germane' to collective bargaining not merely when it is reasonably necessary for the very performance of that collective bargaining, but whenever it is reasonably designed to achieve a more favorable outcome from collective bargaining (e.g., expenditures for strike preparations). That, in my view, is wrong. The Court adds two further tests, which apparently all expenditures that pass the first one must also meet, but neither of them compensates for the overly broad concept of germaneness. I think that those two additional tests, which are seemingly derived from Part VI of the *Ellis* opinion, represent a mistaken reading of that case, but since they make no difference to my analysis of the expenditures at issue here, I need not contest them."

concluded that a teachers' union (Ferris Faculty Association (FFA), which was an affiliate of the Michigan Education Association (MEA) and the National Education Association (NEA)), could not constitutionally charge objecting employees for lobbying, electoral, and other union political activities outside the limited context of contract ratification or implementation;[1165] and for a public relations campaign meant to raise the esteem for teachers in the public mind and so increase the public's willingness to pay for public education.[1166] Conversely, the Court decided that a local bargaining representative may charge objecting employees for their *pro rata* share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities are not performed for the direct benefit of the objecting employees' bargaining unit. "The essence of the affiliation relationship is the notion that the parent union will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to it is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year."[1167] The Court also found that the following union activities could constitutionally be supported through objecting employees' funds:

(1) NEA "program expenditures" destined for States other than Michigan and the expenses of an MEA publication, the Teacher's Voice, listed as "Collective Bargaining;"[1168]

(2) information services such as portions of the Teacher's Voice that concerned teaching and education generally, professional development, unemployment, job opportunities, MEA award programs, and other miscellaneous matters, since these services were neither political nor public in nature, were for the benefit of all, and were comparable to the *de minimis* social activity charges approved in *Ellis*;[1169]

(3) participation by FFA delegates in the MEA and NEA conventions and in the Coordinating Council meeting, an event at which bargaining strategies and representational policies were developed for bargaining units, since

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[1165] *Id.* at 519–22, 527 (four-Justice plurality); *id.* at 559 (Scalia, J., concurring in judgment in part and dissenting in part). The plurality stressed, *inter alia*, that charging dissenters for such activities would compel them to engage in core political speech with which they disagree, thus placing a burden upon their First Amendment rights that extends far beyond acceptance of the agency shop.

[1166] *Id.* at 528–29 (plurality opinion); *id.* at 559 (opinion of Scalia, J.). The plurality noted that "the public relations activities at issue entailed speech of a political nature in a public forum [and] public speech in support of the teaching profession generally is not sufficiently related to the union's collective bargaining functions to justify compelling dissenting employees to support it."

[1167] *Id.* at 523. This does not give the local union *carte blanche*, since there "must be some indication that the payment is for services that may ultimately enure to the benefit of the local's members by virtue of their membership in the parent organization," and since "the union bears the burden of proving the proportion of chargeable expenses to total expenses." *Id.* at 524.

[1168] *Id.* at 527. The Court's conclusion that unions may bill dissenting employees for their share of general collective bargaining costs of the state or national parent union was dispositive as to the bulk of the NEA expenditures.

[1169] *Id.* at 529. The dissenters noted that the newsletter was inherently communicative; hence the fact that what it communicated might be "for the benefit of all" did not lessen the First Amendment injury to those who did not agree. *See id.* at 560.

such conventions were essential to the union's discharge of its bargaining agent duties even though they were not solely devoted to FFA activities;[1170]

(4) expenses incident to preparation for a strike, since such expenditures fell within the range of reasonable bargaining tools available to a public sector union during contract negotiations and enured to the direct benefit of members of the dissenters' unit.[1171]

[I449] Finally, the Court has acknowledged that "[i]t would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to any political expenditures by the union."[1172] But that dissent "is not to be presumed—it must affirmatively be made known to the union by the dissenting employee,"[1173] who may first make known his objection to the union's political expenditures in his complaint filed in the court action.[1174] Although "the nonunion employee has the burden of raising an objection, . . . the union retains the burden of proof."[1175] "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion."[1176]

ii. Procedural Safeguards

[I450] In *Hudson*, a public sector case, the Court determined that the First Amendment requires unions and employers to provide procedural protections for non-union workers who object to the calculation of the agency fee. "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the union's ability to require every employee to contribute to the cost of collective bargaining activities."[1177] "Procedural safeguards are necessary to achieve this objective for two reasons. First, although the government interest in labor peace is strong enough to support an 'agency shop,' notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee—the individual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meri-

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[1170] *Id.* at 529–30.

[1171] *Id.* at 531–32.

[1172] Ry. Clerks v. Allen, 373 U.S. 113, 118 (1963). *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977) ("To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the union that are unrelated to its duties as exclusive bargaining representative.").

[1173] Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 774 (1961).

[1174] *See* Ry. Clerks v. Allen, 373 U.S. 113, 119, n.6 (1963).

[1175] Chicago Teachers Union v. Hudson, 475 U.S. 292, 306 (1986).

[1176] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 239, n.40 (1977), *quoting* Ry. Clerks v. Allen, 373 U.S. 113, 122 (1963).

[1177] Chicago Teachers Union v. Hudson, 475 U.S. 292, 302 (1986), *quoting* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237 (1977).

torious First Amendment claim."[1178] Under *Hudson*, "employees must receive 'sufficient information to gauge the propriety of the union's fee;' . . . the union must give objectors 'a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker;' . . . and any amount of the objector's fee 'reasonably in dispute' must be held in escrow while the challenge is pending."[1179] The Court also has held that when a union adopts an arbitration process to comply with *Hudson*'s "impartial decisionmaker" requirement, agency fee objectors who have not agreed to the procedure may not be required to exhaust the arbitral remedy before challenging the union's calculation in a federal court action.[1180]

iii. Appropriate Remedies

[I451] If employees have made known to their respective unions their objection to the use of their money for the support of political causes, unions are without power to use payments thereafter tendered by them for such causes. However, the union shop agreement itself is not unlawful. Hence, to enjoin its enforcement would sweep too broadly.[1181] Moreover, an injunction prohibiting the union from expending dues for political purposes would be inappropriate, mainly because those union members who do wish part of their dues to be used for political purposes have a right to associate to that end, "without being silenced by the dissenters." "To attain the appropriate reconciliation between majority and dissenting interests in this area, courts should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other."[1182] As the Court suggested in *Street*, among the permissible remedies for dissenting employees are, first, "an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget," and, second, "restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed."[1183] The Court in *Allen* suggested, in addition, a "practical decree" that could properly be entered, providing for the refund of a portion of the exacted funds in the proportion that union political expenditures bear to total union expenditures and for the reduction of future exactions by the same proportion.[1184] Moreover, in *Ellis*, the

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[1178] Chicago Teachers Union v. Hudson, 475 U.S. 292, 302–03 (1986).

[1179] Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 874 (1998), *discussing and quoting* Chicago Teachers Union v. Hudson, 475 U.S. 292, 306, 310 (1986).

[1180] Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 875–80 (1998). As the Court pointed out, the purpose of *Hudson*'s "impartial decisionmaker" requirement is "to advance the swift, fair, and final settlement of objectors' rights," not to compel objectors to pursue arbitration. *Id.* at 877.

[1181] *See* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 771 (1961).

[1182] *Id.* at 773.

[1183] *Id.* at 744–75. In proposing a restitution remedy, the *Street* opinion made clear that "[t]here should be no necessity, however, for the employee to trace his money up to and including its expenditure; if the money goes into general funds and no separate accounts of receipts and expenditures of the funds of individual employees are maintained, the portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget." *Id.* at 775.

[1184] Ry. Clerks v. Allen, 373 U.S. 113, 122 (1963).

Court determined that, under the Railway Labor Act, a "pure rebate approach" is inadequate. The Court explained that, under such an approach, in which the union refunds to the non-union employee any money to which the union was not entitled, "the union obtains an involuntary loan for purposes to which the employee objects."[1185] "[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose."[1186]

b. Compulsory Dues to State Bars

[I452] In *Lathrop*, a Wisconsin lawyer claimed that he could not constitutionally be compelled to join and financially support a state bar association that expressed opinions on, and attempted to influence, legislation. Six members of the Court, relying on *Hanson*,[1187] rejected this claim. A four-member plurality noted that a state, in order to further its "legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated [state] bar [of Wisconsin,] . . . [which it purposed to serve the function] of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process, . . . and in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues," the plurality was "unable to find any impingement upon protected rights of association."[1188] Two other members of the Court concluded that "a State may constitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified by state needs as the union shop is by federal needs."[1189] The *Lathrop* plurality emphasized, however, that the Court was confronted, as in *Hanson*, only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect.[1190]

[I453] The question expressly reserved in *Lathrop* was answered in *Keller*. There, the Court held that "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. . . . [T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State."[1191] Hence, compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze ini-

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[1185] Ellis v. Ry. Clerks, 466 U.S. 435, 443–44 (1984).

[1186] Chicago Teachers Union v. Hudson, 475 U.S. 292, 305 (1986).

[1187] *See* para. I444.

[1188] Lathrop v. Donohue, 367 U.S. 820, 842–43 (1961).

[1189] *Id.* at 849 (opinion of Harlan, J., concurring in judgment).

[1190] *Id.* at 828–29. Justice Harlan would have reached this claim and decided that it lacked merit. *Id.* at 848–65.

[1191] Keller v. State Bar of California, 496 U.S. 1, 14 (1990).

tiative; but compulsory dues may be spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.[1192]

F. FREEDOM OF POLITICAL ASSOCIATION

1. General Considerations

[I454] "The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization."[1193] Thus, the Constitution guarantees "the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."[1194] The freedom to join together in furtherance of common political beliefs "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."[1195]

[I455] On the other hand, it is also clear that government "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."[1196] In this context, "[r]egulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. . . . However, when regulations impose lesser burdens, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'"[1197]

2. Organization and Internal Affairs of Political Parties—Selection of Party Nominees

[I456] "[P]olitical parties' government, . . . and activities enjoy constitutional protection."[1198] A party's "determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected" by the First and Fourteenth Amendments.[1199] And "the processes by which political parties select their nominees are . . . [not] wholly public affairs that States may regulate freely."[1200]

[I457] In *Eu*, the California Elections Code provided that the "official governing bodies" for a "ballot-qualified" party were its "state convention," "state central committee," and "county central committees," and that these bodies were responsible for conducting the party's campaigns. Separate statutory provisions dictated the size and composition of the state central committees (for example, the Code dictated the precise mix of

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[1192] *Id.* at 15–16. The Court also noted that an integrated bar can certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson* (*see* para. I450). *Id.* at 17.

[1193] Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 214 (1986).

[1194] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997).

[1195] Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981).

[1196] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

[1197] Clingman v. Beaver, 544 U.S. 581, 586–87 (2005), *citing and quoting* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997). "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *See* Tashijian v. Republican Party of Connecticut, 479 U.S. 208, 215 (1986), *quoting* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[1198] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

[1199] Tashijian v. Republican Party of Connecticut, 479 U.S. 208, 224 (1986).

[1200] California Democratic Party v. Jones, 530 U.S. 567, 572–73 (2000).

elected officials, party nominees, and party activists who were members of the state central committees of the parties, as well as who might nominate the various committee members); set forth rules governing the selection and removal of committee members; fixed the maximum term of office for the chair of the state central committee (the Code limited the term of office of the chair of the state central committee to two years, and prohibited successive terms); required that the chair rotate between residents of northern and southern California; and specified the time and place of committee meetings. These laws directly burdened the associational rights of a party and its members by limiting "the party's discretion in how to organize itself, conduct its affairs, and select its leaders." Moreover, the laws did not serve a compelling state interest. As the Court emphasized, "a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair."[1201] The state's claim that it had a compelling interest in the "democratic management of the political party's internal affairs" was without merit, since this was not a case where intervention was "necessary to prevent the derogation of the civil rights of party adherents," and since a state "has no interest in protecting the integrity of the [p]arty against the [p]arty itself."[1202] Nor were the restrictions justified by the state's claim that limiting the term of the state central committee chair and requiring that the chair rotate between northern and southern California helped to "prevent regional friction from reaching a critical mass," since a state "cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure."[1203] In the same case, the Court also struck down a state rule that prohibited political parties from endorsing, supporting, or opposing any candidate in primary elections for partisan offices. Such a ban "directly hampers the party's ability to spread its message and hamstrings voters seeking to inform themselves about the candidates and issues" and thereby burdens the freedom of political speech of the party and its members. It also infringes a party's associational rights "to identify the people who constitute the association and to select a standard-bearer who best represents the party's ideology and preferences," by preventing the party from promoting candidates at the crucial primary election juncture. Moreover, the challenged ban did not serve a compelling governmental interest. The state's explanation that the ban advanced its claimed interest in party stability was untenable. "[T]he proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign" [cannot stand.] To the contrary, . . . contending forces within the party can employ the primary campaign and the primary election to finally settle their differences. . . . [A] State may enact laws to prevent disruption of political parties from without, but not

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[1201] Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 233 (1989).

[1202] *Id.* at 232.

[1203] *Id.* at 232–33. As the Court noted, *Marchioro v. Chaney*, 442 U.S. 191 (1979), was "not to the contrary. There [the Court] upheld a Washington statute mandating that political parties create a state central committee, to which the Democratic Party, not the State, had assigned significant responsibilities in administering the party, raising and distributing funds to candidates, conducting campaigns, and setting party policy. . . . The statute only required that the state central committee perform certain limited functions such as filling vacancies on the party ticket, nominating Presidential electors and delegates to national conventions, and calling statewide conventions. The party members did not claim that these statutory requirements imposed impermissible burdens on the party or themselves, so [the Court] had no occasion to consider whether the challenged law burdened the party's First Amendment rights, and, if so, whether the law served a compelling state interest." *See* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 232 n.22 (1989), *citing* Marchioro, *supra*, at 197, n.12.

. . . laws to prevent the parties from taking internal steps affecting their own process for the selection of candidates." The state's additional claim that the ban was necessary to protect primary voters from confusion and undue influence was also rejected. "While a State may regulate the flow of information between political associations and their members when necessary to prevent fraud and corruption," the Court found no evidence that California's ban on party primary endorsements served that purpose.[1204]

[I458] In *Tashjian*, the Court struck down, as inconsistent with the First Amendment, a closed primary system that prevented a political party from inviting independent voters—registered voters not affiliated with any party—to vote in the party's primary. The state thus limited the party's "associational opportunities at the crucial juncture at which the appeal to common principles [might] be translated into concerted action, and hence to political power in the community."[1205] The interests asserted by the state as justification for the statute were judged insubstantial. "While the State [wa]s of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, . . . the possibility of future increases in the cost of administering the election system [wa]s not a sufficient basis" for infringing the party's First Amendment rights.[1206] The interest in curtailing raiding, a practice whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary, was not implicated, since the statute did not impede a raid on the party by independent voters who could register as party members and vote in the primary.[1207] Furthermore, "the State's legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions in no respect ma[de] it necessary to burden the party's rights. . . . By inviting independents to assist in the choice at the polls between primary candidates selected at the party convention, the party . . . intended to produce the candidate and platform most likely to . . . appeal to the independent voter. The state statute [wa]s said to decrease voter confusion, yet it deprive[d] the party and its members of the opportunity to inform themselves as to the level of support for the party's candidates among a critical group of electors."[1208] Finally, even if the state were correct in arguing that the statute was designed to save the party from undertaking conduct destructive of its own interests, the state could not constitutionally substitute its judgment for that of the party, regarding the boundaries of the party's association.[1209]

[I459] *Clingman* presented a question that *Tashjian* had left open—whether a state may prevent a political party from inviting registered voters of other parties to vote in its primary. In that case, when the Libertarian Party of Oklahoma (LPO) notified the state Election Board it wanted to open its upcoming primary to all registered voters regardless of party affiliation, the Board agreed as to independents, but not as to other parties' members, for, under Oklahoma's semi-closed primary law, a political party could invite only its own registered members and voters registered as independents to vote in its primary. The Court first found that the law at issue did not severely burden associational rights, since (1) the law did "not regulate the LPO's internal processes, its author-

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[1204] Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222–29 (1989).
[1205] Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 216 (1986).
[1206] *Id.* at 218.
[1207] *Id.* at 219.
[1208] *Id.* at 221–22.
[1209] *Id.* at 224.

ity to exclude unwanted members, or its capacity to communicate with the public," and (2) party disaffiliation was not difficult, and voters would have to make a minimal effort to reregister as independents or libertarians. Further, Oklahoma's primary advanced a number of important regulatory interests. It "preserve[d] political parties as viable and identifiable interest groups;" "enhance[d] parties' electioneering and party-building efforts;" and "guard[ed] against party raiding and 'sore lose'" candidacies by spurned primary contenders. Under these considerations, the Court concluded that Oklahoma's semi-closed primary system did not violate the right to freedom of association.[1210]

[I460] "A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution."[1211] In *Cousins*, the Court reviewed the decision of an Illinois court holding that state law exclusively governed the seating of a state delegation at the 1972 Democratic National Convention and enjoining the Democratic Party from refusing to seat delegates selected in a manner in accord with state law, although contrary to party rules, regarding participation of minorities, women, and young people, as well as other matters. The Court found that "Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention." Subsequently, it held that the appellate court had erred in according primacy to state law over the party's rules in the determination of the qualifications and eligibility of delegates to the party's national convention.[1212]

[I461] A corollary of the freedom of political association is the right not to associate.[1213] Under *Rodriguez*, a state may vest in a political party the initial authority to appoint an interim replacement for one of its members who vacates a position as a district senator or representative. In such a case, the party is entitled to adopt its own procedures to select this replacement. Non-members' exclusion from this election does not violate their rights of association, nor does it deprive them of equal protection of the laws.[1214]

[I462] "In no area is the political [party's] right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views."[1215]

[I463] In *La Follette*, the state of Wisconsin conducted an open presidential preference primary.[1216] Although the voters did not select the delegates to the Democratic Party's National Convention directly—they were chosen later at caucuses of party members—Wisconsin law required these delegates to vote in accord with the primary results. Thus, allowing non-party members to participate in the selection of the party's nominee conflicted with the Democratic Party's rules. The Court noted that "the inclusion

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[1210] Clingman v. Beaver, 544 U.S. 581, 590–91, 594 (2005).

[1211] Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124 (1981).

[1212] Cousins v. Wigoda, 419 U.S. 477, 490–91 (1975).

[1213] *See* California Democratic Party v. Jones, 530 U.S. 567, 574 (2000).

[1214] Rodriguez v. Popular Democratic Party, 457 U.S. 1, 14 (1982).

[1215] California Democratic Party v. Jones, 530 U.S. 567, 575 (2000).

[1216] An "open" primary differs from a "blanket" primary in that, although as in the blanket primary any person, regardless of party affiliation, may vote for a party's nominee, his choice is limited to that party's nominees *for all offices.*

of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions—and that political parties may accordingly protect themselves from intrusion by those with adverse political principles." Hence, the Court held that, whatever the strength of the state interests supporting the open primary itself, they could not justify this substantial intrusion into the associational freedom of members of the Democratic Party.[1217]

[I464] Similarly, *Jones* struck down a California statute that provided for a blanket primary, in order to favor nominees with "moderate" positions.[1218] Under this statute, each voter's ballot listed every candidate regardless of party affiliation and allowed the voter to choose freely among them, although the California Democratic Party, the California Republican Party, and other California parties had rules prohibiting persons not members of the party from voting in the party's primary. The candidate of each party who won the most votes was that party's nominee for the general election. Thus, the statute "force[d] political parties to associate with—to have their nominees, and hence their positions, determined by—those who at best ha[d] refused to affiliate with the party, and at worst ha[d] expressly affiliated with a rival. . . . In any event, the deleterious effects of [the statute] [we]re not limited to altering the identity of the nominee. Even when the person favored by a majority of the party members prevail[ed,] he [would] have prevailed by taking somewhat different positions—and, should he be elected, [would] continue to take somewhat different positions in order to be renominated. . . . Such forced association ha[d] the likely outcome—indeed, in this case the *intended* outcome—of changing the parties' message."[1219] The statute imposed a very heavy burden on a political party's associational freedom and was therefore unconstitutional unless it was narrowly tailored to serve a compelling state interest. However, none of California's proffered state interests—producing elected officials who would better represent the electorate, expanding candidate debate beyond the scope of partisan concerns, ensuring that disenfranchised persons would enjoy the right to an effective vote, promoting fairness, affording voters greater choice, increasing voter participation, and protecting associational privacy—was a compelling interest justifying California's intrusion into the parties' associational rights.[1220] Furthermore, the Court observed that even if all these state interests were compelling ones, the statute was not a narrowly tailored means of furthering them. The state "could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote-getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan

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[1217] Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122, 126 (1981).

[1218] California Democratic Party v. Jones, 530 U.S. 567, 577–85 (2000).

[1219] *Id.* at 577, 579–81.

[1220] With respect to the confidentiality of one's party affiliation, the Court noted that "[e]ven if (as seem[ed] unlikely) a scheme for administering a closed primary could not be devised in which the voter's declaration of party affiliation would not be public information, . . . the State's interest in assuring the privacy of this piece of information in all cases [could not] conceivably be considered a 'compelling' one. If such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices." *Id.* at 585.

blanket primary, save the constitutionally crucial one: primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased 'privacy,' and a sense of 'fairness'—all without severely burdening a political party's First Amendment right of association."[1221]

[I465] Nevertheless, "a State may require parties to use the primary (or the convention) format for selecting their nominees, in order to assure that intra-party competition is resolved in a democratic fashion."[1222] And "[w]here the state law has made the party primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice" of government officials, the Fifteenth and Fourteenth Amendments apply to primaries.[1223]

[I466] Finally, "in order to prevent 'party raiding'—a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary—a State may require party registration a reasonable period of time before a primary election."[1224] *Rosario* dealt with a New York statutory provision that, to vote in a party primary, the voter should have registered as a party member 30 days prior to the previous general election, a date eight months prior to the presidential primary and 11 months prior to the non-presidential primary. Those failing to meet this deadline, with some exceptions, were barred from voting at either primary. The Court found that, although the period between the enrollment deadline and the next primary election was lengthy, that period was "not an arbitrary time limit unconnected to any important state goal." The purpose of New York's delayed-enrollment scheme was to inhibit party raiding, a matter that bore on "the integrity of the electoral process." In the service of this legitimate and valid state goal, New York had adopted its delayed-enrollment scheme, and an integral part of that scheme was that, in order to participate in a primary election, a person should enroll before the preceding general election. Since "[a]llowing enrollment any time after the general election would not have the same deterrent effect on raiding, for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another," the resulting time limitation for enrollment was in no sense invidious or arbitrary.[1225]

[I467] By contrast, *Kusper* struck down similar Illinois provisions aimed at the same evil, where the deadline for changing party registration was 23 months prior to the primary date. One consequence was that a voter wishing to change parties could not vote in any primary that occurred during the waiting period. "The Court did not retreat from *Rosario* or question the recognition in that case of the States' strong interest in maintaining the integrity of the political process by preventing inter-party raiding. Although the 11-month requirement imposed in New York had been accepted as necessary for an effective remedy, the Court was unconvinced that the 23-month period established in Illinois was an essential instrument to counter the evil at which it was aimed."[1226]

[1221] *Id.* at 585–86.

[1222] *Id.* at 572, *citing* Am. Party of Texas v. White, 415 U.S. 767, 781 (1974).

[1223] *See* United States v. Classic, 313 U.S. 299, 318 (1941); Smith v. Allwright, 321 U.S. 649, 659–60 (1944); Terry v. Adams, 345 U.S. 461 (1953). *See, in extenso*, paras. B15, B16 *(state action).*

[1224] California Democratic Party v. Jones, 530 U.S. 567, 572 (2000).

[1225] Rosario v. Rockefeller, 410 U.S. 752, 760–62 (1973).

[1226] *See* Storer v. Brown, 415 U.S. 724, 730, 731–32 (1974), *discussing* Kusper v. Pontikes, 414 U.S. 51, 60–61 (1973).

3. Ballot Access[1227]

[I468] "Restrictions upon the access of political parties and independent candidates to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively."[1228] "These associational rights, however, are not absolute, and are necessarily subject to qualification if elections are to be run fairly and effectively."[1229] "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[1230] Thus, "[w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights, [the Court] weigh[s] the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. . . . Regulations imposing severe burdens on parties' and candidates' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'"[1231] "[E]laborate empirical verification of the weightiness of the State's asserted justifications" is not required.[1232]

[1227] *See also* paras. K152–K154.

[1228] Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986). "The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for likeminded citizens." *See* Anderson v. Celebrezze, 460 U.S. 780, 787–88 (1983).

[1229] Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986), *citing* Storer v. Brown, 415 U.S. 724, 730 (1974).

[1230] Burdick v. Takushi, 504 U.S. 428, 433 (1992).

[1231] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997), *quoting* Burdick v. Takushi, 504 U.S. 428, 434 (1992). *See also* Norman v. Reed, 502 U.S. 279, 288–89 (1992), requiring "a corresponding interest sufficiently weighty to justify the limitation."

Applying this test, *Burdick* sustained Hawaii's prohibition on write-in voting, finding that the state's asserted interests in avoiding the possibility of unrestrained factionalism at the general election and in guarding against "party raiding" during the primaries were legitimate, and sufficient to outweigh the "limited burden" that the write-in voting ban imposed upon voters' freedom of choice and association. In so holding, the Court rejected the petitioner's argument that the ban "deprive[d] him of the opportunity to cast a meaningful ballot," emphasizing that "the function of the election process is to winnow out and finally reject all but the chosen candidates," and that "attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *See* Burdick v. Takushi, 504 U.S. 428, 438 (1992).

[1232] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997), *citing* Munro v. Socialist Workers Party, 479 U.S. 189, 195–96 (1986). In the latter case, the Court said: "To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight, rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights."

[I469] "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties. . . . By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas."[1233] Furthermore, in the context of a Presidential election, state-imposed restrictions[1234] "implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus, in a Presidential election, a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders."[1235]

[I470] In *Williams v. Rhodes*, the Court was confronted with a state electoral structure that favored the two major particular parties—the Republicans and the Democrats—and, in effect, tended to give them a complete monopoly. The Court held unconstitutional the election laws of Ohio insofar as, in combination, they made it "virtually impossible" for a new political party, even though it had hundreds of thousands of members, or an old party, which had a very small number of members, to be placed on the state ballot, in the 1968 presidential election. The challenged laws made no provision for ballot position for independent candidates, as distinguished from political parties, and a new political party, in order to be placed on the ballot, had to obtain petitions signed by qualified electors totaling 15 percent of the number of ballots cast in the last preceding gubernatorial election. But this requirement was only a preliminary. For, although the Ohio American Independent Party in the first six months of 1968 had obtained more than 450,000 signatures (well over the 15-percent requirement), Ohio had nonetheless denied the party a place on the ballot by reason of other statutory burdensome procedures, requiring extensive organization and other election activities by a very early date, including the early deadline for filing petitions (February 7, 1968), and the requirement of a primary election conforming to detailed and rigorous standards. Because these restrictions, which were challenged under the Equal Protection Clause, severely burdened the right to associate for political purposes and the right to vote effectively, the Court ruled that the discriminations against new parties and their candidates had to be justified by compelling state interests. However, the state interests in "encourag[ing] compromise and political stability," and "in attempting to see that the election winner be the choice of a majority" of the state's voters were deemed insufficient to warrant such restrictions on voting and associational rights.[1236]

[I471] *Anderson v. Celebrezze* involved an Ohio statute that required an independent candidate for President to file a statement of candidacy and nominating petition in

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[1233] Anderson v. Celebrezze, 460 U.S. 780, 793–94 (1983).

[1234] The Constitution expressly delegates authority to the States to regulate the selection of Presidential electors (Article II, Section 1). But the Court has rejected the notion that Article II, Section 1, gives the states power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. *See* Williams v. Rhodes, 393 U.S. 23, 29 (1968).

[1235] Anderson v. Celebrezze, 460 U.S. 780, 794–95 (1983).

[1236] Williams v. Rhodes, 393 U.S. 23, 30–34 (1968).

March in order to appear on the general election ballot in November. The Court found that none of the three interests that Ohio sought to further by its early filing deadline justified the challenged provision and concluded that the statute imposed an unconstitutional burden on voters' freedom of choice and freedom of association.[1237] As to the state's asserted interest in voter education, the Court noted, *inter alia*, that "[i]n the modern world, it is somewhat unrealistic to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate simply because he lacks a partisan label." "The state's asserted interest in equal treatment for partisan and independent candidates was not achieved by imposing the early filing deadline on both, since, although a candidate participating in a primary election should declare his candidacy on the same date as an independent, both the burdens and benefits of the respective requirements were materially different, and the reasons for early filing for a primary candidate were inapplicable to independent candidates in the general election."[1238] Moreover, the state's asserted interest in political stability amounted to a desire to protect existing political parties from competition generated by independent candidates who had previously been affiliated with a party, an interest that conflicted with First Amendment values.[1239]

[1237] Anderson v. Celebrezze, 460 U.S. 780, 796–806 (1983). The Court based its decision directly on the First and Fourteenth Amendments and did not engage in a separate Equal Protection Clause analysis. *Id.* at 786–77, n.7.

[1238] *Id.* at 799. "The early filing deadline for a candidate in a party's primary election [wa]s adequately justified by administrative concerns. Seventy-five days appeared to be a reasonable time for processing the documents submitted by candidates and preparing the ballot. . . . The primary date itself [should] be set sufficiently in advance of the general election; furthermore, a Presidential preference primary [had] to precede the national convention, which [wa]s regularly held during the summer. Finally, the successful participant in a party primary generally acquire[d] the automatic support of an experienced political organization. . . . Neither the administrative justification nor the benefit of an early filing deadline [wa]s applicable to an independent candidate. Ohio d[id] not suggest that the March deadline was necessary to allow petition signatures to be counted and verified or to permit November general election ballots to be printed. In addition, the early deadline d[id] not correspond to a potential benefit for the independent, as it d[id] for the party candidate. After filing his statement of candidacy, the independent d[id] not participate in a structured intraparty contest to determine who [would] receive organizational support; he [should] develop support by other means." *Id.* at 800–01.

[1239] Ohio's challenged restriction was substantially different from the California provisions upheld in *Storer* (*see* para. I476). The filing deadline was "neither a 'sore loser' provision nor a disaffiliation statute." Furthermore, *Storer* upheld the state's interest in avoiding political fragmentation in the context of elections wholly within the boundaries of California. "The State's interest in regulating a nationwide Presidential election is not nearly as strong; no State could singlehandedly assure 'political stability' in the Presidential context. The Ohio deadline d[id] not serve any state interest in 'maintaining the integrity of the various routes to the ballot' for the Presidency, because Ohio's Presidential preference primary d[id] not serve to narrow the field for the general election. A major party candidate who los[t] the Ohio primary, or who d[id] not even run in Ohio, [might] nonetheless appear on the November general election ballot as the party's nominee. In addition, the national scope of the competition for delegates at the Presidential nominating conventions assure[d] that 'intraparty feuding' [would] continue until August. More generally, the early filing deadline [wa]s not precisely drawn to protect the parties from 'intraparty feuding,' whatever legitimacy that state goal [might] have in a Presidential election. . . . [T]he early deadline applie[d] broadly to independent candidates who ha[d] not been affiliated in the recent past with any political party. On the other hand, . . . Ohio did not prohibit independent candidacies by persons formerly affiliated with a political party." *Id.* at 804–05.

[I472] States may condition access to the general election ballot by a minor party or independent candidate upon "a preliminary showing of substantial support" among the potential voters for the office.[1240] In *Jenness*, the Court unanimously rejected a challenge to Georgia's election statutes that required independent candidates and minor party candidates, in order to be listed on the general election ballot, to submit petitions signed by at least 5 percent of the voters eligible to vote in the last election for the office in question. Primary elections were held only for those political organizations whose candidate received 20 percent or more of the vote at the last gubernatorial or Presidential election. The Court's opinion stressed that the system did not operate to freeze the political *status quo*, and observed that "there is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."[1241]

[I473] In *American Party of Texas v. White*, candidates of minor political parties in Texas were required to demonstrate support by persons numbering at least 1 percent of the total vote cast for governor at the last preceding general election (in that instance, 22,000 signatures). Candidates could secure the requisite number of petition signatures at precinct nominating conventions and by supplemental petitions following the conventions. Voters signing these supplemental petitions had to swear under oath that they had not participated in another party's primary election or nominating process. In rejecting a First Amendment challenge to the 1-percent requirement, the Court asserted that the state's interest in preserving the integrity of the electoral process and in regulating the number of candidates on the ballot was compelling and reiterated the holding in *Jenness* that a state may require a preliminary showing of significant support before placing a candidate on the general election ballot.[1242] The Court also decided that a state "may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the same nominating process," noting that, "[a]t least where the political parties had access to the entire electorate and an opportunity to commit voters on primary day, [there is] nothing invidious in disqualifying those who have voted at a party primary from signing petitions for another party seeking ballot position for its candidates for the same offices."[1243] Moreover, the Court considered that a period of 55 days, after the general May primary election, was not an unduly short time for circulating supplemental petitions, with the purpose to secure the entire 22,000 signatures.[1244] Finally the Court

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[1240] Anderson v. Celebrezze, 460 U.S. 780, 789, n.9 (1983).

[1241] Jenness v. Fortson, 403 U.S. 431, 439, 442 (1971). The Court also rejected appellants' claim under the Equal Protection Clause, finding that it was not inherently more burdensome for a candidate to gather the signatures of 5 percent of the total eligible electorate than it was to win the votes of a majority in a party primary. *Id.* at 440–41.

[1242] Am. Party of Texas v. White, 415 U.S. 767, 782–83, n.14 (1974). The Court first held that the Equal Protection Clause did not forbid the requirement that small parties proceed by convention, rather than primary election, noting that the convention process had not been shown to be "invidiously more burdensome than the primary election, followed by a runoff election where necessary, particularly where the major party, in addition to the elections, must also hold its precinct, county, and state conventions to adopt and promulgate party platforms and to conduct other business." *Id.* at 781.

[1243] *Id.* at 786.

[1244] *Id.* at 786–87.

upheld the statutory requirement that all signatures evidencing support for the party be notarized, since the party had failed to demonstrate its impracticability or that it was unusually burdensome.[1245]

[I474] The principle set forth in *Jenness* and *American Party of Texas* was reaffirmed in *Munro*. There, the Court upheld a Washington statute requiring that a minor party candidate for office receive at least 1 percent of all votes cast for that office in the state's primary election before the candidate's name would be placed on the general election ballot. "Because Washington provide[d] a 'blanket primary,' minor party candidates [could] campaign among the entire pool of registered voters. Effort and resources that would otherwise be directed at securing petition signatures [could] instead be channeled into campaigns to 'get the vote out,' foster candidate name recognition, and educate the electorate." Consequently, the Court found no differences of constitutional dimension between requiring primary votes to qualify for a position on the general election ballot and requiring signatures on nominating petitions.[1246]

[I475] Nevertheless, a statute that furthers the legitimate state's interest in restricting the ballot to parties with demonstrated public support contravenes the Constitution, if it is not narrowly tailored to achieve the desired objective. If a state has determined that a specific number of signatures in a larger political unit adequately serves its interest in regulating the number of candidates on the ballot, more stringent signature requirements for new political parties and independent candidates seeking offices in a smaller political subdivision are clearly not the least restrictive means of advancing the aforesaid interest.[1247] Thus a "State's requirements for access to the statewide ballot become criteria in the first instance for judging whether rules of access to local ballots are narrow enough to pass constitutional muster."[1248]

[I476] In *Storer*, the Court faced a constitutional challenge to provisions of the California Elections Code that regulated the procedures by which independent candidates could obtain ballot position in general elections. The Code required candidates affiliated with a qualified party to win a primary election, but it required independents to make timely filing of nomination papers signed by at least 5 percent of the entire vote cast in the last general election. This percentage, as such, did not appear to be excessive, in light of the Court's holding in *Jenness*. However, in order to assess realistically whether the law imposed excessively burdensome requirements upon independent candidates, the Court found it necessary to know other critical facts that did not appear from the evidentiary record in this case. It was necessary in the first instance to know the "entire vote" in the last general election. The Court assumed that 325,000 signatures were required in total and also knew that this requirement should be satisfied within a period of 24 days between the primary and the general election. But it did not

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[1245] *Id.* at 787.

[1246] Munro v. Socialist Workers Party, 479 U.S. 189, 197 (1986). The Court also rejected appellees' argument that, since voter turnout at primary elections is generally lower than the turnout at general elections, the statute reduced the pool of potential supporters from which appellee party candidates could secure one percent of the vote, noting, *inter alia*, that "States are not burdened with a constitutional imperative to reduce voter apathy." *Id.* at 198.

[1247] Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 185–86 (1979); Norman v. Reed, 502 U.S. 279, 293–94 (1992).

[1248] Norman v. Reed, 502 U.S. 279, 294 (1992). In that case, the Court also sustained a 25,000 signature rule, requiring the support of only slightly more than 2 percent of an electoral district's voters. *Id.* at 295.

know the number of qualified voters from which the requirement should be satisfied within this period of time. California law disqualified from signing the independent's petition all registered voters who had voted in the primary. In theory, it could be that voting in the primary was so close to 100 percent of those registered, and new registrations since closing the books before primary day were so low that eligible signers of an unaffiliated candidate's petition would number less than the total signatures required. This was unlikely, for it is usual that a substantial percentage of those eligible do not vote in the primary, and there were undoubtedly millions of voters qualified to vote in the 1972 primary. But it was not at all unlikely that the available pool of possible signers, after eliminating the total primary vote, would be substantially smaller than the total vote in the last general election, and that it would require substantially more than 5 percent of the eligible pool to produce the necessary 325,000 signatures. This would be in excess, percentage-wise, of anything the Court had approved as a pre-condition to an independent's securing a place on the ballot and in excess of the 5 percent in the *Jenness* case, which was higher than the requirement imposed by most state election codes. Therefore, further proceedings should be had in the district court to permit further findings with respect to the extent of the burden imposed on independent candidates for President and Vice President under California law. "Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desired to be a candidate for President. But it [wa]s a substantial requirement. . . . [Hence,] it should be determined whether the available pool [wa]s so diminished in size by the disqualification of those who [had] voted in the primary that the 325,000 signature requirement, to be satisfied in 24 days, [wa]s too great a burden on the independent candidates for the offices of President and Vice President."[1249]

[I477] In the same case, the state contended that the signature requirements for independent candidates were of no consequence, because California had provided a valid way for new political parties to qualify for ballot position, an alternative that appellant could have pursued, since, under the Code, new political parties could be recognized and qualify their candidate for ballot position if, 135 days before a primary election, it appeared that voters equal in number to at least 1 percent of the entire vote of the state, at the last preceding gubernatorial election, had declared to the county clerks their intention to affiliate with the new party. The Court rejected the claim, emphasizing that "the political party and the independent candidate approaches to political activity are

[1249] Storer v. Brown, 415 U.S. 724, 738–40 (1974). The Court also noted that, while the district court had taken the view that California law disqualified anyone who had voted in the primary from signing an independent's petition, whether or not the vote had been confined to non-partisan offices and propositions, it would be difficult on the record before the Court to ascertain any rational ground, let alone a compelling interest, for disqualifying non-partisan primary voters at the primary. *See id.* at 741. Furthermore, the Court observed that the district court, in determining whether, in the context of California politics, a "reasonably diligent" independent candidate could be expected to satisfy the signature requirements or would only rarely succeed in securing ballot placement, should consider not only past experience but also "the relationship between the showing of support through a petition requirement and the percentage of the vote the State can reasonably expect of a candidate who achieves ballot status in the general election." *See id.* at 742–43.

entirely different, and neither is a satisfactory substitute for the other. A new party organization contemplates a state-wide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centered around a particular candidate for a particular office. For the candidate himself, it would mean undertaking the serious responsibilities of qualified party status under [state] law, such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who was, by definition, an independent and desired to remain one, should surrender his independent status." The Court concluded that it could perceive "no sufficient state interest in conditioning ballot position for an independent candidate on his forming a new political party as long as the State is free to assure itself that the candidate is a serious contender, truly independent, and with a satisfactory level of community support."[1250]

[I478] *Storer* also upheld California's statutory provisions that denied ballot access to an independent candidate, if the candidate had been affiliated with any political party within one year prior to the immediately preceding primary election. These laws were expressive of a general state policy aimed at maintaining the integrity of various routes to the ballot and discouraging "independent candidacies prompted by short-range political goals, pique, or personal quarrel." In recognizing the legitimacy of the state's interest in preventing "splintered parties and unrestrained factionalism," the Court sustained the provisions, in the face of a First Amendment challenge, as furthering the compelling state interest in maintaining the integrity of its political processes.[1251]

[I479] A party is not "absolutely entitled to have its nominee appear on the ballot as that party's candidate. A particular candidate might be ineligible for office, unwilling to serve, or another party's candidate."[1252] *Timmons* sustained Minnesota's ban of multiple-party, or "fusion," candidacies for elected office. As the Court emphasized, "[t]hat a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's association rights. . . . [A 'fusion' ban] does not restrict the ability of [that] party and its members to endorse, support, or vote for anyone they like or directly limit the party's access to the ballot. . . . Instead, [such a provision only] reduce[s] the universe of potential candidates who may appear on the ballot as the party's nominee . . . [and] limit[s,] slightly, the party's ability to send a message to the voters and to its candidates. . . . [However,] [b]allots serve primarily to elect candidates, not as fora for political expression."[1253] Furthermore, since Minnesota's fusion ban did not impose a severe burden on a party's rights, the state was required to show not that the ban was narrowly tailored to serve compelling state interests, but that the state's asserted regulatory interests were sufficiently weighty to justify the challenged limitation on associational freedom. "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for

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[1250] *Id.* at 745–46.

[1251] *Id.* at 735–36. *See also* Burdick v. Takushi, 504 U.S. 428, 439 (1992) ("the State is within its rights to reserve the general election ballot for major struggles and not a forum for continuing intraparty feuds").

[1252] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997).

[1253] *Id.* at 359, 363.

electing public officials." Minnesota feared that "a candidate or party could easily exploit fusion as a way of associating his or its name with popular slogans and catchphrases, transforming the ballot from a means of choosing candidates to a billboard for political advertising." It was also concerned that "fusion would enable minor parties, by nominating a major party's candidate, to bootstrap their way to major party status in the next election and circumvent the State's nominating petition requirement for minor parties. . . . The State surely has a valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support." In addition, the Court stressed that the Constitution permits a state "to decide that political stability is best served through a healthy two party system. . . . States have a strong interest in the stability of their political systems. . . . This interest does not permit a State to completely insulate the two party system from minor parties' or independent candidates' competition and influence, . . . nor is it a paternalistic license for States to protect political parties from the consequences of their own internal disagreements. . . . [But] the States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two party system, . . . and that temper the destabilizing effects of party-splintering and excessive factionalism. . . . And while an interest in securing the perceived benefits of a stable two party system will not justify unreasonably exclusionary restrictions, States need not remove all of the many hurdles third parties face in the American political arena." Under these considerations, the Court concluded that the burdens Minnesota's fusion ban imposed on a party's associational rights were justified by correspondingly weighty valid state interests in ballot integrity and political stability.[1254]

[I480] "To prevent misrepresentation and electoral confusion, [a state] may . . . prohibit candidates running for office in one [political] subdivision from adopting the name of a party established in another if they are not in any way affiliated with the party. The State's interest is particularly strong where the party and its self-described candidates coexist in the same geographical area." However, a statute that prohibits candidates running for office and seeking to expand an established party to another political district from adopting the established party's name "sweeps broader than necessary to advance electoral order, and accordingly violates the First Amendment right of political association." In such a case, the state can avoid the above-mentioned ills "merely by requiring the candidates to get formal permission to use the name from the established party they seek to represent, a simple expedient for fostering an informed electorate without suppressing the growth of small parties."[1255]

4. Freedom of Political Association of Public Employees

[I481] Subjecting a non-confidential, non-policy-making public employee to penalty for exercising rights of political association is tantamount to an unconstitutional condition. *Elrod* and *Branti* decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved.[1256] *Rutan* held that promotion, transfer, recall, and hiring deci-

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[1254] *Id.* at 364–70.

[1255] Norman v. Reed, 502 U.S. 279, 290 (1992).

[1256] Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980). *See, in extenso,* paras. H11–H12.

sions involving low-level public employees may not be constitutionally based on party affiliation and support.[1257] And *O'Hare* declined to draw a line excluding independent government contractors from the First Amendment safeguards of political association afforded to government employees.[1258]

[I482] Nevertheless, the government may restrict the political activities of civil servants. Under *Mitchell*, Congress has the power to prevent federal employees from holding a party office, working at the polls, and acting as party paymaster for other party workers.[1259] *CSC v. Letter Carriers* reaffirmed *Mitchell* and held that Congress can also constitutionally forbid federal employees from engaging in "plainly identifiable acts of political management and political campaigning, . . . such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate, or proxy to a political party convention."[1260] The Court found that these limitations on partisan political activities by federal employees were justified, because they insured that the government and its employees in fact "enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof" execute the laws impartially, and that "they appear to the public to be [doing so,] if confidence in the system of representative Government is not to be eroded to a disastrous extent."[1261] Moreover, the Court emphasized that the limitations were narrowly drawn, leaving federal employees free to vote as they chose and to express their opinions on political subjects and candidates.[1262] Similarly, *Broadrick* upheld a statute providing that no classified service employee "shall directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment or contribution for any political organization, candidacy or other political purpose" and prohibiting any state classified employee from being an officer or member of a "partisan political club" or a candidate for "any paid public office" or from taking part "in the management or affairs of any political party or in any political campaign."[1263] And *Clements* rejected First and Fourteenth Amendment challenges to Texas' so-called "resign-to-run" provision. That provision treated an elected state official's declaration of candidacy for another elected office as an automatic resignation from the office then held. As the Court noted, the regulation represented a far more limited restriction on partisan political activity of state officeholders than the Court had upheld with regard to civil servants in *Mitchell*, *Letter Carriers*, and *Broadrick*.[1264]

[1257] Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990). *See, in extenso*, para. H13.

[1258] O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 726 (1996).

[1259] United Public Workers v. Mitchell, 330 U.S. 75, 99–102 (1947). The Court noted, *inter alia*, that the challenged Act—which applied to both administrative employees of the government and industrial workers in its employ—proscribed only "active participation in political management and political campaigns" and relied on Congress' judgment that efficiency in public service might be best obtained by prohibiting active participation by classified employees in politics as party officers or workers.

[1260] United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 556, 567 (1973).

[1261] *Id.* at 565.

[1262] *Id.* at 575–76.

[1263] Broadrick v. Oklahoma, 413 U.S. 601, 607–08 (1973).

[1264] Clements v. Fashing, 457 U.S. 957, 972 (1982). A four-member plurality noted that (1)

5. Campaign Finance

a. Contributions or Expenditures Limitations

i. In General

[I483] The giving and spending of money in political campaigns is intertwined with political expression and association. "Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet, . . . the dependence of a communication on the expenditure of money [does not] operat[e] itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."[1265]

[I484] "A restriction on the amount of money a person or group can *spend* on political communication during a campaign necessarily reduces the quantity and diversity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money."[1266] "By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may *contribute* to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution, but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor."[1267]

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candidacy is not a "fundamental right" that itself requires departure from traditional equal protection principles under which state law classifications need only be drawn in such a manner as to bear some rational relationship to a legitimate state end; (2) the challenged provision placed a *de minimis* burden on the political aspirations of an officeholder; (3) the provision furthered Texas' legitimate interests in maintaining the integrity of its Justices of the Peace by ensuring that they would neither abuse their position nor neglect their duties because of aspirations for higher office and, in discouraging its Justices of the Peace from vacating their terms of office, thereby avoiding the difficulties accompanying interim elections and appointments; (4) the provision was not invalid in that it burdened only those officeholders who desired to run for the legislature or on the ground that it applied only to certain elected officials and not to others. *Id.* at 962–71.

[1265] Buckley v. Valeo, 424 U.S. 1, 16 (1976) *(per curiam)*. There, in addressing the speech claim, the Court explicitly rejected both *O'Brien* intermediate scrutiny for communicative action (*see* para. I300) and the similar standard applicable to merely time, place, and manner restrictions (*see* para. I301).

[1266] Buckley v. Valeo, 424 U.S. 1, 19 (1976) *(per curiam)* (emphasis added).

[1267] *Id.* at 20–21 (emphasis added).

[I485] The Court has flagged a similar difference between expenditure and contribution limitations in their impacts on the association right.[1268] While an expenditure limit "precludes most associations from effectively amplifying the voice of their adherents," the contribution limits "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates" and allow associations "to aggregate large sums of money to promote effective advocacy."[1269] The "overall effect" of dollar limits on contributions is "merely to require candidates and political committees to raise funds from a greater number of persons."[1270]

[I486] Hence, restrictions on campaign expenditures are subjected to closer scrutiny than limits on campaign contributions.[1271] Thus, "a contribution limit involving even significant interference with associational rights is nevertheless valid if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest,"[1272] "though the dollar amount of the limit need not be 'fine tun[ed].'"[1273] In this context, a statute's tailoring is not constitutionally adequate, if the contribution limits imposed are "so low as to impede the ability of candidates 'to amass the resources necessary for effective advocacy.'"[1274]

ii. Contribution Restrictions[1275]

[I487] Congress' concern over the political potentialities of wealth and their untoward consequences for the democratic process led it to enact the Federal Election Campaign Act of 1971 (FECA). As amended in 1974, this statute, among other provisions, limited political contributions to candidates for federal elective office or to their authorized political committees, by an individual or a group, to $1,000 and, by a political committee,[1276] to $5,000 to any single candidate per election, with an overall annual

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[1268] "Contribution limits may bear more heavily on the associational right than on freedom to speak, . . . since contributions serve 'to affiliate a person with a candidate' and 'enable like-minded persons to pool their resources'" in furtherance of common political goals. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 135 (2003), *quoting* Buckley v. Valeo, 424 U.S. 1, 22 (1976).

[1269] Buckley v. Valeo, 424 U.S. 1, 22 (1976).

[1270] *Id.* at 21–22 (1976).

[1271] Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 259–60 (1986); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 134 (2003).

[1272] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 136 (2003). This less rigorous standard of review "shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *Id.* at 137.

[1273] Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 388 (2000), *quoting* Buckley v. Valeo, 424 U.S. 1, 30 (1976). A contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well. *See id.* at 388.

[1274] Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 387 (2000), *quoting* Buckley v. Valeo, 424 U.S. 1, 21 (1976).

[1275] A regulation restricting donations to a federal candidate, regardless of the ends to which those funds are ultimately put, qualifies as a contribution limit. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 182 (2003).

[1276] The term "political committee" was defined to mean "any committee, club, association, or other group of persons which received contributions or made expenditures during a calendar year in an aggregate amount exceeding $1,000."

limitation of $25,000 by an individual contributor.[1277] In *Buckley*, the Court found that the government interest in preventing the actual or apparent corruption of federal candidates and officeholders constituted a constitutionally sufficient justification for the $1,000 contribution limitation.[1278] As the Court emphasized, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of [the American] system of representative democracy is undermined."[1279] The Court expressly rejected the argument that anti-bribery laws provided a less restrictive alternative to FECA's contribution limits, noting that such laws "deal with only the most blatant and specific attempts of those with money to influence government action."[1280] "Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . [T]he avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"[1281] The Court also rejected the claim that the contribution lim-

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[1277] The limitation reached "a gift, subscription, loan, advance, deposit of anything of value," or promise to give a contribution, made for the purpose of influencing a primary election, a Presidential preference primary, or a general election for any federal office. All contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions that were in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, would be treated as contributions from such person to such candidate. The Act provided for a functional, not formal, definition of "contribution," which included "expenditures made by any person *in cooperation, consultation, or concert, with* a candidate." *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 222–23 (2003) (emphasis added).

[1278] As a general matter, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrate[d] that the dangers of large corrupt contributions and the suspicion that large contributions [we]re corrupt [we]re neither novel nor implausible." Although mere conjecture is not adequate to carry a First Amendment burden, the Court has not required that governments enacting contribution limits must "demonstrate that the recited harms are real, not merely conjectural." *See* Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 391–92 (2000).

[1279] Buckley v. Valeo, 424 U.S. 1, 26–27 (1976).

[1280] *Id.* at 28. Thus, "[i]n speaking of 'improper influence' and 'opportunities for abuse' in addition to *quid pro quo* arrangements, [the Court has] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *See* Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 389 (2000). *See also* Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001) (acknowledging that corruption extends beyond explicit cash-for-votes agreements to "undue influence on an officerholder's judgment").

[1281] Buckley v. Valeo, 424 U.S. 1, 27 (1976), *quoting* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973). *Cf.* McCollum v. Fed. Election Comm'n, 540 U.S. 93 (2003) (*see* paras. I497–I498), where the Court upheld new FECA Section 323(e), which, with many exceptions, forbade federal candidates and officeholders to solicit, receive, direct, transfer, or spend "soft money" in connection with federal elections and limited their ability to do so for state and local elections.

Hence, the "speech by proxy" that is achieved through contributions to a political campaign committee is not the sort of political advocacy that is entitled to full First Amendment protection. And "[i]f the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views

itations in themselves discriminated against major party challengers to incumbents (because major party candidates receive far more money in large contributions), noting that the limitations might have "a significant effect on particular challengers or incumbents," but the record provided "no basis for predicting that such adventitious factors [would] invariably and invidiously benefit incumbents as a class." "Since the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents, Congress had ample justification for imposing the same fundraising constraints upon both."[1282] And "any attempt to exclude minor parties and independents en masse from the Act's contribution limitations [would] overloo[k] the fact that minor party candidates [might] win elective office or have a substantial impact on the outcome of an election."[1283]

[I488] FECA excluded from the definition of contribution the value of services provided without compensation by individuals who volunteered a portion or all of their time on behalf of a candidate or political committee. Certain expenses incurred by persons in providing volunteer services to a candidate were exempt from the $1,000 ceiling only to the extent that they did not exceed $500. These expenses were expressly limited to (1) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities; (2) the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge at least equal to cost but less than the normal comparable charge; and (3) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteered his personal services to a candidate. The Court held that these provisions were "a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates. The expenditure of resources at the candidate's direction for a fundraising event at a volunteer's residence or the provision of in-kind assistance in the form of food or beverages to be resold to raise funds or consumed by the participants in such an event provides material financial assistance to a candidate. The ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the fundraising event or the food. Similarly, travel undertaken as a volunteer at the direction of the candidate or his staff is an expense of the campaign and may properly be viewed as a contribution if the volunteer absorbs the fare. Treating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff foreclosed an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign."[1284]

[I489] FECA permitted "multi-candidate political committees" to contribute up to $5,000 to any candidate with respect to any election for federal office. In order to qual-

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and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee," which advocates the views and candidacies of a number of candidates. *See* California Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 196–97 (1980) (four-Justice plurality).

[1282] Buckley v. Valeo, 424 U.S. 1, 32–33 (1976) *(per curiam).*

[1283] *Id.* at 34–35. *See also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 159 (2003).

[1284] Buckley v. Valeo, 424 U.S. 1, 36–37 (1976) *(per curiam).*

ify for the higher contribution ceiling, a group should have been registered as a political committee for not less than six months, have received contributions from more than 50 persons, and, except for state political party organizations, have contributed to five or more candidates for federal office. The Court found that, "[r]ather than undermining freedom of association," these provisions "enhance[d] the opportunity of *bona fide* groups to participate in the election process, and the registration, contribution, and candidate conditions serve[d] the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees."[1285]

[I490] In addition to the $1,000 limitation on the non-exempt contributions that an individual might make to a particular candidate for any single election, the Act contained an overall $25,000 limitation on total contributions by an individual during any calendar year (a contribution made in connection with an election was considered to be made in the year the election was held). This ceiling imposed an ultimate restriction upon the number of candidates and committees with which an individual could associate himself by means of financial support. "But this quite modest restraint upon protected political activity serve[d] to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the over-all ceiling [wa]s thus no more than a corollary of the basic individual contribution limitation, . . . found to be constitutionally valid."[1286]

iii. Expenditure Restrictions[1287]

[I491] *Buckley* also examined the constitutionality of expenditure ceilings imposed by the Federal Election Campaign Act (FECA). First, the Act prohibited any person, on pain of criminal sanctions, from making "any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." In order to preserve the provision against invalidation on vagueness grounds, the Court construed the foregoing provision to apply only to expenditures for "communications that, in express terms advocate the election or defeat of a clearly identified candidate for federal office;" this construction would restrict the application of the provision to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,'

[1285] *Id.* at 35–36.

[1286] *Id.* at 38.

[1287] Congress may constitutionally provide that campaign expenditures that are *coordinated* with a candidate or party will be treated as contributions to, and expenditures by, that candidate or party. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 202–03 (2003), and paras. I495–I496. *Cf.* Buckley v. Valeo, 424 U.S. 1, 46 (1976) *(per curiam).* Relatedly, the Court has rejected the contention that the presence of a pre-existing agreement marks the dividing line between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that truly are independent. As the Court noted, "expenditures made after a 'wink or nod' often will be as useful to the candidate as cash;" and "[a] supporter easily could comply with a candidate's request or suggestion without first agreeing to do so, and the resulting expenditure would be virtually indistinguishable from a simple contribution." *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 221–22 (2003).

'vote against,' 'defeat,' 'reject.'"[1288] Turning to the basic First Amendment question, the Court found that the governmental interest in preventing corruption and the appearance of corruption was inadequate to justify the statutory ceiling on independent expenditures, which heavily burdened core First Amendment expression. The Court noted that, even if large independent expenditures posed the same dangers of actual or apparent *quid pro quo* arrangements as did large contributions, the challenged provision did "not provide an answer that sufficiently relate[d] to the elimination of those dangers." Unlike the contribution limitations' total ban on the giving of large amounts of money to candidates, the provision at issue prevented only some large expenditures. "So long as persons and groups eschew[ed] expenditures that, in express terms advocate[d] the election or defeat of a clearly identified candidate, they [we]re free to spend as much as they want[ed] to promote the candidate and his views. The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermine[d] the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat, but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office."[1289] "Second, quite apart from the shortcomings of the provision in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by the provision d[id] not appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending [the provision] contend[ed] that it [wa]s necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue[d] that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures [we]re treated as contributions, rather than expenditures under the Act. [FECA's] contribution ceilings, rather than [its] independent expenditure limitation, prevent[ed] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. . . . [And] [u]nlike contributions, . . . independent expenditures [might] well provide little assistance to the candidate's campaign, and indeed [might] prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent

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[1288] Buckley v. Valeo, 424 U.S. 1, 44, n.52 (1976) *(per curiam)*. "[A] plain reading of *Buckley* makes clear that the express advocacy limitation [there] was the product of statutory interpretation rather than a constitutional command." *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 191–92 (2003).

In *McConnell, supra*, at 193, the Court made clear that the First Amendment erects no "rigid barrier between express advocacy and so-called issue advocacy," noting that "the presence or absence of magic words," such as "Elect John Smith," "cannot meaningfully distinguish electioneering speech from a true issue ad."

[1289] Buckley v. Valeo, 424 U.S. 1, 45 (1976) *(per curiam)*.

not only undermine[d] the value of the expenditure to the candidate, but also alleviate[d] the danger that expenditures [would] be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, [the provision] severely restrict[ed] all independent advocacy despite its substantially diminished potential for abuse."[1290] Furthermore, the Court rejected the contention that "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serve[d] to justify the limitation on express advocacy of the election or defeat of candidates imposed" by the challenged expenditure ceiling. As the Court stressed, "the concept that government may restrict the speech of some elements of the American society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which is designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[1291] For these reasons, the Court concluded that FECA's independent expenditure limitation was unconstitutional under the First Amendment.

[I492] FECA set limits on expenditures by a candidate "from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year." These ceilings varied from $50,000 for Presidential or Vice Presidential candidates to $35,000 for senatorial candidates, and $25,000 for most candidates for the House of Representatives. The ceiling on personal expenditures by candidates on their own behalf, imposed a "substantial restraint" on the ability of persons to engage in protected First Amendment expression. "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." The primary governmental interest served by the Act—the prevention of actual and apparent corruption of the political process—did not support the limitation on the candidate's expenditure of his own personal funds. "Indeed, the use of personal funds reduce[d] the candidate's dependence on outside contributions, and thereby counteract[ed] the coercive pressures and attendant risks of abuse to which the FECA's contribution limitations [we]re directed. The ancillary interest in equalizing the relative financial resources of candidates competing for elective office, therefore, provide[d] the sole relevant rationale for the ceiling on a candidate's personal expenditures. But this interest [wa]s clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights. First, the limitation [might] fail to promote financial equality among candidates. A candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts. Indeed, a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign. Second, and more fundamentally, the First Amendment simply cannot tolerate [such a] restriction upon the freedom of a candi-

[1290] *Id.* at 45–47.
[1291] *Id.* at 48–49.

date to speak without legislative limit on behalf of his own candidacy." In light of these considerations, the Court struck down FECA's limitation on a candidate's personal expenditures.[1292]

[I493] *Buckley* also invalidated FECA's limitations on overall campaign expenditures by candidates seeking nomination for election and election to federal office,[1293] since no governmental interest advanced in support of this provision was sufficient to justify "the restriction on the quantity of political expression imposed" by these limitations. "The major evil associated with rapidly increasing campaign expenditures [wa]s the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributions [wa]s served by the Act's contribution limitations and disclosure provisions, rather than by [the Act's] campaign expenditure ceilings. The . . . assertion that the expenditure restrictions [we]re necessary to reduce the incentive to circumvent direct contribution limits [wa]s not found persuasive. . . . There [wa]s no indication that the substantial criminal penalties for violating the contribution ceilings, combined with the political repercussion of such violations, [would] be insufficient to police the contribution provisions. Extensive reporting, auditing, and disclosure requirements applicable to both contributions and expenditures by political campaigns [we]re designed to facilitate the detection of illegal contributions. Moreover, the Act permit[ted] an officeholder or successful candidate to retain contributions in excess of the expenditure ceiling, and to use these funds for 'any other lawful purpose.' This provision undercu[t] whatever marginal role the expenditure limitations might otherwise play in enforcing the contribution ceilings."[1294] "The interest in equalizing the financial resources of candidates competing for federal office [wa]s no more a convincing justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, [would] normally vary with the size and intensity of the candidate's support. There [wa]s nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate. Moreover, the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign."[1295] "The campaign expenditure ceilings appear[ed] to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns. . . . [However] the mere growth in the cost of federal election campaigns, in and of itself, provide[d] no legitimate basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power

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[1292] *Id.* at 51–54.

[1293] Presidential candidates could spend $10,000,000 in seeking nomination for office, and an additional $20,000,000 in the general election campaign. The ceiling on senatorial campaigns was pegged to the size of the voting-age population of the state, with minimum dollar amounts applicable to campaigns in states with small populations. The Act imposed blanket $70,000 limitations on both primary campaigns and general election campaigns for the House of Representatives. These ceilings were to be adjusted upwards at the beginning of each calendar year by the average percentage rise in the consumer price index for the 12 preceding months.

[1294] Buckley v. Valeo, 424 U.S. 1, 55–56 (1976) *(per curiam).*

[1295] *Id.* at 56–57.

to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by [the] Constitution, it is not the government, but the people—individually, as citizens and candidates, and collectively, as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign."[1296]

[I494] The Presidential Election Campaign Fund Act (Fund Act) offered the Presidential candidates of major political parties the option of receiving public financing for their general election campaigns. Under the statute, if a candidate elected public financing, it would be a criminal offense for an independent political committee to expend more than $1,000 to further that candidate's election. Relying on *Buckley* and considering that independent expenditures (not made at the request of, or in coordination with, the candidate's election campaign committee or any of its agents) by political committees produce speech at the core of the First Amendment, the Court held in *National Conservative Political Action Committee* that the foregoing provision was constitutionally infirm, since it found "no tendency in such expenditures . . . to corrupt or to give the appearance of corruption." The Court noted that it was of course "hypothetically possible . . . that candidates might take notice of and reward those responsible for such expenditures by giving official favors to the latter in exchange for the supporting messages. [Nevertheless,] the absence of prearrangement and coordination undermine[d] the value of the expenditure to the candidate, and thereby alleviate[d] the danger that expenditures [would] be given as a *quid pro quo* for improper commitments from the candidate. [On the record of the case,] such an exchange of political favors for uncoordinated expenditures remain[ed] a hypothetical possibility, and nothing more. [In any case, even if] the large pooling of financial resources by [independent political committees] did pose a potential for corruption or the appearance of corruption, [the challenged provision wa]s a fatally overbroad response to that evil. It [wa]s not limited to multimillion dollar war chests; its terms appl[ied] equally to informal discussion groups that solicit[ed] neighborhood contributions to publicize their views about a particular Presidential candidate."[1297]

iv. Party Contributions and Expenditures

[I495] As observed above,[1298] the Federal Election Campaign Act treated coordinated expenditures as contributions. This functional treatment "prevent[ed] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions."[1299] *Colorado I* was a challenge to FECA's provision, which imposed

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[1296] *Id.* at 57.

[1297] Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497–98 (1985). The Court pointed out that it was not free to adopt a limiting construction that might isolate wealthy political committees, even if such a construction might save the statute. First, Congress plainly had intended to prohibit independent expenditures over $1,000 by all political committees, large and small. And even if it had not intended to cover small neighborhood groups, there was also no evidence in the statute or the legislative history that it would have looked favorably upon a construction of the statute limiting the provision only to very successful political committees. Secondly, the Court could not distinguish in principle between a political committee that had solicited 1,000 $25 contributions and one that had solicited 100,000 $25 contributions. *Id.* at 498–99.

[1298] *See* para. I491.

[1299] Buckley v. Valeo, 424 U.S. 1, 47 (1976).

dollar limits upon political party expenditures in connection with the general election campaign of a congressional candidate. This case arose as a result of the Federal Election Commission's enforcement action against the Colorado Republican Federal Campaign Committee (Party) for exceeding the campaign spending limit through its payments for radio advertisements attacking a Democratic congressman and senatorial candidate. The Party defended in part with the claim that the party expenditure limitations violated the First Amendment. The principal opinion in *Colorado I* observed that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees"[1300] and concluded that the limitations were unconstitutional *as applied* to the advertising expenditures at issue. The members of the Court who joined the principal opinion thought the payments were "independent expenditures," owing to the facts that the Party had spent the money before selecting its own senatorial candidate and without any arrangement with potential nominees.[1301] "The principal opinion found no reason to see these expenditures as more likely to serve or be seen as instruments of corruption than independent expenditures by anyone else. So there was no justification for subjecting party election spending across the board to the kinds of limits previously invalidated when applied to individuals and nonparty groups."[1302]

[I496] Nevertheless, the Party's broader claim remained: although prior decisions of the Court had upheld the constitutionality of limits on coordinated expenditures by political speakers other than parties, the congressional campaign expenditure limitations on parties themselves were *facially* unconstitutional, and so were incapable of reaching Party spending even when coordinated with a candidate. This claim was rejected in *Colorado II*. "The Party's argument that its coordinated spending, like its independent spending, should be left free from restriction under the *Buckley* line of cases boil[ed] down to this: because a party's most important speech is aimed at electing candidates and is itself expressed through those candidates, any limit on party support for a candidate imposes a unique First Amendment burden, . . . that justifies a stricter level of scrutiny than has been applied to analogous limits on individuals or nonparty groups, . . . [and, in any case,] reflects a fatal mismatch between the effects of limiting coordinated party expenditures and the prevention of corruption or its appearance."[1303]

[1300] Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 616 (1996) *(Colorado I)* (opinion of Breyer, J., joined by O'Connor and Souter, JJ.).

[1301] *Id.* at 613–14.

[1302] *See* Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 444 (2001) *(Colorado II), discussing Colorado I.*

In *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 217–19 (2003), the Court invalidated new FECA Section 315(d)(4), under which a party that made any independent expenditure expressly advocating the election or defeat of a clearly identified candidate was barred from making any expenditure in coordination with its nominee. In so holding, the Court noted that (1) under the foregoing provision, a political party's exercise of its constitutionally protected right to engage in core First Amendment expression "result[ed] in the loss of a valuable statutory benefit that ha[d] been available to parties for many years;" (2) "[t]o survive constitutional scrutiny, a provision that has such consequences must be supported by a meaningful governmental interest;" (3) the interest in requiring political parties to avoid engaging independently in express advocacy is not such an interest.

[1303] Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 445–46 (2001) *(Colorado II).*

However, this argument did not prevail. The Party's contention that "coordinated relationship between a party and a candidate so defines a party that it cannot function as such without coordinated spending, the object of which is a candidate's election," was belied by political history and political reality.[1304] This assertion was at odds with the history of nearly 30 years under FECA. The Party's claim amounted implicitly to saying that, for almost three decades, political parties had not been functional or had been functioning in systematic violation of the law; the Court could not accept either implication. Furthermore, the Court pointed out that when one looks "directly at a party's function in getting and spending money, it would ignore reality to think that the party role is adequately described by speaking generally of electing particular candidates. The money parties spend comes from contributors with their own personal interests. . . . Parties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors. Parties thus perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders. It [wa]s this party role, which functionally unite[d] parties with other self-interested political actors, that [FECA's] Party Expenditure Provision target[ed.] This party role, accordingly, provide[d] good reason to view limits on coordinated spending by parties through the same lens applied to such spending by donors, like [political action committees,] that [could] use parties as conduits for contributions meant to place candidates under obligation."[1305] Subsequently, the Court concluded that a party's coordinated spending limitation should be subject to the same scrutiny applied to the other political actors—that is, scrutiny appropriate for a contribution limit, enquiring whether "the restriction is 'closely drawn' to match . . . the 'sufficiently important' government interest in combating political corruption."[1306] Noting that "circumvention is a valid theory of corruption,"[1307] the Court found that adequate evidentiary grounds existed to sustain the limit under the foregoing standard, on the theory that unlimited coordinated spending by a party raised the risk of corruption (and its appearance) through circumvention of valid contribution limits. Under the Act, a donor was limited to $2,000 in contributions to one candidate in a given election cycle. The same donor might give as much as another $20,000 each year to a national party committee supporting the candidate. "What a realist would expect to occur had occurred. Donors [were giving] to the party with the tacit understanding that the favored candidate [would] benefit. . . . [Hence, i]f suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent would almost certainly intensify."[1308] Finally, the Court rejected the Party's claim that even if there was a circumvention threat, the First Amendment demanded a response better tailored to that threat than a limitation on coordinated spending. First, the Party's suggestion that better crafted safeguards were already in place in another FECA provision, under which contributions directed through an intermediary to a candidate should be treated as contributions to the candidate, ignored "the practical difficulty of identifying and directly combating circumvention

[1304] *Id.* at 449.
[1305] *Id.* at 450–52.
[1306] *Id.* at 456.
[1307] *Id.*
[1308] *Id.* at 458, 460.

under actual political conditions."[1309] The Party's second preferred prescription for the threat of an end run called for replacing limits on coordinated expenditures by parties with limits on contributions to parties, the latter supposedly imposing a lesser First Amendment burden. "The Party thus invoke[d] the general rule that contribution limits take a lesser First Amendment toll, expenditure limits a greater one. That was one strand of the reasoning in *Buckley* itself, which rejected the argument that limitations on independent expenditures by individuals, groups, and candidates were justifiable in order to avoid circumvention of contribution limitations. . . . It was also one strand of the logic of the *Colorado I* principal opinion in rejecting the Party Expenditure Provision's application to independent party expenditures. . . . In each of those cases, however, the Court's reasoning contained another strand. The analysis ultimately turned on the understanding that the expenditures at issue were not potential *alter egos* for contributions, but were independent and therefore functionally true expenditures, qualifying for the most demanding First Amendment scrutiny employed in *Buckley*."[1310] But in *Colorado II* just the opposite was true. "There [wa]s no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there [wa]s good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending and undermine contribution limits. Therefore the choice [t]here [wa]s not, as in *Buckley* and *Colorado I*, between a limit on pure contributions and pure expenditures. The choice [wa]s between limiting contributions and limiting expenditures whose special value as expenditures [wa]s also the source of their power to corrupt. Congress [wa]s entitled to its choice."[1311] For these reasons, the Court concluded that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits."[1312]

[I497] FECA's disclosure requirements and source and amount limitations extended only to so-called "hard money" contributions made for the purpose of influencing an election for federal office. Political parties were able to circumvent FECA's limitations by accepting contributions of "soft money," used for activities intended to influence state or local elections; for mixed-purpose activities, such as get-out-the-vote drives and generic party advertising; and for legislative advocacy advertisements, even if they mentioned a federal candidate's name, so long as the ads did not expressly advocate the candidate's election or defeat.[1313] In enacting the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended FECA, Congress primarily sought to plug the soft-money loophole. The cornerstone of this effort, was new FECA Section 323(a), which prohibited national party committees and their agents from soliciting, receiving, directing, or spending any soft money.[1314] The remaining provisions of new FECA Section 323 largely rein-

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[1309] *Id.* at 462.

[1310] *Id.* at 463.

[1311] *Id.* at 464–65.

[1312] *Id.* at 465. The four dissenters stressed that "it makes no sense to contravene a political party's core First Amendment rights because of what a third party might unlawfully try to do" and that, "[i]nstead of broadly restricting political parties' speech, the Government should have pursued better-tailored alternatives for combating the alleged corruption," such as lowering the statutory cap for donations to the national committee of a political party. *Id.* at 482.

[1313] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 122–24 (2003).

[1314] Under this provision, "national committee[s] of a political party . . . may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other

forced the restrictions in Section 323(a). New FECA Section 323(b) prevented the wholesale shift of soft-money influence from national to state party committees by prohibiting state and local party committees from using such funds for (mixed-purpose) activities that affected federal elections. New FECA Section 323(d) reinforced these soft-money restrictions by prohibiting political parties from soliciting and donating funds to tax-exempt organizations that engaged in electioneering activities. New FECA Section 323(e) restricted federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and limited their ability to do so in connection with state and local elections. Finally, new FECA Section 323(f) prevented circumvention of the restrictions on national, state, and local party committees by prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promoted or attacked federal candidates.[1315] In *McConnell*, the Court emphasized that, like the contribution limits upheld in *Buckley*, Section 323's restrictions had "only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech. . . . Complex as its provisions [might] be, § 323, in the main, d[id] little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders." The contention that strict scrutiny should be applied to Section 323, because many of its provisions restricted not only contributions but also the spending and solicitation of funds raised outside of FECA's contribution limits, could not prevail. As the Court pointed out, "for purposes of determining the level of scrutiny, it was irrelevant that Congress chose in § 323 to regulate contributions on the demand, rather than the supply, side. The relevant inquiry [wa]s whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdened speech in a way that a direct restriction on the contribution itself would not. . . . [W]hile § 323(a) prohibit[ed] national parties from receiving or spending nonfederal money, and § 323(b) prohibit[ed] state party committees from spending nonfederal money on federal election activities, neither provision in any way limit[ed] the total amount of money parties [could] spend. . . . Rather, they simply limit[ed] the source and individual amount of donations. That they d[id] so by prohibiting the spending of soft money d[id] not render them expenditure limitations."[1316] "Similarly, the solicitation provisions of § 323(a) and § 323(e), which restrict[ed] the ability of national party committees, federal candidates, and federal officeholders to solicit nonfederal funds, [left] open ample opportunities for soliciting federal funds on behalf of entities subject to FECA's source and amount restrictions. Even §323(d), which on its face enact[ed] a blanket ban on party solicitations of funds to certain tax-exempt organizations, nevertheless allow[ed parties to solicit funds to the organizations' federal [political action committees]. . . . And as with §323(a), §323(d) place[d] no limits on other means of endorsing tax-exempt organizations or any restrictions on solicitations by party officers acting in their individual capacities."[1317] Subsequently, the Court applied the less rig-

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thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." The prohibition extended to "any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, or maintained, or controlled by such a national committee."

[1315] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 133–34 (2003).

[1316] *Id.* at 138–39.

[1317] *Id.* at 139.

orous scrutiny standard applicable to contribution limits to evaluate the constitutionality of new FECA Section 323.

[I498] In this context, the Court, first, reiterated that the governmental interest in preventing the actual or apparent corruption of federal candidates and officeholders constitutes a sufficiently important interest to justify not only contribution limits themselves but also laws preventing the circumvention of such limits, such as Section 323(a).[1318] Next it rejected the claim that Section 323(a) was impermissibly overbroad, because it subjected *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including funds spent on purely state and local elections in which no federal office was at stake. "As the record demonstrate[d], it [wa]s the close relationship between federal officeholders and the national parties, as well as the means by which parties ha[d] traded on that relationship, that ha[d] made all large soft money contributions to national parties suspect," regardless of how those funds were ultimately used. . . . The Government's strong interests in preventing corruption, and particularly its appearance, [we]re thus sufficient to justify subjecting all donations to national parties to FECA's source, amount, and disclosure limitations."[1319] Furthermore the prohibition's reach was "limited," since it barred only soft-money solicitations by national party committees and party officers acting in their official capacities. "The committees remain[ed] free to solicit hard money on their own behalf, as well as to solicit hard money on behalf of state committees and state and local candidates. They also [could] contribute hard money to state committees and to candidates. In accordance with FEC regulations, furthermore, officers of national parties [we]re free to solicit soft money in their individual capacities, or, if they [we]re also officials of state parties, in that capacity."[1320] Plaintiffs argued unpersuasively that the solicitation ban's overbreadth was demonstrated by Section 323(e), which allowed federal candidates and officeholders to solicit limited amounts of soft money from individual donors under certain circumstances. "The differences between §§ 323(a) and 323(e), however, [we]re without constitutional significance," since they "reflect[ed] Congress' reasonable and expert judgments about national committees' functions and their interactions with officeholders."[1321] Nor was Section 323(a) substantially overbroad with respect to the speech and associational rights of minor parties. As the Court noted, "the relevance of the interest in avoiding actual or apparent corruption is not a function of the number of legislators a given party manages to elect. It applies as much to a minor party that manages to elect only one of its members to federal office as it does to a major party whose members make up a majority of Congress. It is therefore reasonable to require that all parties and all candidates follow the same set of rules designed to protect the integrity of the electoral process."[1322]

[I499] "[G]iven the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity [c]ould rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations. Section 323(b) [wa]s designed to foreclose wholesale evasion of § 323(a)'s anti-corruption measures by sharply curbing state committees' ability to use large soft-money

[1318] *Id.* at 144.
[1319] *Id.* at 154, 156.
[1320] *Id.* at 157.
[1321] *Id.* at 158.
[1322] *Id.* at 159.

contributions to influence federal elections. The core of § 323(b) [wa]s a straightforward contribution regulation: it prevent[ed] donors from contributing nonfederal funds to state and local party committees to help finance 'Federal election activity.'"[1323] This term encompassed four distinct categories of electioneering: (1) voter registration activity during the 120 days preceding a regularly scheduled federal election; (2) voter identification, "get-out-the-vote," and generic campaign activity that was conducted in "connection with an election in which a candidate for Federal office appears on the ballot;" (3) any "public communication that refers to a clearly identified candidate for Federal office" and "promotes," "supports," "attacks," or "opposes" a candidate for that office; and (4) the services provided by a state committee employee who dedicated more than 25 percent of his or her time to "activities in connection with a Federal election." The Act explicitly excluded several categories of activity from this definition: public communications that referred solely to non-federal candidates; contributions to nonfederal candidates; state and local political conventions; and the cost of grassroots campaign materials like bumper stickers that referred only to state candidates. All activities that fell within the statutory definition should be funded with hard money. The Levin amendment carved out an exception to this general rule, allowing state and local party committees to pay for certain federal election activities—namely, activities falling within categories (1) and (2) above that either did not refer to a clearly identified candidate for federal office or, if they involved broadcast communications, referred solely to a clearly identified candidate for state or local office—with an allocated ratio of hard money and funds raised within an annual limit of $10,000 per person.[1324] The Court found Section 323(b) served the "important governmental interest" in "[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA."[1325] In addition, it rejected the claim that Section 323(b) represented a pervasive federal regulation of state-focused electioneering activities that could not possibly corrupt or appear to corrupt federal officeholders. By limiting its reach to "Federal election activities," Section 323(b) was "narrowly focused on regulating contributions that pose the greatest risk of . . . corruption: those contributions to state and local parties that can be used to benefit federal candidates directly. Further, these regulations all [we]re reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anti-corruption interests to be served."[1326] The first two categories of "Federal election activity" clearly captured activities that conferred a substantial benefit on federal candidates. And if a voter registration drive did not specifically mention a federal candidate, state committees could take advantage of the Levin amendment's higher contribution limits and relaxed source restrictions.[1327] As regards the third category of "Federal election activity," because the record demonstrated abundantly that public communications promoting or attacking a federal candidate directly affected the election in which that candidate was participating, application of Section 323(b)'s contribution caps to such communications was closely drawn to the anti-corruption interest it was intended to address. Finally, Congress' interest in preventing circumvention of Section 323(b)'s other restrictions justified the requirement of the fourth category of "Federal election activity" that federal funds be

[1323] *Id.* at 161–62.
[1324] *See id.* at 162–64.
[1325] *Id.* at 165–66.
[1326] *Id.* at 167.
[1327] *Id.* at 167–69.

used to pay any state or local party employee who spent more than 25 percent of his or her compensated time on activities connected with a federal election. "In the absence of this provision, a party might use soft money to pay for the equivalent of a full-time employee engaged in federal electioneering, by the simple expedient of dividing the federal workload among multiple employees."[1328]

[I500] New FECA Section 323(d), which forbade national, state, and local party committees and their agents to "solicit any funds for, or make or direct any donations" to tax-exempt organizations making expenditures in connection with a federal election, and to political organizations other than a political committee, a state, district, or local committee of a political party, or the authorized campaign committee of a candidate for state or local office, was upheld as a valid anti-circumvention measure.[1329] Absent such a provision, "national, state, and local party committees would have significant incentives to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conducted activities benefiting their candidates" and to launder large sums of soft money through tax-exempt organizations engaging in federal election activities. Moreover, Section 323(d)'s solicitation restriction was "closely drawn to prevent political parties from using tax-exempt organizations as soft-money surrogates. Though phrased as an absolute prohibition, the restriction d[id] nothing more than subject contributions solicited by parties to FECA's regulatory regime, leaving open substantial opportunities for solicitation and other expressive activity in support of these organizations."[1330] And in order to avoid overbreadth problems, the Court construed Section 323(d)'s restriction on donations to apply only to donations of funds not raised in compliance with FECA.[1331]

[I501] New FECA Section 323(f) prohibited state and local candidates or officeholders from raising and spending soft money to fund ads and other public communications promoting or attacking federal candidates. Exempted from this restriction were communications made in connection with an election for state or local office that referred only to the state or local candidate or officeholder making the expenditure or to any other candidate for the same state or local office. The section placed no cap on the funds that such candidates could spend on any activity, but, rather, it "limit[ed] only the source and amount of contributions that [they could] draw on to fund expenditures that directly impacted federal elections. And, by regulating only contributions used to fund public communications, § 323(f) focuse[d] narrowly on those soft-money donations with the greatest potential to corrupt or give rise to the appearance of corruption of federal candidates and officeholders." Section 323(f) was thus sustained as a valid anti-circumvention provision.[1332]

[1328] *Id.* at 170–71.

[1329] *Id.* at 174–84.

[1330] *Id.* at 175, 177.

[1331] *Id.* at 179–81.

[1332] *Id.* at 184–85. The Court also rejected the argument that Section 323 violated the equal protection component of the Due Process Clause of the Fifth Amendment by discriminating against political parties in favor of special interest groups, which remained free to raise soft money to fund voter registration, "get-out-the-vote" activities, mailings, and broadcast advertising. In doing so, the Court noted not only that BCRA actually favored political parties in many ways (e.g., party committees were entitled to receive individual contributions that substantially

v. Corporate Financing

[I502] "State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the [American] economy, but also permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace."[1333] "Hence, the public interest in 'restrict[ing] the influence of political war chests funneled through the corporate form.'"[1334] A statute that prohibits corporations from using treasury funds to make an expenditure in connection with any federal or state election is not only intended to prevent corruption or the appearance of corruption. It also protects "the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed."[1335] "Quite aside from war-chest corruption and the interests of contributors and owners, another reason for regulating corporate electoral involvement has emerged with restrictions on individual campaign contributions. [The Court has] recognized that restricting contributions by various organizations hedges against their use as conduits for circumvention of valid contribution limits. . . . To the degree that a corporation could contribute to political candidates, the individuals who created it, who own it, or whom it employs . . . could exceed the bounds imposed on their own contributions by diverting money through the corporation."[1336] A statute that prohibits corporations from making contributions or expenditures in connection with federal or state elections, but allows such organizations to establish "separate segregated funds" that may be used for political purposes during elections, is sufficiently tailored to achieve the foregoing goals and does not violate, on its face, the First Amendment,[1337] even if a corporation is prohibited from soliciting contributions to its separate fund from persons who do not have some relatively enduring and independently significant financial or organizational attachment to the corporation.[1338]

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exceed FECA's limits on contributions to nonparty political committees), but also that "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. . . . Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation is the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders." *See id.* at 187–88.

[1333] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658–59 (1990).

[1334] Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 154 (2003), *quoting* Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 500–01 (1985).

[1335] Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 154 (2003), *quoting* Fed. Election Comm'n v. Nat'l Right to Work Committee, 459 U.S. 197, 208 (1982).

[1336] Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 155 (2003).

[1337] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657–61 (1990); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 203 (2003).

[1338] *See* Fed. Election Comm'n v. Nat'l Right to Work Committee, 459 U.S. 197, 204–11 (1982).

[I503] Nevertheless, in *Massachusetts Citizens for Life (MCFL)*, involving an "as applied" challenge to such a statute, the Court held that the non-profit organization there had "features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." In reaching that conclusion, the Court enumerated three characteristics of the corporation that were "essential to [its] holding." First, MCFL had been "formed for the express purpose of promoting political ideas, and [could not] engage in business activities. . . . This ensure[d] that political resources reflect[ed] political support." Second, it had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensure[d] that persons connected with the organization [would] have no economic disincentive for disassociating with it if they disagree[d] with its political activity." Third, MCFL had not been "established by a business corporation or a labor union, and it [wa]s its policy not to accept contributions from such entities. This prevent[ed] MCFL from serving as conduit for the type of direct spending that creates a threat to the political marketplace."[1339] Furthermore, MCFL would face certain organizational and financial hurdles in establishing and administering a segregated political fund. For example, the statute required the corporation to appoint a treasurer for its segregated fund, keep records of all contributions, file a statement of organization containing information about the fund, and update that statement periodically. In addition, the corporation was permitted to solicit contributions to its segregated fund only from "members," which did not include persons who merely contributed to or indicated support for the organization. These hurdles "impose[d] administrative costs that many small entities [might] be unable to bear" and "create[d] a disincentive for such organizations to engage in political speech."[1340] Hence, the challenged statutory restriction was found unconstitutional, as applied to MCFL.

[I504] *Michigan Chamber of Commerce* rejected a similar "as applied" challenge. The Court found that the Chamber did not exhibit the crucial features identified in *MCFL*, which would require the state to exempt it from independent spending burdens as a non-profit corporation more akin to a voluntary political association than a business firm. *MCFL*'s narrow political focus ensured that its resources reflected political support, while the Chamber's bylaws set forth more varied purposes, several of which are not inherently political. Additionally, although the Chamber also lacked shareholders, "many of its members [might] be similarly reluctant to withdraw as members even if they disagree[d] with the Chamber's political expression, because they wish[ed] to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community." Also in contrast to *MCFL*, more than three-quarters of the Chamber's members were business corporations, whose political contributions and expenditures were permissibly regulated by the state, and who thus could

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[1339] Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 264 (1986).

[1340] *Id.* at 254–55 (four-Justice plurality); *see id.* at 265–66 (Justice O'Connor concurring in part and concurring in the judgment). Justice O'Connor wrote separately, because she was concerned that the Court's discussion of the statute's disclosure requirements might be read as moving away from the teaching of *Buckley* (*see* para. I509). In her view, the significant burden on MCFL came not from the disclosure requirements that it should satisfy but from the additional organizational restraints imposed upon it by the statute. These additional requirements did not further the government's informational interest in campaign disclosure.

circumvent the relevant statutory restrictions by funneling money through the Chamber's general treasury.[1341]

[I505] *Beaumont* held that applying a direct contribution prohibition to non-profit advocacy corporations is consistent with the First Amendment. As the Court noted, "concern about the corrupting potential underlying the corporate ban may . . . be implicated by advocacy corporations. They, like their for-profit counterparts, benefit from significant 'state-created advantages,' . . . and may well be able to amass substantial political 'war chests.' . . . Nonprofit advocacy corporations substantial resources are, moreover, no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals."[1342]

[I506] In *Michigan Chamber of Commerce*, which involved a state law prohibiting corporations from using general treasury funds for independent expenditures in connection with state candidate elections, the Chamber attacked the statute as underinclusive, because it did not regulate the independent expenditures of unincorporated labor unions. In rejecting the claim, the Court reasoned that, "[w]hereas unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure; corporations are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth. . . . The desire to counterbalance those advantages unique to the corporate form is the State's compelling interest in this case; thus, excluding from the statute's coverage unincorporated entities that also have the capacity to accumulate wealth does not undermine its justification for regulating corporations."[1343] Moreover, because members who disagreed with a union's political activities could decline to contribute to them without giving up other membership benefits,[1344] a union's political funds more accurately reflected members' support for the organization's political views than did a corporation's general treasury.[1345] Similarly, the exemption of media corporations from the expenditure restrictions did not render the statute unconstitutional under the Equal Protection Clause. "[M]edia corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. . . . The Act's definition of 'expenditure' . . . conceivably could be interpreted to encompass election-related news stories and editorials. The Act's restrictions on independent expenditures therefore might discourage incorporated news broadcasters or publishers from serving their crucial societal role. The media exception ensure[d] that the Act d[id] not hinder or prevent the institutional press from reporting on and publishing editorials about newsworthy events."[1346]

vi. Contributions by Minors

[I507] The Bipartisan Campaign Reform Act of 2002 prohibited individuals "17 years old or younger" from making contributions to candidates and contributions or donations to political parties. In *McConnell*, the government asserted that the provision pro-

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[1341] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 662–64 (1990).

[1342] Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 159–60 (2003).

[1343] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 665 (1990).

[1344] *See* paras. I444 *et seq.*

[1345] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 665–66 (1990).

[1346] *Id.* at 667–68. *See also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 207–09 (2003).

tected against corruption by conduit—namely, donations by parents through their minor children to circumvent contribution limits applicable to the parents. However, the government offered scant evidence of this form of evasion. "Absent a more convincing case of the claimed evil," the Court found that this interest was "simply too attenuated for the ban to withstand heightened scrutiny." And even assuming, *arguendo*, that the government advanced an important interest, the provision was overinclusive. As the Court noted, the states had adopted "a variety of more tailored approaches—e.g., counting contributions by minors against the total permitted for a parent or family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by very young children." Without deciding whether any of these alternatives would be sufficiently tailored, the Court held that the provision swept too broadly. For these reasons, the prohibition was struck down, as violative of the First Amendment rights of minors.[1347]

vii. Referenda[1348]

[I508] "Placing limits on contributions to a committee advocating a position on a ballot measure, which, in turn, limits expenditures, plainly impairs freedom of expression."[1349] "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." Consequently, the Court held in *Bellotti* that a state cannot prohibit corporations from making contributions or expenditures advocating views on ballot measures.[1350]

[1347] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 207–09 (2003).

[1348] *See also* paras. I194, I513 *(restrictions on paid circulation of ballot initiative petitions).*

[1349] Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 299 (1981).

[1350] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978). The asserted justifications for the challenged statute did not survive the exacting scrutiny required when the legislative prohibition is directed at speech itself and speech on a public issue. The argument that, since corporations are wealthy and powerful, corporate participation in discussion of a referendum issue would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government, was not supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating, rather than serving, First Amendment interests. Nor could the statute be justified on the asserted ground that it protected the rights of shareholders whose views differed from those expressed by management on behalf of the corporation, for the statute was both underinclusive and overinclusive in serving this purpose. Corporate expenditures, with respect to a referendum, were prohibited, while corporate activity, with respect to the passage or defeat of legislation, was permitted. And the statute did not prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it became the subject of a referendum, though the displeasure of disapproving shareholders was unlikely to be any less. The overinclusiveness of the statute was demonstrated by the fact that it would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure. "Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. [And] shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management." *Id.* at 788–95.

b. Record-Keeping and Disclosure Requirements [1351]

[I509] Unlike limitations on contributions and expenditures, disclosure requirements impose no ceiling on campaign-related activities. However, compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.[1352] The Federal Election Campaign Act (FECA) required political committees and candidates to keep detailed records of contributions and expenditures, including the name and address of each individual contributing in excess of $10, and his occupation and principal place of business if his contribution exceeded $100, and to file quarterly reports with the Federal Election Commission disclosing the source of every contribution exceeding $100 and the recipient and purpose of every expenditure over $100, and also required every individual or group, other than a candidate or political committee, making contributions or expenditures exceeding $100, other than by contribution to a political committee or candidate, to file a statement with the Commission. In *Buckley*, the Court upheld against a First Amendment challenge to these record-keeping, reporting, and disclosure requirements. The Court found three government interests sufficient in general to justify requiring disclosure of information concerning campaign contributions and expenditures. "First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive, and thus facilitate predictions of future performance in office. Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . Third, [such] requirements are an essential means of gathering the data necessary to detect violations of . . . contribution limitations."[1353] Moreover, the Act's primary disclosure provisions, which imposed reporting obligations on political committees and candidates, appeared—certainly in most applications—to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress had found to exist.[1354] The Court stressed, however, that, in certain circumstances, the balance of interests requires exempting minor political parties from compelled disclosures. The government's interests in compelling disclosures are diminished[1355] in the case of minor parties, with little chance of winning an election. At the same time, the potential for impairing First Amendment interests is substantially greater. "[T]he damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents may be significant. These movements are less likely to have a sound financial base, and thus are more vulnerable to fall-offs in contributions. In some instances, fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that

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[1351] *See also* para. I292.

[1352] *See* paras. I414 *et seq.*

[1353] Buckley v. Valeo, 424 U.S. 1, 66–68 (1976) *(per curiam).*

[1354] *Id.* at 68.

[1355] Still, they are existent. As the Court noted, "a minor party sometimes can play a significant role in an election. Even when a minor party candidate has little or no chance of winning, he may be encouraged by major party interests in order to divert votes from other major party contenders." *See id.* at 70.

result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena."[1356] Thus, in some circumstances, the diminished government interests furthered by compelling disclosures by minor parties does not justify the greater threat to First Amendment values. *Buckley* set forth the following test for determining when the First Amendment requires exempting minor parties from compelled disclosures: "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[1357]

[I510] In *Buckley*, the provision for disclosure by individuals and groups making independent contributions and expenditures[1358] was construed narrowly to apply only to those who (1) made contributions earmarked for political purposes or authorized or requested by a candidate or his agent to some person other than a candidate or political committee; or (2) made an expenditure for a communication that expressly advocated the election or defeat of a clearly identified candidate. As narrowed, this provision could not be considered unconstitutionally vague. Moreover, it was upheld, primarily because it served an "informational interest" by "increas[ing] the fund of information concerning those who support the candidates." As the Court concluded, the above burden constituted "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of [the] federal election system to public view."[1359]

[1356] *Id.* at 71.

[1357] *Id.* at 74. The Court acknowledged that "unduly strict requirements of proof can impose a heavy burden on minor parties." Accordingly, the Court emphasized that "[m]inor parties must be allowed sufficient flexibility in the proof of injury. . . . The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id.* at 74.

The test announced in *Buckley*, for safeguarding the First Amendment interests of minor parties and their members and supporters, applies not only to the compelled disclosure of *campaign contributors* but also to the compelled disclosure of *recipients of campaign disbursements*. "Expenditures by a political party often consist of reimbursements, advances, or wages paid to party members, campaign workers, and supporters, whose activities lie at the very core of the First Amendment. Disbursements may also go to persons who choose to express their support for an unpopular cause by providing services rendered scarce by public hostility and suspicion. Should their involvement be publicized, these persons would be as vulnerable to threats, harassment, and reprisals as are contributors whose connection with the party is solely financial. Even individuals who receive disbursements for 'merely' commercial transactions may be deterred by the public emnity attending publicity, and those seeking to harass may disrupt commercial activities on the basis of expenditure information. Because an individual who enters into a transaction with a minor party purely for commercial reasons lacks any ideological commitment to the party, such an individual may well be deterred from providing services by even a small risk of harassment. Compelled disclosure of the names of such recipients of expenditures could therefore cripple a minor party's ability to operate effectively, and thereby reduce the free circulation of ideas both within and without the political arena." *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 97–98 (1983).

[1358] The provision which defined "expenditures" to include the use of money or other assets "for the purpose of . . . influencing" a federal election. The Court found that the "ambiguity of this phrase" posed "constitutional problems."

[1359] Buckley v. Valeo, 424 U.S. 1, 80–82 (1976) *(per curiam)*.

[I511] Finally, the Court also upheld the $10 and $100 thresholds.[1360] Since disclosure served informational functions, as well as the prevention of corruption and the enforcement of the contribution limitations, "Congress [wa]s not required to set a threshold that [wa]s tailored only to the latter goals. In addition, the enforcement goal [could] never be well served if the threshold [wa]s so high that disclosure [became] equivalent to admitting violation of the contribution limitations. The $10 recordkeeping threshold . . . facilitate[d] the enforcement of the disclosure provisions by making it relatively difficult to aggregate secret contributions in amounts that surpass[ed] the $100 limit." On the bare record of the case, the Court could not say that "the limits designated [we]re wholly without rationality."[1361]

[I512] The Bipartisan Campaign Reform Act of 2002 (BCRA), which amended FECA, required political committees to file detailed periodic financial reports with the Federal Election Commission. The amendment coined a new term, "electioneering communication," to replace the narrowing construction of FECA's disclosure provisions adopted by the Court in *Buckley*. As discussed above,[1362] that construction limited the coverage of FECA's disclosure requirement to communications expressly advocating the election or defeat of particular candidates. By contrast, the term "electioneering communication" applied to a broadcast clearly identifying a candidate for federal office, aired within a specific time period (60 days before a general, special, or runoff election for the office sought by the candidate or 30 days before a primary or preference election, or a convention or caucus of a political party having authority to nominate a candidate, for the office sought by the candidate), and targeted to an identified audience of at least 50,000 viewers or listeners. BCRA's amendment to FECA also specified significant disclosure requirements for persons who funded electioneering communications. The Court found that the definition of "electioneering communication" raised no vagueness concerns.[1363] Moreover, it rejected the contention that the amendment unnecessarily required disclosure of the names of persons who had contributed $1,000 or more to the individual or group paying for a communication and unnecessarily mandated disclosure of executory contracts for communications that had not yet aired. Because the "important state interests" identified in *Buckley*—"providing the electorate with information, deterring actual corruption and avoiding its appearance, and gathering data necessary to enforce more substantive electioneering restrictions—appl[ied] in full to BCRA, . . . *Buckley* amply support[ed] application of FECA's . . . disclosure requirements to the entire range of 'electioneering communications.'"[1364] *Buckley* also foreclosed a facial attack on the new provision that required disclosure of the names of persons who contributed $1,000 or more to segregated funds, and the Court agreed with the district court's conclusion that there was no evidence establishing the requisite reasonable probability of harm to any plaintiff group or its members resulting from compelled disclosure.[1365] With respect to executory contracts, the new provision mandated disclosure only if and when a person made disbursements totaling more than $10,000 in any calendar year to pay for electioneering communications. Plaintiffs did not take issue with the use of a dollar

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[1360] *See* para. I509.

[1361] Buckley v. Valeo, 424 U.S. 1, 83–84 (1976) *(per curiam).*

[1362] *See* para. I510.

[1363] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 194 (2003).

[1364] *Id.* at 196.

[1365] *Id.* at 197–99.

amount, rather than the number or dates of the ads, to identify the time when a person paying for electioneering communications should make disclosures to the FEC. The Court stressed that, "[g]iven the relatively short timeframes in which electioneering communications are made, the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant. Yet fixing the deadline for filing disclosure statements based on the date when aggregate disbursements exceeded $10,000 would open a significant loophole if advertisers were not required to disclose executory contracts. In the absence of that requirement, political supporters could avoid pre-election disclosures concerning ads slated to run during the final week of a campaign simply by making a pre-election downpayment of less than $10,000, with the balance payable after the election. Indeed, if the advertiser waited to pay that balance until the next calendar year, then, as long as the balance did not itself exceed $10,000, the advertiser might avoid the disclosure requirements completely."[1366] Furthermore, the record contained little evidence identifying any harm that might flow from the enforcement of the "advance" disclosure requirement. The district court had speculated that disclosing information about contracts that had not been performed, and might never be performed, could lead to confusion and an unclear record upon which the public would evaluate the forces operating in the political marketplace. However, "without evidence relating to the frequency of nonperformance of executed contracts, such speculation cannot outweigh the public interest in ensuring full disclosure before an election actually takes place."[1367]

[I513] *ACLF* involved a Colorado statute requiring ballot initiative proponents, who paid circulators to file both a final report, when the initiative petition was submitted to the Secretary of State, and monthly reports, during the circulation period. More specifically, the statute required that initiative proponents disclose (1) at the time they filed their petition, the name, address, and county of voter registration of all paid circulators, the amount of money proponents paid per petition signature, and the total amount paid to each circulator, and (2) on a monthly basis, the names of the proponents, the name and address of each paid circulator, the name of the proposed ballot measure, and the amount of money paid and owed to each circulator during the month. Relying on *Buckley*, the Court did not upset Colorado's disclosure requirements as a whole. The Court upheld the state's requirements for disclosure of payors, in particular, proponents' names and the total amount they had spent to collect signatures for their petitions. These requirements responded to Colorado's important interest in controlling "domination of the initiative process by affluent special interest groups." By contrast, the state failed to demonstrate the added benefit of revealing the names of paid circulators and amounts paid to each circulator. Hence, Colorado's reporting requirements, to the extent that they targeted paid circulators, could not pass constitutional muster.[1368]

[I514] In *Citizens Against Rent Control*, the Court invalidated a municipal ordinance placing a limitation of $250 on contributions to committees formed to support or oppose ballot measures submitted to a popular vote. The Court noted that, "[w]hatever may be the state interest, or degree of that interest, in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees, there is no significant state or public interest in curtailing debate and discussion of a ballot

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[1366] *Id.* at 200.

[1367] *Id.* at 201.

[1368] Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 202–04 (1999).

measure. . . . The integrity of the political system [may] be adequately protected if contributors to a committee advocating a position on a ballot measure are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions."[1369]

c. Government Funding

[I515] The Internal Revenue Code of 1954 (IRC), as amended in 1974, provided for public financing of presidential nominating conventions and general election and primary campaigns from general revenues and allocated such funding to conventions and general election campaigns by establishing three categories: (1) "major" parties (those whose candidate had received 25 percent or more of the vote in the most recent election), which received full funding; (2) "minor" parties (those whose candidate had received at least 5 percent but less than 25 percent of the votes at the last election), which received only a percentage of the funds to which the major parties were entitled; and (3) "new" parties (all other parties), which were limited to receipt of post-election funds or were not entitled to any funds if their candidate received less than 5 percent of the vote. In *Buckley*, the Court held that these provisions did not violate the First Amendment. Rather than abridging, restricting, or censoring speech, they represented an effort "to use public money to facilitate and enlarge public discussion and participation in the electoral process. Thus, [they] further[ed,] not abridge[d,] pertinent First Amendment values."[1370] The same provisions were sustained against a due process (equal protection) challenge, under the Fifth Amendment. First, the Court pointed out that "public financing, as a means of eliminating the improper influence of large private contributions, furthers a significant governmental interest. In addition, the limits on contributions [imposed by FECA] necessarily increase[d] the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving major party Presidential candidates from the rigors of soliciting private contributions." Relatedly, the Court pointed out that, while "[p]ublic funding for candidates of major parties [wa]s intended as a substitute for private contributions, . . . for minor party candidates such assistance [might] be viewed as a supplement to private contributions since these candidates [could] continue to solicit private funds up to the applicable spending limit." Moreover, "Congress' interest in not funding hopeless candidacies with large sums of public money, . . . necessarily justifie[d] the withholding of public assistance from candidates without significant public support. Thus, Congress [could] legitimately require 'some preliminary showing of a significant modicum of support.' . . . This requirement also served the important public interest against providing artificial incentives to 'splintered parties and unrestrained factionalism.'"[1371] Under these considerations and in light of *Jenness*,[1372] the Court found that the challenged funding system did not work an invidious discrimination against candidates of non-major parties.

[1369] Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 299–300 (1981).

[1370] Buckley v. Valeo, 424 U.S. 1, 92–93 (1976) *(per curiam)*.

[1371] *Id.* at 96, 99.

[1372] *See* para. I472.

CHAPTER 10

SUBSTANTIVE PROTECTION OF PROPERTY RIGHTS AND ECONOMIC INTERESTS

A. THE TAKINGS CLAUSE [1]

1. Introduction

[J1] The Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment,[2] provides that private property shall not be taken for public use without just compensation. This guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[3]

2. The "Public Use" Requirement [4]

[J2] The scope of the "public use" requirement of the Takings Clause is "coterminous with the scope of a sovereign's police powers,"[5] defined as the authority to provide for the health, safety, morals, and general welfare of the citizenry.[6] "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary."[7]

[J3] There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, but it is an extremely narrow one.[8] The Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."[9] Hence, "the Court will not strike down a condemnation on the basis that it lacks a public use so long as the taking is 'rationally related to a conceivable public pur-

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1 *See also* paras. C29–C30 *(procedural due process).*

2 Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

3 Armstrong v. United States, 364 U.S. 40, 49 (1960).

4 *See also* paras. J21–J22 *(land use restrictions).*

5 Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

6 *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

7 Berman v. Parker, 348 U.S. 26, 33 (1954) (a statute providing both for the comprehensive use of the eminent domain power to redevelop slum areas and for the possible sale or lease of the condemned lands to private interests authorizes takings for a "public use").

The Court has recognized "the principle of the supremacy of a *federal* public use over all other uses in a clearly designated field, such as that of establishing post offices." *See* United States v. Carmack, 329 U.S. 230, 242 (1946) (emphasis added).

8 *See* Berman v. Parker, 348 U.S. 26, 32 (1954).

9 Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984), *quoting* United States v. Gettysburg Elec. R. Co., 160 U.S. 668, 680 (1896).

pose.'"[10] "Judicial deference is required because, in [the American] system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."[11]

[J4] "[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."[12] But "[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court [has] rejected the notion that a use is a public use only if the property taken is put to use for the general public."[13] Indeed, "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[14] "So long as the taking has a conceivable public character, 'the means by which it will be attained is . . . for the legislature to determine.'"[15] In light of these considerations, *Midkiff* upheld land reform legislation that authorized condemnations for the specific purpose of transferring ownership to another private party, in order to eliminate a land oligopoly and the socioeconomic evils associated with it.[16] *Boston & Maine Corporation* held that the Interstate Commerce Commission was not irrational in determining that the condemnation of property owned by freight railroads would serve a public purpose, by facilitating Amtrak's rail passenger service.[17] In *Berman*, the Court permitted land condemnations that contemplated reselling the land to redevelopers as part of a plan to restore dilapidated sections of the District of Columbia.[18] Moreover *Kelo* held that,

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[10] Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 422 (1992), *quoting* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240–41 (1984).

[11] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240, 244 (1984). *See also* United States *ex rel.* TVA v. Welch, 327 U.S. 546, 552 (1946), which emphasized that "any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields."

If the condemnation of property serves legitimate public interests, it is constitutionally irrelevant that other purposes also may be advanced. *See* United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).

[12] Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937).

[13] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243–44 (1984).

[14] *Id.* at 244.

[15] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984), *quoting* Berman v. Parker, 348 U.S. 26, 33 (1954). "The comparative desirability and necessity for the site are matters for legislative or administrative determination, rather than for a judicial finding." *See* United States v. Carmack, 329 U.S. 230, 247 (1946).

[16] Hawaii Hous. Authority v. Midkiff, 467 U.S. 229, 239–44 (1984). As the Court noted, "[t]he land oligopoly ha[d,] according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. . . . Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly was found to be a rational exercise of the eminent domain power." *Id.* at 242–43.

[17] Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 422 (1992). Amtrak is a private corporation.

[18] Berman v. Parker, 348 U.S. 26, 28–36 (1954). The Court emphasized that "[m]iserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cat-

since "[p]romoting economic development is a traditional and long accepted governmental function," a city could use the power of eminent domain to acquire, through its development agent, property in the context of the implementation of comprehensive development plan that it had approved and that was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas."[19]

[J5] Courts are "to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature."[20] "But whether in fact the provision will accomplish its objectives is not the question."[21] "When the legislature's purpose is legitimate and its means are not irrational, [the Court's] cases make clear that empirical debates over the wisdom of takings, including the amount and character of land to be taken for the project at issue and the need for a particular tract to complete the plan—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."[22]

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tle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river. . . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled." *Id.* at 32–33. Further, the Court held that "the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislature." *Id.* at 35–36.

[19] Kelo v. City of New London, 545 U.S. 469 (2005).

Due process does not prohibit allowing private persons to initiate the taking process. *See* New Motor Vehicle Bd. v. Fox Co., 439 U.S. 96, 108–09 (1978); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243, n.6 (1984).

The Court has suggested that *delegations of eminent domain power* to private entities are of a limited nature, for "[t]hey do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers." *See* United States v. Carmack, 329 U.S. 230, 243, n.13 (1946), *cited* in Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 421 (1992).

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014–15 (1984), the Court found that the "public use" requirement was not violated by giving effect to the government's announcement that application for the right to the valuable government benefit of obtaining registration of an insecticide would confer upon the government a license to use the trade secrets contained in the application, even though subsequent applicants might be the most direct beneficiaries. In reaching that conclusion, the Court noted, *inter alia*, that "[a]llowing applicants for registration, upon payment of compensation, to use data already accumulated by others, rather than forcing them to go through the time-consuming process of repeating the research, would eliminate a significant barrier to entry into the pesticide market, thereby allowing greater competition among producers of end-use products," and that such a pro-competitive purpose was within Congress' police power.

[20] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 487, n.16 (1987).

For example, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413–14 (1922), that inquiry led the Court to reject the Pennsylvania legislature's stated purpose for the statute. *See, in extenso*, para. J29.

[21] W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671–72 (1981).

[22] Hawaii Hous. Authority v. Midkiff, 467 U.S. 229, 242–43 (1984). *See also* Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 422–23 (1992).

In *Kelo v. City of New London*, 545 U.S. 469 (2005), where the Court held that a city's deci-

3. What Constitutes "Property"

[J6] "Because the Constitution protects, rather than creates, property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'"[23] The "notion of 'property' extends beyond land and tangible goods and includes the products of an individual's 'labour and invention;'" indeed, intangible property rights protected by state law are deserving of the protection of the Takings Clause.[24] The "private property"[25] upon which the Clause focuses is a *specific* right or interest in physical or intellectual property; takings analysis does not apply to a statute that imposes retroactive financial liability to a former mine owner.[26] And "a mere unilateral expectation or an abstract need is not a property interest entitled to protection."[27] "[P]roperty is more than economic value; . . . it also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it.'"[28] Consequently, the fact that a physical item lacks a positive economic or market value does not exclude the thing from the scope of the Takings Clause.[29]

[J7] In view of these considerations, the Court has applied the Takings Clause, *inter alia*, to the following property rights or interests: right to sell personal property;[30] right to pass on valuable property to one's heirs;[31] right to exclude others from one's property;[32]

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sion to take property for the purpose of economic development satisfied the "public use" requirement of the Fifth Amendment, the Court rejected the argument that, for takings of this kind, it should require a "reasonable certainty" that the expected public benefits will actually accrue. *Id.*

[23] Phillips v. Washington Legal Found., 524 U.S. 156, 164 (1998), *quoting* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). *See also* United States v. Willow River Power Co., 324 U.S. 499, 503 (1945) ("economic uses are [property] rights only when they are legally protected interests").

As a general proposition, the United States, as opposed to the several states, is not "possessed of residual authority that enables it to define 'property' in the first instance." *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980).

[24] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984).

[25] The reference to "private property" in the Takings Clause of the Fifth Amendment has been construed as encompassing the property of state and local governments when it is condemned by the United States. *See* United States v. 50 Acres of Land, 469 U.S. 24, 31, n.15 (1984), *citing* United States v. Carmack, 329 U.S. 230, 242 (1946) ("When the Federal Government takes for a federal public use the independently held and controlled property of a State or of a local subdivision, . . . the Federal Government must pay just compensation for the land condemned.").

[26] *See* E. Enters. v. Apfel, 524 U.S. 498, 540–47 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554–58 (dissenting opinion of Breyer, J., with whom Justices Stevens, Souter, and Ginsburg joined). By contrast, a four-Justice plurality applied takings analysis; *id.* at 522–37 (opinion of Justice O'Connor). *See also* paras. J126, J128.

[27] Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980).

[28] Phillips v. Washington Legal Found., 524 U.S. 156, 170 (1998), *quoting* United States v. Gen. Motors Corp., 323 U.S. 373, 380 (1945).

[29] *See* Phillips v. Washington Legal Found., 524 U.S. 156, 170 (1998). For example, "[t]he government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected." *Id.* at 170.

[30] Andrus v. Allard, 444 U.S. 51 (1979).

[31] Hodel v. Irving, 481 U.S. 704, 715 (1987).

[32] Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

right to build;[33] air rights for high-rise buildings;[34] right to mine coal[35] or to extract mineral deposits;[36] water rights;[37] agricultural value of land;[38] an air easement[39] or a flowage easement;[40] liens on real property;[41] contract rights,[42] including a leasehold interest;[43] stock and undelivered dividends;[44] interest income generated by funds deposited in the registry of a court[45] or held in trust accounts;[46] possession

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[33] Lucas v. S. Carolina Coastal Council, 505 U.S. 1003 (1992).

[34] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978).

[35] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[36] United States v. Cent. Eureka Mining Co., 357 U.S. 155 (1958); Goldblatt v. Hempstead, 369 U.S. 590 (1962).

[37] Dugan v. Rank, 372 U.S. 609, 620 (1963).

[38] United States v. Kansas City Life Ins. Co., 339 U.S. 799, 810 (1950).

[39] Griggs v. Allegheny County, 369 U.S. 84 (1962).

[40] United States v. Virginia Elec. & Power Co., 365 U.S. 624, 627 (1961).

[41] Armstrong v. United States, 364 U.S. 40 (1960).

[42] Omnia Commercial Co. v. United States, 261 U.S. 502, 508 (1923); United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 19, n.16 (1977). *See also* Lynch v. United States, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. . . . When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.").

[43] United States v. Gen. Motors Corp., 323 U.S. 373, 375–77 (1945); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987).

[44] Standard Oil Co. v. New Jersey, 341 U.S. 428, 439 (1951).

[45] *Webb's Fabulous Pharmacies, v. Beckwith*, 449 U.S. 155, 162 (1980), addressed a state statute providing that interest accruing on an interpleader fund deposited in the registry of the court "shall be deemed income of the office of the clerk of the circuit court." The appellant in that case filed an interpleader action in Florida state court and tendered the sum at issue, nearly $2 million, into court. In addition to deducting $9,228.74 from the interpleader fund as a fee "for services rendered," the clerk of the court also retained more than $100,000 in interest income generated by the deposited funds. The Court held that the statute authorizing the clerk to confiscate the earned interest violated the Takings Clause. As the Court explained, "a State by *ipse dixit*, may not transform private property into public property without compensation" simply by legislatively abrogating the traditional rule that "earnings of a fund are incidents of ownership of the fund itself and are property, just as the fund itself is property." *Id.* at 164. The state argued that, since the clerk's authority to invest deposited funds was a statutorily created right, any interest income generated by the funds was not private property. The Court rejected this argument, explaining that "the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest." *Id.* at 162.

[46] Phillips v. Washington Legal Found., 524 U.S. 156, 160–72 (1998). Under Texas' Interest on Lawyers Trust Account (IOLTA) program, an attorney who received client funds should place them in a separate, interest-bearing, federally authorized account upon determining that the funds could not reasonably be expected to earn interest for the client or that the interest that might be earned was not likely to be sufficient to off-set the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs, which would be incurred in attempting to obtain the interest. IOLTA interest income was paid to the Texas Equal Access to Justice Foundation, which financed legal services for low-income persons. The Court found that interest earned on client funds held in IOLTA accounts was the "private property" of the client for Takings Clause purposes. The general rule that "interest follows principal" applied in Texas. And regardless of whether the owner of the principal had a constitutionally cognizable interest in the anticipated generation of interest by his funds, any

of a business enterprise;[47] or trade secrets.[48] By contrast, the Clause does not cover, for example, a contractual arrangement that may be altered or repealed at will by the sovereign that is a party of the agreement;[49] Indian occupancy of land not specifically recognized as ownership by action authorized by Congress;[50] a mere expectation of renewal of a lease;[51] the loss of a prospective business opportunity;[52] or the interest of the owner of a hydroelectric plant in high-water level of the river.[53]

4. What Amounts to a "Taking" of Property

a. Formal Condemnation

[J8] In the context of condemnation proceedings, a taking does not generally occur until compensation is determined and paid.[54] "The mere enactment of legislation

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interest that did accrue attached as a property right incident to the ownership of the underlying principal. Moreover, while IOLTA interest income might have no economically realizable value to its owner (since the client funds could not generate net interest), its possession, control, and disposition were nonetheless valuable rights. Finally, the Court noted that the interest income generated by IOLTA accounts was not transferred to the state as payment "for services rendered" by the state, and added that its holding did "not prohibit a State from imposing reasonable fees it incurs in generating and allocating interest income." *Id.* at 171.

47 Kimball Laundry Co. v. United States, 338 U.S. 1, 6–20 (1949).

48 Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

49 Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 304 (1976) (lease of land revocable at will by the state that owns the land); Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 54–56 (1986) (no "vested rights" under federal statute, which allegedly gave states flexibility to include or withdraw certain employees from a federal social security program, but expressly reserved to Congress the right to alter, amend, or repeal any of the statute's provisions).

50 Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285, 288–89 (1955). By contrast, where Congress, by treaty or other agreement, declared that, thereafter, Indians were to hold lands permanently, compensation must be paid for subsequent taking. *Id.* at 277–78. *See also* United States v. Sioux Nation, 448 U.S. 371, 415, n.29 (1980).

51 United States v. Petty Motor Co., 327 U.S. 372, 380–81 (1946).

52 United States v. Grand River Dam Auth., 363 U.S. 229, 236 (1960) (frustration of plans to develop hydroelectric power on a river). *See also* Omnia Commercial Co. v. United States, 261 U.S. 502 (1923). In that case, the claimant stood to make large profits from a contract it had with a steel company, but the United States, pursuant to the war power, requisitioned the company's entire steel production. The Court noted that, there, the government did not appropriate what the claimant owned but only ended his opportunity to exploit a contract and pointed out that "frustration and appropriation are essentially different things." *Id.* at 513.

"The interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *See* Andrus v. Allard, 444 U.S. 51, 66 (1979).

53 United States v. Willow River Power Co., 324 U.S. 499, 507–10 (1945).

54 See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 320 (1987), *citing* Danforth v. United States, 308 U.S. 271, 284–85 (1939). The United States may institute condemnation proceedings under various Acts of Congress providing authority for such takings. These statutes either require the government to pay over the judicially determined compensation, before it can enter upon the land, or enable it to take immediate possession upon order of the court before the amount of just compensation has been ascertained. Although title to the property passes to the government only when the owner receives compensation, or when the compensation is deposited into court pursuant to the Taking

authorizing condemnation of property cannot constitute a taking. Such legislation may be repealed or modified, or appropriations may fail."[55] A reduction or increase in the value of property may occur during the process of governmental decisionmaking, but, "absent extraordinary delay," such changes in value are "incidents of ownership [and] cannot be considered as a 'taking' in the constitutional sense."[56]

b. Physical Intrusions and Regulatory Restrictions

i. General Considerations

[J9] Although the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, a taking may occur without such formal proceedings. The Court has recognized that a landowner is entitled to bring an action in "inverse condemnation," in order to recover the value of property that has been "taken in fact" by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.[57] "A landowner is entitled to bring such an action as a result of the self-executing character of the constitutional provision with respect to compensation."[58]

[J10] While the Fifth Amendment's guarantee against uncompensated takings "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,"[59] the Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons."[60] But this inquiry is not standardless. "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. 'Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law,' . . . and th[e] Court has accord-

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Act, the passage of title does not necessarily determine the date of "taking." "[I]f the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking." Moreover, "[t]he owner at the time the Government takes possession rather than the owner at an earlier or later date, is the one who has the claim and is to receive payment." *See* United States v. Dow, 357 U.S. 17, 21–22 (1958).

55 Danforth v. United States, 308 U.S. 271, 286 (1939).

56 Agins v. Tiburon, 447 U.S. 255, 263, n.9 (1980).

57 *See* United States v. Clarke, 445 U.S. 253, 257 (1980). "Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation." *Id.*

58 *Id.*

59 Armstrong v. United States, 364 U.S. 40, 49 (1960).

60 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

ingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values."[61]

[J11] "The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. [The Court's] jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. [Its] regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially *ad hoc*, factual inquiries,' . . . designed to allow 'careful examination and weighing of all the relevant circumstances.'"[62]

ii. Physical Takings

[J12] The Court has long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. When the physical intrusion reaches the extreme form of a *permanent physical occupation*, the Court has found "a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[63] "In such a case, the character of the government action not only is an important factor in resolving whether the action works a taking, but also is determinative."[64] As early as 1872, in *Pumpelly*, the Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that "where real estate is actually invaded by super-induced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."[65] In *Western Union Telegraph*, a telegraph company constructed and operated telegraph lines over a railroad's right of way. In holding that federal law did not grant the company the right of eminent domain or the right to operate the lines absent the railroad's consent, the Court found that the invasion of the telephone lines would be a compensable taking.[66] And *Loretto* determined that a state law requiring landlords to allow tel-

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61 *Id.* at 25. Zoning laws are the classic example, "which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property." *Id.* at 25. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) (residential zoning—prohibition of industrial uses); Welch v. Swasey, 214 U.S. 91 (1909) (height restriction); Gorieb v. Fox, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); Agins v. Tiburon, 447 U.S. 255 (1980) (development of between one and five single-family residences on a five-acre tract).

62 Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–22 (2002). *See also* Yee v. City of Escondido, 503 U.S. 519, 523 (1992) ("The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.").

63 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 434–35 (1982).

64 *Id.* at 426.

65 Pumpelly v. Green Bay Co., 13 Wall. 166, 181 (1872).

66 W. Union Tel. Co. v. Pennsylvania R. Co., 195 U.S. 540, 570 (1904).

evision cable companies to emplace cable facilities in their apartment buildings constituted a taking, even though the facilities occupied, at most, only one and a half cubic feet of the landlords' property.[67]

[J13] *Temporary physical seizure* of private property is no different in kind from permanent physical occupation of land.[68] Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary.[69] In *Pewee*, the Court unanimously held that the government's seizure and direction of operation of a coal mine during a five-month period, undertaken to prevent a national strike of coal miners, constituted a taking.[70] "There are, however, unusual circumstances in which governmental occupation does not amount to a taking. For example, the entry by firemen upon burning premises cannot be said to deprive the private owners of any use of the premises."[71]

[J14] A *physical invasion short of an occupation* amounts to a "taking," "if its effects are so complete as to deprive the owner of all or most of his legally protected interests in the subject matter."[72] For example, military installations' repeated firing of guns over a summer resort constitutes a taking.[73] Property owners whose lands adjoin a railroad line, while not entitled to compensation for damages resulting from the usual noise, vibrations, smoke, and the like, incidental to the proper operation of the trains, are entitled to compensation for such direct, peculiar and substantial damages as specially affect his property and diminish its value.[74] When the government takes part of a tract of land by flooding, it must pay for the damage caused by resulting erosion to the remainder of the tract.[75]

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[67] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–38, n.16 (1982). A law requiring that the interest on certain private funds be transferred to a person other than the owner of the principal mandates a *per se* taking of the interest income. *See* Brown v. Legal Found. of Washington, 538 U.S. 216 (2003).

[68] *Cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987).

[69] *See* United States v. Gen. Motors Corp., 323 U.S. 373 (1945); United States v. Petty Motor Co., 327 U.S. 372 (1946).

[70] United States v. Pewee Coal Co., 341 U.S. 114 (1951). The plurality noted that, because there had been an "actual taking of possession and control," the taking was as clear "as if the Government held full title and ownership." *Id.* at 116 (opinion of Black, J., with whom Frankfurter, Douglas, and Jackson, JJ., joined).

[71] Nat'l Bd. of Young Men's Christian Ass'ns v. United States, 395 U.S. 85, 93 (1969). In that case, the physical occupation by troops did not deprive petitioners of any use of their buildings, since at the time the troops entered, a riot was well under way, and petitioners' buildings were already under heavy attack. Hence, throughout the period of occupation, the buildings could not have been used by petitioners in any way. *See also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 335 (2002) (orders temporarily prohibiting access to crime scenes, businesses that violate health codes, or fire-damaged buildings have long been considered permissible exercises of the police power).

[72] United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

[73] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329–30 (1922). Mere occasional acts of gun fire do not amount to an appropriation if there is no proof that government has the intent to repeat firing whenever it sees fit. *See* Peabody v. United States, 231 U.S. 530 (1913); Portsmouth Harbor Land & Hotel Co. v. United States, 250 U.S. 1, 2 (1919).

[74] Richards v. Washington Terminal Co., 233 U.S. 546, 553–57 (1914).

[75] United States v. Dickinson, 331 U.S. 745, 750–51 (1947).

[J15] "The airspace, apart from the immediate reaches above the land, is part of the public domain. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[76] In *Causby*, the Court ruled that the United States, by low and frequent flights of its military planes over a chicken farm, made the property unusable for that purpose, and that therefore there had been a "taking," in the constitutional sense, of an air easement for which compensation must be made.[77]

[J16] "The government effects a physical taking of land only where it *requires* the landowner to submit to the physical occupation of his property. This element of required acquiescence is at the heart of the concept of occupation. . . . [Thus, the Takings Clause comes into play if] the government authorizes a compelled physical invasion of property."[78] In *Yee v. City of Escondido*, the Court held that a rent control scheme authorized no such thing and did not constitute a physical taking. Under this scheme, the bases upon which a park owner could terminate a mobile home owner's tenancy were limited to, *inter alia*, non-payment of rent and the park owner's desire to change the use of his land. The park owner might not require the removal of a mobile home when it was sold and might neither charge a transfer fee for the sale nor disapprove of a purchaser who was able to pay rent. The state law did not limit the rent the park owner could charge, but Escondido had a rent control ordinance setting mobile home rents back to their 1986 levels and prohibiting rent increases without the City Council's approval. The Court decided that the rent control scheme did not authorize an unwanted physical occupation of petitioners' property and, thus, did not amount to a *per se* taking. Petitioners' argument that the scheme authorized a physical taking, because it increased a mobile home's value by giving the homeowner the right to occupy the pad indefinitely at a sub-market rent, was rejected. Petitioners had voluntarily rented their land to mobile home owners, and were not required to continue to do so; to the contrary, state law provided that a park owner who wished to change the use of his land could evict his tenants, albeit with six or 12 months notice. On their face, the laws at issue "merely regulate[d] petitioners' *use* of their land by regulating the relationship between landlord and tenant." Any transfer of wealth from park owners to incumbent mobile home owners in the form of sub-market rent did not, in itself, convert regulation into physical invasion. Similarly, the contention that the scheme deprived petitioners of the ability to choose their incoming tenants might have some bearing on whether the statutes in question caused a regulatory taking, but it had nothing to do with whether it caused a physical taking.[79]

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[76] United States v. Causby, 328 U.S. 256, 266 (1946).

[77] *Id.* at 261–67. The Court emphasized that the government had "not merely destroyed property" but "was using a part of it for the flight of its planes." *Id.* at 262, n.7. *See also* Griggs v. Allegheny County, 369 U.S. 84 (1962) (over-flights held a taking of residential property).

[78] Yee v. City of Escondido, 503 U.S. 519, 527 (1992).

[79] Yee v. City of Escondido, 503 U.S. 519, 527–32 (1992). *See also* Fed. Communications Comm. v. Florida Power Corp., 480 U.S. 245, 252–53 (1987). In that case, the respondent had voluntarily leased space on its utility poles to a cable television company for the installation of cables. The federal government, exercising its statutory authority to regulate pole attachment agreements, substantially reduced the annual rent. The Court rejected the respondent's claim that the challenged government action constituted a *per se* taking, noting that "it is the invitation, not the rent, that makes the difference. The line which separates [this case] from *Loretto* is the unambiguous distinction between a . . . lessee and an interloper with a government license."

iii. Regulatory Takings

[J17] *Generally.* It was *Pennsylvania Coal v. Mahon* that gave birth to the Court's regulatory takings jurisprudence. In that case, the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking."[80] Since *Mahon*, the Court has given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, under *Lucas*, a regulation that "denies *all* economically beneficial or productive use" of land will require compensation under the Takings Clause.[81] Second, under *Penn Central*, where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on "a complex of factors including the regulation's *economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations*, and *the character of the government action*"[82]—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good."[83]

[J18] Even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases "the aggregate must be viewed in its entirety."[84] "[W]here an owner

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[80] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[81] Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). This categorical rule is limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted;" it would not apply if the diminution in value were 95 percent instead of 100 percent. Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central*. *See Lucas, supra*, at 1017, 1019, n.8. For example, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001), the Court held that a regulation permitting a landowner to build a substantial residence on an 18-acre parcel did not leave the property "economically idle."

[82] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (emphasis added), *discussing* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[83] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). *See also* Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984): "[A] radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property. . . . The principle that underlies this doctrine is that, *while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of the advantage of living and doing business in a civilized community, some are so substantial and unforeseeable, and can so easily be identified and redistributed, that justice and fairness require that they be borne by the public as a whole.* These considerations are as applicable to the problem of determining when in a condemnation proceeding the taking occurs as they are to the problem of ascertaining whether a taking has been effected by a putative exercise of the police power." (Emphasis added.)

The rule applied in *Dolan* (*see* para. G37) considers whether *dedications demanded as conditions of development* are proportional to the development's anticipated impacts. It is not designed to address, and is not readily applicable to, the much different questions arising where the landowner's challenge is based not on excessive exactions but on denial of development. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703 (1999).

[84] Andrus v. Allard, 444 U.S. 51, 66 (1979).

possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking," even when this strand constitutes the most beneficial use of the property.[85] That explains why, for example, a regulation that prohibits commercial transactions in eagle feathers, but does not bar other uses or impose any physical invasion or restraint upon them, is not a taking.[86] Moreover, the regulatory takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, th[e] Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."[87]

[J19] "An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. . . . Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not."[88] An "extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking cannot be sustained. [Such a] broad submission would apply to numerous 'normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like,' . . . as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, or fire-damaged buildings. . . . [Consequently it] would . . . require changes in numerous practices that have long been considered permissible exercises of the police power. . . . A rule . . . requir[ing] compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision making."[89] Moreover, interference with investment-backed expectations is one of a number of factors to be examined under the *Penn Central* framework. Under these considerations, the Court has held that the proper "approach to claims that a regulation has effected a temporary taking requires careful examination and weighing of all the relevant circumstances," only one of which is the length of the delay; "the duration of the restriction is one of the important factors that a court must con-

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[85] *Id.* at 65–66.

[86] *Id.* at 64–68.

[87] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978). The "deprivation of all economically feasible use" rule does not make clear the "property interest" against which the loss of value is to be measured. "When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether the Court would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." In any event, a court may not examine the diminution in a particular parcel's value produced by a municipal ordinance in light of the total value of the taking claimant's other holdings in the vicinity. *See* Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1016, n.7 (1992).

[88] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331–32 (2002).

[89] *Id.* at 534–35.

sider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the temptation to adopt what amount to *per se* rules in either direction must be resisted."[90]

[J20] In *Lucas*, "the Court observed that a landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute, but instead is confined by limitations on the use of land which 'inhere in the title itself.' . . . This is so, the Court reasoned, because the landowner is constrained by those 'restrictions that background principles of the State's law of property and nuisance already place upon land ownership.'"[91] "A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a land-filling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles."[92] *Palazzolo* made clear that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a 'background principle of the State's law' by mere virtue of the passage of title. [The foregoing concept] is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. . . . A regulation or common law rule cannot be a background principle for some owners, but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. [Hence, a] law does not become a background principle for subsequent owners by enactment itself."[93]

[J21] *Zoning and Land Use Restrictions—In General. Agins* held that a use restriction on real property "effects a taking if [it] does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[94] "Because this statement was phrased in the disjunctive, *Agins*' 'substantially advances' language was read to announce a stand-alone regulatory takings test that was wholly independent of *Penn Central* or any other test."[95]

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[90] *Id.* at 535, 542.

[91] Palazzolo v. Rhode Island, 533 U.S. 606, 629 (2001), *quoting* Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1015, 1029 (1992).

[92] Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1015, 1029–30 (1992). As the Court noted, common law principles "rarely support prohibition of the 'essential use' of land." Moreover, the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so). So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant. *Id.* at 1031.

[93] Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001).

[94] Agins v. Tiburon, 447 U.S. 255, 260 (1980).

[95] Lingle v. Chevron, 544 U.S. 528, 540 (2005). Although the Court did not provide a

[J22] *In Lingle v. Chevron*, the Court held that that the above formula, adopted in *Agins*, prescribes an inquiry in the nature of a due process, not a takings, test, and that it is "not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment, . . . [since it] reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause."[96] In light of these considerations, the Court concluded that "a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."[97]

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thorough explanation of the nature or applicability of the requirement that a regulation "substantially advance legitimate public interests" outside the context of required dedications or exactions, it made clear that this standard was not the same as those applied to due process or equal protection claims: the Court required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that the state "could rationally have decided" that the measure adopted might achieve the state's objective. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, n.3 (1987), *discussing Agins*.

This requirement did not mean that courts had "a license to judge the effectiveness of legislation," or that courts were to undertake "least restrictive alternative" analysis in deciding whether a state regulatory scheme was designed to remedy a public harm or was instead intended to provide private benefits. "That a land use regulation might be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it." *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 487, n.16 (1987).

96 Lingle v. Chevron, 544 U.S. 528, 542 (2005).

97 *Id.* at 548. Relatedly, the Court emphasized:

> Our holding today—that the "substantially advances" formula is not a valid takings test—does not require us to disturb any of our prior holdings. To be sure, we applied a "substantially advances" inquiry in *Agins* itself, . . . and arguably also in *Keystone Bituminous Coal Assn. v. DeBenedictis*. . . . But in no case have we found a compensable taking based on such an inquiry. Indeed, in most of the cases reciting the 'substantially advances' formula, the Court has merely assumed its validity when referring to it in dicta.
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> [Further] . . . [a]lthough *Nollan* and *Dolan* quoted *Agins*' language, . . . the rule those decisions established is entirely distinct from the "substantially advances" test we address today. Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. . . . Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve a special application of the doctrine of "unconstitutional conditions," which provides that the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property. . . . That is worlds apart from a rule that says a regulation

[J23] "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent economically viable use of the land in question can it be said that a taking has occurred."[98]

[J24] *The Ripeness Requirement.* A takings claim challenging the application of land use regulations "is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[99] "A final decision by the responsible state agency informs the

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affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, *Nollan* and *Dolan* cannot be characterized as applying the "substantially advances" test we address today, and our decision should not be read to disturb these precedents.

Id. at 545–48.

"[I]n evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. . . . [By contrast, where a city has] made an adjudicative decision to condition one's application for a building permit on an individual parcel, the burden properly rests on the city." *See* Dolan v. City of Tigard, 512 U.S. 374, 391, n.8 (1994).

Under the due process clause, the legislature may not *delegate*, without proper guideline or check, zoning power to a narrow segment of the community. In *Eubank v. Richmond*, 226 U.S. 137 (1912), the Court invalidated a city ordinance that conferred the power to establish building setback lines upon the owners of two-thirds of the property abutting any street. Similarly, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), the Court 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.

"[T]he standardless *delegation of zoning power* to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decision making by the people through the referendum process. . . . 'A referendum is far more than an expression of ambiguously founded neighborhood preference; it is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.'" *See* City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 678–79 (1976).

In *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917), the Court upheld a neighborhood consent provision that permitted property owners to waive a municipal restriction prohibiting the construction of billboards. In that case, the Court distinguished *Eubank* in the following way: "[The ordinance in *Eubank*] left the establishment of the building line untouched until the lot owners should act, and then . . . gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards . . . , but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification." Since the property owners could simply waive an otherwise applicable legislative limitation, the Court in *Cusack* determined that the provision did not delegate legislative power at all. *Id.* at 531.

98 United States v. Riverside Bayview Homes Inc., 474 U.S. 121, 127 (1985). There, the Court upheld a regulation requiring landowners to obtain permits from the Army Corps of Engineers before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.

99 Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473

constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property, . . . or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred."[100] These matters cannot be resolved in definitive terms until a court knows the nature and extent of permitted development on the land in question.[101]

[J25] *Agins* is the first case in which the Court employed a notion of ripeness in declining to reach the merits of an as-applied regulatory taking claim. In *Agins*, the landowners, who challenged zoning ordinances restricting the number of houses they could build on their property, sued without seeking approval for any particular development on their land. The Court held that the only issue justiciable at that point was whether mere enactment of the statute amounted to a taking. Without employing the term "ripeness," the Court explained that, because the owners "ha[d] not submitted a plan for development of their property as the [challenged] ordinances permitted, there [wa]s as yet no concrete controversy regarding the application of the specific zoning provisions."[102]

[J26] *Hodel* toughened the ripeness requirement. There, coal producers and landowners challenged the enactment of the Surface Mining Control and Reclamation Act of 1977 as a taking of their property. As in *Agins*, the Court concluded that an as-applied challenge was unripe, reasoning that "[t]here [wa]s no indication in the record that appellees ha[d] availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting . . . a variance from the [applicable provisions of the Act.]"[103] The Court thus "held that, where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim."[104]

[J27] *Williamson County* confirmed *Hodel*'s holding. In that case, a developer's plan to build a residential complex was rejected by the local Planning Commission as inconsistent with zoning ordinances and subdivision regulations in eight different respects. The Court acknowledged that respondent had submitted a plan for developing its prop-

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U.S. 172, 186 (1985). The Court has noted that the ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. *See, e.g.*, Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733, n.7 (1997). *See also* para. A7.

100 Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001).

101 *Id.* at 618, *citing* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986). Facial challenges to land use regulation "are generally ripe the moment the challenged regulation or ordinance is passed, but face an uphill battle, . . . since it is difficult to demonstrate that 'mere enactment' of a piece of legislation 'deprived [the owner] of economically viable use of [his] property.'" *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736, n.10 (1997), *quoting* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 297 (1981).

The ripeness doctrine has also been applied with respect to a *rent control* ordinance, under which a landlord may automatically raise the annual rent of a tenant in possession by as much as 8 percent, but if a tenant objects to a higher increase, a hearing is required to determine whether the landlord's proposed increase is "reasonable under the circumstances," and the hearing officer is directed to consider specified factors, including "the hardship to a tenant." *See* Pennell v. San Jose, 485 U.S. 1, 9–10 (1988).

102 Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

103 Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 297 (1981).

104 *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736–37 (1997).

erty, and thus had passed beyond the *Agins* threshold, but nonetheless held the taking challenge unripe, reasoning that, "among the factors of particular significance in the [taking] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations, . . . factors [that] simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[105] Thus, a developer must at least "resort to the procedure for obtaining variances . . . [and obtain] a conclusive determination by the [administrative agency] whether it would allow" the proposed development, in order to ripen his taking claim.[106] Further, *MacDonald* "suggested that the *Williamson County* 'final decision' requirement might sometimes require multiple proposals or variance applications before a landowner's case will be considered ripe."[107] "Leaving aside the question of how definitive a local zoning decision must be to satisfy *Williamson County*'s demand for finality, two points about the requirement are clear: it applies to decisions about how a taking plaintiff's own land may be used, and it responds to the high degree of discretion characteristically possessed by land use boards in softening the strictures of the general regulations they administer."[108]

[J28] *Landmark Laws.* The Court has recognized that "States and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city."[109] *Penn Central* involved the New York City Landmarks Preservation Commission's denial of permission to construct an office building in excess of 50 stories above the Grand Central Terminal, an eight-story structure used as a railroad station and for a variety of other commercial purposes, which had been designated as a "landmark." The city had not prohibited any new construction but had announced that whether any construction would be allowed depended on

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[105] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191 (1985).

[106] *Id.* at 193.

[107] See Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738, n.12 (1997), *discussing* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353, n.9 (1986) ("[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews").

"Government authorities, of course, may not burden property by imposition of repetitive or unfair land use procedures in order to avoid a final decision." *See* Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001).

[108] Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738 (1997). If the administrative agency has no discretion to exercise over one's right to use his land, no occasion exists for applying *Williamson County*'s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel. The same is true when no discretionary decision must be made by any agency official for the landowner to obtain "Transferable Development Rights" or to offer them for sale. *Id.* at 739–40.

See also Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001) ("While a landowner must give a land use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.").

[109] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978), *citing* New Orleans v. Dukes, 427 U.S. 297 (1976) (New Orleans ordinance prohibiting pushcart food sales in the Vieux Carre); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976) (city ordinance prohibiting two or more adult theaters within a specified area).

whether the proposed addition would harmonize in scale, material, and character with the Terminal. Moreover, the Court remarked that, because the rights to develop the airspace above Grand Central Terminal had been made transferable to other parcels in the vicinity (some of which the owners of the terminal themselves owned), it was not accurate to say that the owners had been denied all use of their pre-existing air rights, and that, even if the Transferable Development Rights were inadequate to constitute just compensation if a taking had occurred, they could nonetheless be taken into account in considering the impact of regulation. Under these considerations, the Court concluded that the application of New York City's Landmarks Law had not effected a "taking" of appellants' property; the restrictions imposed were substantially related to the promotion of the general welfare, and "not only permit[ted] reasonable beneficial use of the landmark site, but also afford[ed] appellants opportunities further to enhance not only the Terminal site proper but also other properties."[110]

[J29] *Mining Regulations.* In *Mahon*, the Pennsylvania Coal Company had served notice on Mr. and Mrs. Mahon that the company's mining operations beneath their premises would soon reach a point that would cause subsidence to the surface. The Mahons filed a bill in equity seeking to enjoin the coal company from removing any coal that would cause "the caving in, collapse or subsidence" of their dwelling. The bill acknowledged that the Mahons owned only the surface or right of soil in the lot, and that the coal company had reserved the right to remove the coal without any liability to the owner of the surface estate. Nonetheless, the Mahons asserted that Pennsylvania's then recently enacted Kohler Act, which prohibited mining that caused subsidence under certain structures, entitled them to an injunction. After initially having entered a preliminary injunction pending a hearing on the merits, the Chancellor soon dissolved it, observing that the plaintiffs' bill contained no averment on which to base, by implication or otherwise, any finding of fact that any interest, public or private, was involved in the defendant's proposal to mine the coal, except the private interest of the plaintiffs in the prevention of private injury. The Pennsylvania supreme court reversed, concluding that the Kohler Act was a proper exercise of the police power. One Justice dissented, arguing that the Kohler Act was not actually intended to protect lives and safety, but rather it was special legislation enacted for the sole benefit of the surface owners who had released their right to support. The Court accepted this argument. In his opinion for the Court, Justice Holmes first decided the specific case at hand in a single, terse paragraph: "This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. . . . But usually, in ordinary private affairs, the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance, even if similar damage is inflicted on others in different places. The damage is not common or public. . . . The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land

[110] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129–38 (1978). The Court also noted that, although landmark laws apply only to selected parcels, they are not, as a matter of principle, like discriminatory, or "reverse spot," zoning—that is, a land use decision that arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land use control as part of some comprehensive plan, a municipal landmark law normally embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city. *Id.* at 132.

when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed, the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand, the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."[111] Then, the Court discussed the general validity of the Act. In this portion of the Court's opinion, Justice Holmes rested on two propositions, both critical to the Court's decision. First, because it served only private interests, not health or safety, the Kohler Act could not be sustained as an exercise of the police power. Second, the statute made it "commercially impracticable" to mine "certain coal" in the areas affected by the Kohler Act.[112]

[J30] *Keystone Bituminous Coal* involved Section 4 of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (Act), which prohibited coal mining causing subsidence damage to preexisting public buildings, dwellings, and cemeteries. Implementing regulations issued by Pennsylvania's Department of Environmental Resources (DER) required 50 percent of the coal beneath Section 4-protected structures to be kept in place to provide surface support and extend Section 4's protection to watercourses. Section 6 of the Act authorized the DER to revoke a mining permit if the removal of coal caused damage to a Section 4-protected structure or area, and the operator did not within six months repair the damage, satisfy any claim arising therefrom, or deposit the sum that repairs would reasonably cost as security. Unlike the statute considered in *Mahon*, the Subsidence Act did not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners, but it served legitimate public interests in health, safety, the environment, and the fiscal integrity of the area by minimizing damage to surface areas. None of the indicia of a statute enacted solely for the benefit of private parties identified in *Mahon* were present in *Keystone*. First, the Kohler Act was a "private benefit" statute, since it ordinarily did not apply to land when the surface was owned by the owner of the coal. The Subsidence Act, by contrast, had no such exception. The current surface owner could only waive the protection of the Act if the DER consented. Moreover, the Court was forced to reject the Commonwealth's safety justification for the Kohler Act, because it found that the Commonwealth's interest in safety could as easily have been accomplished through a notice requirement to landowners. The Subsidence Act, by contrast, was designed to accomplish a number of widely varying interests, with reference to which Keystone had not suggested alternative methods through which the Commonwealth could proceed. Petitioners' argument that Section 6's remedies were unnecessary to satisfy the Act's public purposes, because of the Commonwealth's insurance program that reimbursed repair costs, was not persuasive, since the public purpose was served by deterring mine operators from causing damage in the first place by making them assume financial responsibility. Thus, the Commonwealth had merely exercised its police power to prevent activities that were tantamount to public nuisances. Further, petitioners failed to show that the mere enactment of the Act made it impossible for petitioners to prof-

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111 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413–14 (1922).

112 *Id.* at 414–15.

itably engage in their business, or that there had been undue interference with their investment-backed expectations. The only relevant evidence was testimony indicating that Section 4 required petitioners to leave 27 million tons (less than 2 percent) of their coal in place. Petitioners' argument that the Commonwealth had effectively appropriated this coal was rejected, because the 27 million tons did not constitute a separate segment of property for "taking" law purposes.[113]

[J31] In *Hodel v. Virginia Surface Mining*, the Court upheld, on its face, the Surface Mining Control and Reclamation Act of 1977, a comprehensive statute designed to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations. The district court had held that two of the Act's provisions violated the Just Compensation Clause of the Fifth Amendment: first, a provision that required operators to perform the task of restoring steep slope surface mines to their approximate original contour; second a provision expressly prohibiting mining in certain locations. The Court held that the mere enactment of these provisions did not constitute a taking, for it did not deny an owner economically viable use of his land. First, the Act did not, on its face, prevent beneficial use of coal-bearing lands. Except for the proscription of mining near certain locations (national parks and forests, or where mining would adversely affect publicly owned parks or places included in the National Register of Historic Sites, or areas within 100 feet of a cemetery or the right-of-way of a public road, and within 300 feet of an occupied dwelling, public building, school, church, community or institutional building, or public park), the Act did not categorically prohibit surface coal mining; it merely regulated the conditions under which such operations might be conducted. Second, the prohibition of mining in certain locations, did not, on its face, deprive owners of land within its reach of economically viable use of their land, since it did not proscribe non-mining uses of such land. Finally, the Act did not purport to regulate alternative uses to which coal-bearing lands might be put.[114]

[J32] In *Goldblatt*, a city safety ordinance banned any excavations below the water table and effectively prohibited the claimant from continuing a sand and gravel mining business that had been operated on the particular parcel since 1927. The Court upheld the ordinance against a "taking" challenge, although the ordinance prohibited the present and presumably most beneficial use of the property and had severely affected a particular owner. The Court assumed that the ordinance did not prevent the owner's reasonable use of the property, since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occurred.[115]

[J33] *Moratoria.* Moratoria are "an essential tool of successful development." "The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would . . . treat these interim measures as takings regardless of the planners' good faith, the landowners' reasonable expectations, or the moratorium's actual impact on property values. . . . Otherwise the financial constraints of compensating property owners during a moratorium may force officials to rush through the

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[113] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485–502 (1987).

[114] Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 295–96 (1981). *See also* Hodel v. Indiana, 452 U.S. 314, 335 (1981).

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

planning process or to abandon the practice altogether."[116] And "the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel. . . . Moreover, with a temporary ban on development there, is a lesser risk that individual landowners will be 'singled out' to bear a special burden that should be shared by the public as a whole."[117] For these reasons, although it may be true "that a moratorium lasting more than one year should be viewed with special skepticism," a 32-month moratorium on development imposed during the process of devising a comprehensive land-use plan does not constitute a *per se* taking of property.[118]

[J34] *Restrictions on Housing Arrangements.* In *Belle Terre*, the Court considered an unusual regulation enacted by a small Long Island community in an apparent effort to avoid some of the unpleasantness of urban living. It restricted land use within the village to single-family dwellings, and it defined "family" in such a way that no more than two unrelated persons could inhabit the same house. The Court upheld this ordinance, noting that desires to avoid congestion and noise from both people and vehicles were "legitimate guidelines in a land use project addressed to family needs" and that it was quite within the village's power to "make the area a sanctuary for people."[119] *Moore*, like *Belle Terre*, involved an ordinance that limited the occupancy of each dwelling to a single family. Unlike the ordinance challenged in *Belle Terre*, however, this ordinance defined "family" in a manner that prevented certain relatives from living together, and it therefore intruded on choices concerning family living arrangements. Although the ordinance was supported by the legitimate state interests in avoiding overcrowding, traffic congestion, and an undue financial burden on the school system, the ordinance's relation to those state interests was too "tenuous" to satisfy constitutional standards.[120]

[J35] *Required Dedications and Other Development Conditions.* Under the doctrine of "unconstitutional conditions," the government may not require a person to give up the constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit conferred by the government "where the property sought has little or no relationship to the benefit."[121]

[J36] *Nollan* set forth the *"essential nexus"* standard for reviewing development exactions. There, the Court recognized that a state agency may condition the grant of a land use permit on the dedication of a property interest, if the dedication substantially furthers a legitimate police power purpose that would justify a refusal to issue the permit.[122] At the same time, however, it held that such a condition is unconstitutional, if the condition "utterly fails" to further a goal that would justify the refusal.[123] In that case, the California Coastal Commission demanded a lateral public easement across the Nollan's

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116 Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 338–39 (2002).

117 *Id.* at 340–41.

118 *Id.* at 341–42.

119 Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

120 Moore v. E. Cleveland, 431 U.S. 494, 498–506 (1977) (plurality opinion). Justice Stevens found that the zoning ordinance was unreasonable as having no substantial relation to the public health, safety, morals, or general welfare. *Id.* at 513–521.

121 Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

122 Nollan v. California Coastal Comm'n, 483 U.S. 825, 836–37 (1987).

123 *Id.* at 837.

beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. The public easement was designed to connect two public beaches that were separated by the Nollan's property. The Coastal Commission asserted that the public easement condition was imposed to promote the legitimate state interests of protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront and preventing congestion on the public beaches. Assuming, without deciding, that this was so, the Court admitted that "if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end."[124] The Court resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollan's beachfront lot. How enhancing the public's ability to "traverse to and along the shorefront" served the same governmental purpose of "visual access to the ocean" from the roadway was beyond the Court's ability to countenance. It was also impossible to understand how the challenged exaction lowered any "psychological barrier" to using the public beaches or how it helped to remedy any additional congestion on them caused by construction of the Nollans' new house. The absence of a nexus meant that the building restriction in question was not a valid regulation of land use but "an out-and-out plan of extortion."[125]

[J37] *Dolan* resolved the question of what is the required degree of connection between the exactions imposed by a city and the projected impacts of the proposed development. The Court held there that, in addition to showing a rational nexus to a public purpose that would justify an outright denial of the permit, the city must also demonstrate "rough proportionality" between the harm caused by the new land use and the benefit obtained by the condition. "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[126] In that case, the city Planning Commission had conditioned approval of Dolan's application to expand her store and pave her parking lot upon her compliance with dedication of land (1) for a public greenway along a creek to minimize flooding that would be exacerbated by the increases in impervious surfaces associated with her development, and (2) for a pedestrian/bicycle pathway intended to relieve traffic con-

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[124] *Id.* at 836.

[125] *Id.* at 837.

[126] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

gestion in the city's central business district. The Court found that preventing flooding along the creek and reducing traffic congestion in the district were legitimate public purposes; and a nexus existed between the first purpose and limiting development within the creek's floodplain and between the second purpose and providing for alternative means of transportation. Nevertheless, the findings upon which the city relied, did not show the required reasonable relationship between the floodplain easement and Dolan's proposed building. The Community Development Code already required that Dolan leave 15 percent of her property as open space, and the undeveloped floodplain would have nearly satisfied that requirement. However, the city had "never said why a public, as opposed to a private, greenway was required in the interest of flood control," and had "not attempted to make any individualized determination to support this part of its request." The city had also "not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by Dolan's development reasonably relate[d] to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply [had] found that the creation of the pathway 'could offset some of the traffic demand . . . and lessen the increase in traffic congestion.' . . . [T]he city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."[127]

[J38] *Rent Regulations.*[128] "[S]tatutes regulating the economic relations of landlords and tenants are not *per se* takings."[129] "When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, . . . or require the landowner to accept tenants he does not like, . . . without automatically having to pay compensation. . . . Such forms of regulation are analyzed by engaging in the 'essentially *ad hoc*, factual inquiries' necessary to determine whether a regulatory taking has occurred."[130]

[J39] *Public Utility Rate Regulation.* The main reason for the regulation of private utility rates is "the inevitability of a monopoly that requires price control to take the place of price competition."[131] Public utilities are under a state statutory duty to serve the public. "Although their assets are employed in the public interest, . . . they are owned and operated by private investors. This partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment. The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."[132] "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation, and so violated the Fifth and

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127 *Id.* at 393, 395–96.

128 *See also* para. J24 *(ripeness requirement).*

129 Fed. Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 252 (1987).

130 Yee v. City of Escondido, 503 U.S. 519, 529 (1992). *See, in extenso,* para. J16.

131 Cantor v. Detroit Edison Co., 428 U.S. 579, 596 (1976).

132 Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989), *citing* Covington & Lexington Tpk. Road Co. v. Sandford, 164 U.S. 578, 597 (1896) (a rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); Fed. Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942) ("by longstanding usage in the field of rate regulation, the lowest reasonable rate is one which is not confiscatory in the constitutional sense"); Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 391–92 (1974) ("all that

Fourteenth Amendments. Nevertheless, how such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question."[133]

[J40] "At one time, it was thought that the Constitution required rates to be set according to the actual present value of the assets employed in the public service. This method, known as the 'fair value' rule, is exemplified by the decision in *Smyth v. Ames*. Under the fair value approach, a 'company is entitled to ask . . . a fair return upon the value of that which it employs for the public convenience,' while, on the other hand, 'the public is entitled to demand . . . that no more be exacted from it for the use of [utility property] than the services rendered by it are reasonably worth.'"[134] "In theory, the *Smyth v. Ames* fair value standard mimics the operation of the competitive market. To the extent utilities' investments in plants are good ones (because their benefits exceed their costs), they are rewarded with an opportunity to earn an 'above-cost' return, that is, a fair return on the current 'market value' of the plant. To the extent utilities' investments turn out to be bad ones (such as plants that are canceled and so never used and useful to the public), the utilities suffer because the investments have no fair value, and so justify no return."[135] "Although the fair value rule gives utilities strong incentive to manage their affairs well and to provide efficient service to the public, it suffered from practical difficulties which ultimately led to its abandonment as a constitutional requirement. Perhaps the most serious problem associated with the fair value rule was 'the laborious and baffling task of finding the present value of the utility.' . . . The exchange value of a utility's assets, such as power plants, could not be set by a market price, because such assets were rarely bought and sold. Nor could the capital assets be valued by the stream of income they produced, because setting that stream of income was the very object of the rate proceeding."[136] "In response to these problems, Justice Brandeis . . . advocated an alternative approach as the constitutional minimum, what has become known as the 'prudent investment' or 'historical cost' rule. He accepted the *Smyth v. Ames* eminent domain analogy, but concluded that what was 'taken' by public utility regulation is not specific physical assets that are to be individually valued, but the capital prudently devoted to the public utility enterprise by the utilities' owners."[137] "Under the prudent investment rule, the utility is compensated for all prudent investments at their actual cost when made (their 'historical' cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight. The utilities

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is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level").

"When rates fixed for a public service corporation by an administrative body are alleged to be confiscatory, the Federal Constitution requires that fair opportunity be afforded for submitting the controversy to a judicial tribunal for determination upon its own independent judgment both as to law and facts." *See* United Gas Pub. Serv. Co. v. Texas, 303 U.S. 123, 154 (1938) (separate opinion of McReynolds and Butler, JJ.), *citing* Ohio Valley Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920).

133 Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

134 *Id.* at 308, *quoting* Smyth v. Ames, 169 U.S. 466, 547 (1898).

135 Duquesne Light Co. v. Barasch, 488 U.S. 299, 308–09 (1989).

136 *Id.* at 309, n.5.

137 *Id.* at 309, *discussing* Missouri *ex rel.* Sw. Bell Tel. Co. v. Pub. Serv. Comm'n, 262 U.S. 276, 291 (1923) (dissenting opinion).

incur fewer risks, but are limited to a standard rate of return on the actual amount of money reasonably invested."[138]

[J41] *Hope Natural Gas* abandoned the rule of *Smyth v. Ames*, and held that the "fair value" rule is not the only constitutionally acceptable method of fixing utility rates. *Hope* ruled that historical cost was a valid basis on which to calculate utility compensation. As the Court stated "[r]ates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' ratebase."[139] The Court also acknowledged in that case "that all of the subsidiary aspects of valuation for ratemaking purposes could not properly be characterized as having a constitutional dimension, despite the fact that they might affect property rights to some degree:"[140] "It is not theory, but the impact, of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."[141]

[J42] The Court reaffirmed these teachings in *Duquesne*. There, the Court emphasized that "[t]he designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors. The Constitution within broad limits leaves the States free to decide what rate-setting methodology best meets their needs in balancing the interests of the utility and the public."[142] "The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect. . . . Admittedly, the impact of certain rates can only be evaluated in the context of the system under which they are imposed. One of the elements always relevant to setting the rate under *Hope* is the return investors expect given the risk of the enterprise. . . . The risks a utility faces are in large part defined by the rate methodology, because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which would require investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions."[143]

[J43] *Regulation Against Multiple Ownership of Single Parcels of Indian Land.* In 1983, Congress adopted the Indian Land Consolidation Act (ILCA) in part to reduce fractionated ownership of allotted lands. Section 207 of the Act—the "escheat" provision—prohibited the descent or devise of small fractional interests in allotments. Instead of passing to heirs, such fractional interests would escheat to the tribe, thereby consolidating the ownership of Indian lands. Congress defined the targeted fractional interest as one that both constituted 2 percent or less of the total acreage in an allotted tract

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138 Duquesne Light Co. v. Barasch, 488 U.S. 299, 309 (1989).

139 Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944).

140 *See* Duquesne Light Co. v. Barasch, 488 U.S. 299, 310 (1989).

141 Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

142 Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989).

143 *Id.* at 314–15.

and had earned less than $100 in the preceding year. Section 207 made no provision for the payment of compensation to those who held such interests. In *Hodel v. Irving*, the Court invalidated Section 207 on the ground that it effected a taking of property without just compensation, in violation of the Fifth Amendment. The appellees in that case were, or represented, heirs or devisees of members of the Oglala Sioux Tribe. "But for Section 207, the appellees would have received 41 fractional interests in allotments; under Section 207, those interests would escheat to the Tribe." The Court "tested the legitimacy of § 207 by considering its economic impact, its effect on investment-backed expectations, and the essential character of the measure. . . . Turning first to the economic impact of § 207, the Court observed that the provision's income generation test might fail to capture the actual economic value of the land. . . . The Court next indicated that § 207 likely did not interfere with investment-backed expectations. . . . Key to the decision in *Irving*, however, was the 'extraordinary' character of the Government regulation. . . . As the Court noted, § 207 amounted to the 'virtua[l] abrogation of the right to pass on a certain type of property.' . . . Such a complete abrogation of the rights of descent and devise could not be upheld."[144]

[J44] *Navigational Servitude.* Though the Court "has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation,"[145] there can be no doubt that "the Commerce Clause confers a unique position upon the Government in connection with navigable waters."[146] It gives to the federal government "a 'dominant servitude,' . . . which extends to the entire stream and the streambed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners, within the meaning of the Fifth Amendment, but from the lawful exercise of a power to which the interests of riparian

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144 *See* Babbitt v. Youpee, 519 U.S. 234, 239–40 (1997), *discussing and quoting* Hodel v. Irving, 481 U.S. 704, 714–17 (1987). While *Irving* was pending in the court of appeals, Congress amended Section 207. Amended Section 207 differed from the original provision in three relevant respects: it looked back five years instead of one to determine the income produced from a small interest, and it created a rebuttable presumption that this income stream would continue; it permitted devise of otherwise escheatable interests to persons who already owned an interest in the same parcel; and it authorized tribes to develop their own codes governing the disposition of fractional interests. *Babbitt v. Youpee* held that the amended Section 207 did not cure the constitutional deficiency identified in the original version of Section 207. First, the new provisions "still train[ed] on income generated from the land, not on the value of the parcel." Second, amended Section 207 "severely restrict[ed] the right of an individual to direct the descent of his property" by "shrink[ing] drastically the universe of possible successors." And "the very limited group of permissible devisees [wa]s unlikely to contain any lineal descendants." Moreover, amended Section 207 continued to restrict devise "even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, d[id] not conflict with the further descent of the property." Giving effect to Youpee's directive bequeathing each fractional interest to one heir would not further fractionate Indian land holdings. The third alteration made in amended Section 207 also failed to bring the provision outside the reach of the Court's holding in *Irving*, since tribal codes governing disposition of escheatable interests had apparently not been developed. *See* Babbitt v. Youpee, 519 U.S. 234, 244–45 (1997).

145 Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979).

146 United States v. Rands, 389 U.S. 121, 122 (1967).

owners have always been subject."[147] "The application of these principles to interference with streambed interests has not depended on balancing this valid public purpose in light of the intended use of those interests by the owner."[148] Thus, in *Lewis Blue Point*, the Court decided that no taking occurred where dredging carried out under the direction of the United States destroyed oysters that had been cultivated on privately held lands under the waters of the Great South Bay in New York. "The decision rested on the view that the dominant right of navigation 'must include the right to use the bed of the water for every purpose which is in aid of navigation.' The Court did not rely on the particular use to which the private owners put the bed, but rather observed that their very title to the submerged lands 'is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require.'"[149]

[J45] "High-water mark bounds the bed of the river. Lands above it are fast lands, and to flood them is a taking for which compensation must be paid."[150] Hence, when a navigable stream is raised by the government to its ordinary high-water mark and maintained continuously at that level in the interest of navigation, the government is liable for the destruction of the agricultural value of the land beyond the bed of the stream.[151]

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147 *Id.* at 123. *See also* Scranton v. Wheeler, 179 U.S. 141, 163 (1900): "The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

148 United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 704 (1987).

149 *Id.* at 705, *discussing and quoting* Lewis Blue Point Oyster Cultivation Co. v. Brigggs, 229 U.S. 82, 87–88 (1913). "[J]ust as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, . . . it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." *See* United States v. Virginia Elec. & Power Co., 365 U.S. 624, 629 (1961). Therefore, "when the Government acquires fast lands to improve navigation, it is not required under the Takings Clause to compensate landowners for certain elements of damage attributable to riparian location, such as the land's value as a hydroelectric site, . . . or a port site." *See* Kaiser Aetna v. United States, 444 U.S. 164, 177 (1979), *citing* United States v. Twin City Power Co., 350 U.S. 222, 226 (1956) and United States v. Rands, 389 U.S. 121, 123 (1967).

150 United States v. Willow River Power Co., 324 U.S. 499, 509 (1945).

151 *See* United States v. Kansas City Life Ins. Co., 339 U.S. 799, 800–01 (1950). In *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961), the United States acquired by condemnation a flowage easement over a tract of fast land adjacent to one of its navigable tributaries. That tract included a smaller tract of fast land over which respondent owned a perpetual and exclusive flowage easement, which was destroyed by the government's appropriation. The Court held that respondent was entitled to compensation for the value of its easement which was "attributable not to the water power, but to the depreciative impact of the easement upon the nonriparian uses of the property." *Id.* at 630. The value of respondent's easement was "the nonriparian value of the servient land discounted by the improbability of the easement's exercise," and, "in assessing this improbability, no weight should be given to the prospect of governmental appropriation." *Id.* at 635–36.

[J46] *Kaiser Aetna* was a case in which the owners of a private pond had invested substantial amounts of money in dredging the pond, developing it into an exclusive marina, and building a surrounding marina community. The federal government sought to compel free public use of the private marina on the ground that the marina became subject to the federal navigational servitude, because the owners had dredged a channel connecting it to navigable water. The Court noted that the government "could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation." But petitioners had a body of water that was private property under state law, linked to navigable water by a channel dredged by them with the consent of the government. Hence, the government's attempt to create a public right of access to the improved pond interfered with Kaiser Aetna's "reasonable investment backed expectations" and went "so far beyond ordinary regulation or improvement for navigation as to amount to a taking."[152]

[J47] *Liens.* In *Armstrong*, materialmen delivered materials to a prime contractor for use in constructing Navy personnel boats. Under state law, they obtained liens in the vessels. The prime contractor defaulted on his obligations to the United States, and the government took title to and possession of the uncompleted hulls and unused materials, thus making it impossible for the materialmen to enforce their liens. The Court held that "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking,' and is not a mere 'consequential incidence' of a valid regulatory measure." Therefore, government had the obligation to pay just compensation for the value of the liens the petitioners had lost.[153]

[J48] Under the bankruptcy power, Congress may discharge the debtor's personal obligation, but it cannot take for the benefit of the debtor rights in specific property acquired by the creditor prior to Congress' intervention. "If the public interest . . . permits the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain, so that, through taxation, the burden of the relief afforded in the public interest may be

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[152] Kaiser Aetna v. United States, 444 U.S. 164, 178–79 (1979).

[153] Armstrong v. United States, 364 U.S. 40, 48–49 (1960). *International Harvester Credit Corp. v. Goodrich*, 350 U.S. 537 (1956), involved a highway use tax, computed by the weight-distance principle, and imposed by New York upon motor carriers operating heavy vehicles on the state's highways. The tax owed by a carrier was a statutory lien upon all motor vehicles operated by the carrier within the state, and the lien was paramount to all prior liens or encumbrances. Many such vehicles were purchased and operated under conditional sales agreements, and certain conditional vendors, who had sold trucks to a carrier more than a year after the statute had become effective, questioned the extent to which the state could subordinate the vendors' security interests to the state's lien for taxes owed by the carrier. The Court held that the lien was reasonable and sustained the state's priority, noting (1) "the action of the vendors in yielding control of the trucks to the carrier, thus enabling the carrier to operate them on the State's highways;" (ii) that New York had "an unquestionable right to regulate the use of conditional sales agreements within the State;" and (iii) that vendors of trucks, as well as carriers, derived "substantial benefits from the State's costly construction and maintenance of its highways for heavy traffic." *Id.* at 544–46.

borne by the public."[154] In *Radford*, a bank acquired a mortgage, which, under state law, constituted a lien enforceable by suit to foreclose. Subsequently, Congress amended the Bankruptcy Act so as to deprive mortgagees of substantial incidents of their rights to resort to mortgaged property. The Court held that the bank's property had been taken without just compensation in violation of the Fifth Amendment.[155]

[J49] *Prohibition of Trade in Certain Goods.* Regulations that bar trade in certain goods have been upheld against claims of unconstitutional taking. For example, the Court has sustained regulations prohibiting the sale of alcoholic beverages despite the fact that individuals were left with previously acquired stocks. *Everard's Breweries* involved a federal statute that forbade the sale of liquors manufactured before passage of the statute. The claim of a taking in violation of the Fifth Amendment was tersely rejected.[156] Similarly, in *Jacob Ruppert*, the Court upheld a federal law that extended a domestic sales ban from intoxicating to non-intoxicating alcoholic beverages on hand at the time of the passage of the act, stating that there was "no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use."[157] And *Haberle Brewing* broadly stated that "when a business is extin-

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[154] Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589–90, 601–02 (1935).

[155] *Id.* at 590–602. Congress' enactment, which by its terms applied only retrospectively, permitted the debtor, if the mortgagee assented, to purchase the property at its then-appraised value on a deferred payment plan. If the mortgagee refused to assent, the court was required to stay all proceedings for five years, during which time the debtor could retain possession by paying a reasonable rent. During that period, the bankrupt had an option to purchase the farm at any time at its appraised, or reappraised, value. The mortgagee was not only compelled to submit to the sale to the bankrupt but to a sale made at such time as the latter might choose. The Court found that the Act had taken from the bank the following property rights recognized under state law governing mortgages: "(1) The right to retain the lien until the indebtedness thereby secured is paid. (2) The right to realize upon the security by a judicial public sale. (3) The right to determine when such sale shall be held, subject only to the discretion of the court. (4) The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself. (5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt." *Id.* at 594–95.

In *United States v. Security Industrial Bank*, 459 U.S. 70, 78–79 (1982), the Court considered a Takings Clause challenge to a Bankruptcy Code provision permitting debtors to avoid certain liens, possibly including those pre-dating the statute's enactment. The Court expressed "substantial doubt whether the retroactive destruction of the appellees' liens . . . comport[ed] with the Fifth Amendment," and therefore construed the statute as applying only to lien interests vesting after the legislation took effect.

The Court has upheld, against a due process challenge, a federal statute giving a court of bankruptcy the power to stay the enforcement of the remedy under a real estate mortgage. *See* Continental Illinois Nat'l Bank v. Chicago, R.I. & P. R. Co., 294 U.S. 648, 680–81 (1935).

[156] Everard's Breweries v. Day, 265 U.S. 545, 563 (1924). It is not significant that the statute considered in that case had been passed under the Eighteenth (Prohibition) Amendment. "The Court did not suggest that the Amendment gave Congress a special prerogative to override ordinary Fifth Amendment limitations." *See* Andrus v. Allard, 444 U.S. 51, 67, n.23 (1979).

[157] Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264, 303 (1920). For example, the beverage owner in that case retained the ability to export his product or to sell it domestically for purposes other than consumption.

guished as noxious under the Constitution, the owners cannot demand compensation from the government."[158]

[J50] *Andrus v. Allard* addressed the validity of regulations that prohibited commercial transactions in parts of birds legally killed before the birds came under the protection of federal statutes designed to prevent the destruction of certain species of birds. In sustaining the challenged prohibition against a takings claim, the Court stressed that the regulations did not compel the surrender of pre-existing artifacts consisting in part of protected bird products, and there was no physical invasion or restraint upon them. In this case, it was crucial that traders of avian artifacts retained the rights to possess and transport their property and to donate or devise the protected birds. Besides, it was not clear that appellees would be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge. The Court concluded that, although appellees should bear the costs of the regulations at issue, this was "a burden borne to secure the advantage of living and doing business in a civilized community."[159]

[J51] *Regulations Regarding Trade Secrets.* In *Monsanto*, the respondent had submitted health, safety, and environmental data to the Environmental Protection Agency (EPA) for the purpose of obtaining registration of certain pesticides. The company claimed that the agency's use and disclosure of certain data in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) constituted a taking. The Court conceded that the data in question constituted property under state law. It also found, however, that certain of the data had been submitted to the agency after Congress had made clear that only limited confidentiality would be given data submitted for registration purposes. The Court observed that the statute served to inform Monsanto of the various conditions under which data might be released, and stated that since, "despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission." The Court rejected respondent's argument that the requirement that it relinquish some confidentiality imposed an unconstitutional condition on receipt of a government benefit, noting that "as long as [an applicant] is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking."[160]

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158 Clarke v. Haberle Brewing Co., 280 U.S. 384, 386 (1930). If a state legislature makes the mere possession of certain articles illegal, and such a prohibition is constitutional, the seizure and destruction, without compensation, of these articles does not violate the due process clause of the Fourteenth Amendment. *See* Samuels v. McCurdy, 267 U.S. 188, 194–98 (1925) (intoxicating liquors).

159 Andrus v. Allard, 444 U.S. 51, 65–67 (1979).

160 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006–07 (1984). *See also* Corn Prods. Ref. Co. v. Eddy, 249 U.S. 427, 431–32 (1919) ("The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth.").

[J52] Prior to its amendment in 1972, FIFRA was silent with respect to EPA's authorized use and disclosure of data submitted to it in connection with an application for registration. Although the Trade Secrets Act provided a criminal penalty for a government employee who disclosed, in a manner not authorized by law, any trade secret information revealed to him during the course of his official duties, this statute was not a guarantee of confidentiality to submitters of data, and, "absent an express promise, Monsanto had no reasonable, investment-backed expectation that its information [submitted to EPA before 1972] would remain inviolate in the hands of EPA." By contrast, under the statutory scheme in effect between 1972 and 1978, a submitter was given an opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. The Court held that the explicit governmental guarantee to registration applicants of confidentiality and exclusive use with respect to trade secrets during this period formed the basis of a reasonable investment-backed expectation. Hence, if the EPA, consistent with the data-consideration and data-disclosure provisions enacted in 1978, were to disclose such trade secret data or consider those data in evaluating the application of a subsequent applicant in a manner not authorized by the version of FIFRA in effect between 1972 and 1978, its actions would amount to a taking.[161]

[J53] *Limitations on the "Right to Exclude."* The Court has repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[162] In *Kaiser Aetna*, the Court held that the government's imposition of a navigational servitude requiring public access to a pond was a taking where the landowner had reasonably relied on government consent in connecting the pond to navigable water. As the Court explained, "[t]his is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina." The Court concluded that even if the government physically invades only an easement in property, it must nonetheless pay compensation.[163]

[J54] By contrast *PruneYard* upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property, to which they had already invited the general public. As the Court noted, there was nothing to suggest that preventing mall owners from prohibiting this sort of activity would "unreasonably impair the value or use of their property as a shopping center."[164] Moreover, the state Constitution did not prevent the owners from restricting expressive activities by imposing reasonable time, place, and manner restrictions to minimize interference with their commercial functions. "Since the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, 'the fact that [the solicitors] may have physically invade [the owners'] property cannot be viewed as determinative.'"[165]

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161 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1008–14 (1984).

162 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982), *quoting* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

163 Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979).

164 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).

165 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982), *discussing*

[J55] The Court also has sustained labor laws requiring companies to permit access to union organizers. The Court, in *Babcock*, stated: "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."[166] Moreover, the Court held, in *Central Hardware*, that "[t]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights [to organize under the National Labor Relations Act]. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited."[167]

c. Destruction of Property in Emergency Situations[168]

[J56] A state may not be held liable for the destruction of real and personal property, "'in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others."[169] For example, in *Miller v. Schoene*, the Court held that the Fifth Amendment did not require Virginia to pay compensation to the owner of cedar trees ordered destroyed to prevent a disease from spreading to nearby apple orchards, which represented a far more valuable resource.[170] In such as case, due process of law, within the meaning of the Fourteenth Amendment, does not require previous notice and opportunity to be heard.[171]

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and quoting PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980). The Court, in *PruneYard*, distinguished *Kaiser Aetna* on the basis that, there, the government's attempt to create a public right of access to the improved pond interfered with Kaiser Aetna's "reasonable investment backed expectations." *Id.* at 84.

166 Nat'l Labor Relations Bd. v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

167 Central Hardware Co. v. Nat'l Labor Relations Bd., 407 U.S. 539, 545 (1972). *See also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434, n. 11 (1982).

168 *See also* para. B48 *(destruction of property in wartime).*

169 Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1029, n.16 (1992), *quoting and citing* Bowditch v. Boston, 101 U.S. 16, 18–19 (1880).

170 Miller v. Schoene, 276 U.S. 272, 279–80 (1928). The Court stated: "It will not do to say that the case is merely one of a conflict of two private interests, and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of one interest over the other. And where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."

171 *See* N. Am. Cold Storage Co. v. Chicago, 211 U.S. 306, 315–19 (1908).

d. Government Liability for Property Damage Caused by Others

[J57] "The Constitution does not require compensation every time violence aimed against government officers damages private property. . . . [W]here government action is causally related to private misconduct which leads to property damage, . . . a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment."[172] In *YMCA*, the Court held that the temporary, unplanned occupation by troops of petitioners' buildings, in the course of battle against rioters, did not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment.[173]

e. Forfeiture of Property Used Illegally

[J58] The Court has repeatedly held that an owner's interest in property may be forfeited by reason of the unlawful use to which the property is put, even though the owner did not know that it was to be put to such use. Forfeiture serves not only to punish the owner[174] but also a distinct deterrent purpose: it "prevents illegal uses 'both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.'"[175] "To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."[176]

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[172] Nat'l Bd. of Young Men's Christian Ass'ns v. United States, 395 U.S. 85, 93 (1969).

[173] *Id.* The Court had no occasion to decide whether compensation may be required where the government makes private property a particular target for destruction by private parties. *Id.* at 94.

[174] *See* Austin v. United States, 509 U.S. 602, 618 (1993). "There is no constitutional objection to enforcing a penalty by forfeiture of an offending article." *See* United States v. One Ford Coupe, 272 U.S. 321, 329 (1926).

[175] Bennis v. Michigan, 516 U.S. 442, 446, 452 (1996), *quoting* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687 (1974).

[176] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668, 688 (1974). For example, in *Van Oster v. Kansas*, 272 U.S. 465, 467–68 (1926), the Court upheld the forfeiture of a purchaser's interest in a car misused by the seller. Van Oster purchased an automobile from a dealer but agreed that the dealer might retain possession for use in its business. The dealer allowed an associate to use the automobile, and the associate used it for the illegal transportation of intoxicating liquor. Kansas brought a forfeiture action pursuant to a state statute, Van Oster defended on the ground that the transportation of the liquor in the car was without her knowledge or authority. The Court rejected Van Oster's claim, noting that "statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws . . . is not a violation of the due process clause of the Fifth Amendment."

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974), held that the interest of a yacht rental company in one of its leased yachts could be forfeited because of its use for transportation of controlled substances, even though the company was "in no way . . . involved in the criminal enterprise carried on by [the] lessee," and "had no knowledge that its property was being used in connection with or in violation of [Puerto Rican Law]."

In *Bennis v. Michigan*, 516 U.S. 442, 446–53 (1996), petitioner was a joint owner, with her husband, of an automobile in which her husband engaged in sexual activity with a prostitute.

[J59] *Calero-Toledo* held that the government could seize a yacht subject to civil forfeiture without affording prior notice or hearing. Central to the Court's analysis in *Calero-Toledo* was the fact that a yacht was the "sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." "The ease with which an owner could frustrate the Government's interests in the forfeitable property created a 'special need for very prompt action' that justified the postponement of notice and hearing until after the seizure."[177] The same considerations do not apply to the forfeiture of real property, which, by its very nature, can be neither moved nor concealed. Hence, absent exigent circumstances, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.[178] "[W]hen law enforcement agents seize property pursuant to warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return."[179]

f. Abandoned Property

[J60] From an early time, the Court has recognized that states have the power to permit unused or abandoned interests in property to revert to another after the passage of time. In *Hawkins*, the Court upheld a state statute that prevented a landowner from recovering property on which the defendant had resided for more than seven years under a claim of right.[180] Similarly, in *Wilson v. Iseminger*, the Court sustained a statute that provided for the extinguishment of a reserved interest in ground rent if the owner collected no rent and made no demand for payment for a period of 21 years. The Court also held that the statute could apply to interests created before the enactment of the statute, since the statute contained a reasonable grace period in which owners could protect their rights, noting that "statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect."[181]

A Michigan court ordered the automobile forfeited as a public nuisance, with no off-set for her interest, notwithstanding her lack of knowledge of her husband's activity. The Court held that the Michigan court order did not offend the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment, noting, *inter alia*, that "the government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."

177 United States v. James Daniel Good Real Prop., 510 U.S. 43, 52 (1993), *discussing and quoting* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678 (1974).

178 United States v. James Daniel Good Real Prop., 510 U.S. 43, 52–53 (1993).

179 City of W. Covina v. Perkins, 525 U.S. 234, 240 (1999).

180 Hawkins v. Barney's Lessee, 5 Pet. 457, 466 (1831). The Court said: "What right has anyone to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?"

181 Wilson v. Iseminger, 185 U.S. 55, 59–63 (1902). "In these early cases, the Court often emphasized that the statutory 'extinguishment' properly could be viewed as the withdrawal of a remedy, rather than the destruction of a right." *See* Texaco, Inc. v. Short, 454 U.S. 516, 528, n.22 (1982), *citing* Wilson v. Iseminger, 185 U.S. 55, 61 (1902). It subsequently "made clear, however, that, when the practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the constitutional analysis is the same." *See* Texaco, Inc. v. Short, 454 U.S. 516, 528 (1982), *citing* El Paso v. Simmons, 379 U.S. 497, 506–07 (1965).

[J61] "[S]tock certificates and undelivered dividends thereon may . . . be abandoned property subject to the disposition of the domiciliary state of the corporation when the whereabouts of the owners are unknown for such lengths of time, and under such circumstances, as permit the declaration of abandonment."[182] In such cases, notice given by publication and identifying the property and the last-known owners is adequate to bind interested persons.[183]

[J62] Unclaimed property at the disposal of the state may also include deposits in banks doing business in the particular state. "The deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence are subject to the state's dominion."[184] *Anderson National Bank* sustained a Kentucky statute setting up a comprehensive scheme for the administration of abandoned bank deposits. Upon a report by the bank and notice to the depositor (by the sheriff's posting on the courthouse door or bulletin board, for a period of six weeks, a copy of the bank's report of deposits presumed abandoned), and with an opportunity for either to be heard, the state could take into its protective custody bank accounts that, having been inactive for at least ten years if demand accounts or for at least 25 years if non-demand, the statute declared to be presumptively abandoned. The bank was relieved of its liability to the depositor, who received instead a claim against the state, enforceable at any time until the deposit was judicially found to be abandoned and for five years thereafter. The Court held that the statutory rebuttable presumption of abandonment of demand deposits after inactivity of ten years, and of non-demand deposits after inactivity of 25 years, was reasonable, and that in requiring payment of the deposit accounts to the state on the prescribed notice, without recourse to judicial proceedings or any court order or judgment, the statute did not deprive the depositor or the bank of property without due process of law.[185]

[J63] *Texaco v. Short* involved an Indiana statute pursuant to which a severed mineral interest that had not been used for a period of 20 years automatically lapsed and reverted to the current surface owner of the property, unless the mineral owner, prior to the end of the 20-year period or within a two-year grace period after the effective date of the statute, filed a statement of claim in the local county recorder's office. The "use" of a mineral interest sufficient to preclude its extinction included actual or attempted production of the minerals, payment of rents or royalties, and payment of taxes. In upholding the statute, the Court emphasized that a state has the power "to condition the retention of a property right upon the performance of an act within a limited period of time," and that Indiana had not exercised this power "in an arbitrary manner." "Each of the actions required by the state to avoid an abandonment of a mineral estate further[ed] a legitimate state goal. Certainly the State may encourage own-

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[182] Standard Oil Co. v. New Jersey, 341 U.S. 428, 442 (1951). Moneys owed by foreign insurance companies, doing business in a state, on life policies issued on the lives of residents of that state and remaining unclaimed for an adequate period, are also subject to the state's disposition. *See* Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541 (1948).

[183] Standard Oil Co. v. New Jersey, 341 U.S. 428, 432–35 (1951).

[184] Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 241 (1944).

[185] *Id.* at 240–47. The Court did not decide whether the procedure for determining abandonment in fact conformed to due process, but it noted that, if the notice to depositors were adequate, the period of five years, after the judicial decree of actual abandonment, within which a claimant might demand payment of his deposit, did not infringe constitutional rights. *Id.* at 241–42.

ers of mineral interests to develop the potential of those interests; similarly, the fiscal interest in collecting property taxes is manifest. The requirement that a mineral owner file a public statement of claim further[ed] both of these goals by facilitating the identification and location of mineral owners, from whom developers [might] acquire operating rights and from whom the county [might] collect taxes." Noting that the state is not required to compensate an owner for the consequences of his own neglect, the Court concluded that Indiana surely had the power "to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner, while providing such clear benefits to the State." Moreover, the two-year grace period included in the statute foreclosed any argument that mineral owners did not have an adequate opportunity to familiarize themselves with the terms of the legislation and to comply with its provisions before their mineral interests were extinguished.[186]

[J64] In *Locke*, the Court recognized that "[l]egislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment. . . . As long as proper notice of these rules exists, and the burdens they impose are not so wholly disproportionate to the burdens other individuals face in a highly regulated society that some people are being forced 'alone to bear public burdens which, in all fairness and justice, must be borne by the public as a whole,' . . . the burden imposed is a reasonable restriction on the property right."[187] That case involved a federal statute establishing a federal recording system designed to rid federal lands of stale mining claims and to provide federal land managers with up-to-date information that would allow them to make informed land management decisions. The statute required that mining claims, located prior to its enactment, be initially recorded with the Bureau of Land Management (BLM) within three years of the enactment, and that the claimant, in the year of initial recording and "prior to December 31" of every year after that, file with state officials and the BLM a notice of intention to hold a claim, an affidavit of assessment work performed on the claim, or a detailed reporting form. The statute also provided that failure to comply with either of these requirements would be deemed conclusively to constitute an abandonment of the claim. The Court found that "Congress ha[d] chosen to redefine the way in which an unpatented mining claim [could] be lost through imposition of a filing requirement that serve[d] valid public objectives, impose[d] minimal burdens on property holders, and [took] effect only after appellees ha[d] had sufficient notice of their need to comply and a reasonable opportunity to do so." Hence, the filing requirement constituted a reasonable restriction on the continued retention of the property right.[188]

5. Just Compensation—Remedial Questions[189]

[J65] "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[190] "Such compensation is for the property, not to the owner, and "must be a full and perfect equivalent [in money] for the property

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186 Texaco, Inc. v. Short, 454 U.S. 516, 528–33 (1982).

187 United States v. Locke, 471 U.S. 84, 106, n.15 (1985).

188 *Id.* at 106–09, n.15.

189 *See also* para. J9 *(inverse condemnation action)*; paras. J39–J42 *(fixing of utility rates).*

190 Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985).

taken."[191] In giving content to the just compensation requirement, the Court has sought to put the owner of condemned property "in as good a position pecuniarily as if his property had not been taken."[192] "However, this principle of indemnity has not been given its full and literal force. Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, [the Court has] recognized the need for a relatively objective working rule. . . . The Court therefore has employed the concept of *fair market value* to determine the condemnee's loss. Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking."[193] Thus, "fair market value does not include the special value of property to the owner arising from its adaptability to his particular use."[194] In short, "the concept of fair market value has been chosen to strike a fair 'balance between the public's need and the claimant's loss' upon condemnation of property for a public purpose."[195] But while the indemnity principle must yield to some extent before the need for a practical general rule, the Court has refused to designate

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[191] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

[192] Olson v. United States, 292 U.S. 246, 255 (1934). *See also* Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 304 (1923); United States v. Reynolds, 397 U.S. 14, 16 (1970). "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, . . . as it does from technical concepts of property law." *See* United States v. Fuller, 409 U.S. 488, 490 (1973).

"[T]he legislature [can]not, by setting either a fixed amount to be paid for property condemned or a principle for arriving at that amount, settle the constitutional right to just compensation." *See* Reg'l R.R. Reorganization Act Cases, 419 U.S. 102 (1974), *citing* Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

[193] United States v. 564.54 Acres of Land, 441 U.S. 506, 510–11 (1979) *(Lutheran Synod)* (emphasis added), *quoting* United States v. Miller, 317 U.S. 369, 374 (1943); Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973). The Court has suggested that "consideration *other than cash*—for example, special benefits to a property owner's remaining properties—may be counted in the determination of just compensation." *See* Reg'l R.R. Reorganization Act Cases, 419 U.S. 102, 144 (1974) (emphasis added), *citing* Bauman v. Ross, 167 U.S. 548, 584 (1897).

[194] United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979), *citing* United States v. Miller, 317 U.S. 369, 374–75 (1943). By contrast, "[t]he special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain." *See* Mitchell v. United States, 267 U.S. 341, 344–45 (1925).

As the Court said in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949), "[t]he value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of *nontransferable values deriving from his unique need for property or idiosyncratic attachment to it*, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship." (Emphasis added.)

[195] United States v. 564.54 Acres of Land, 441 U.S. 506, 512 (1979), *quoting* United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 402 (1949).

market value as the sole measure of just compensation. For there are situations where this standard is inappropriate: "when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public," other standards have been fashioned and applied.[196]

[J66] "The instances in which market value is too difficult to ascertain generally involve property of a type so infrequently traded that [the courts] cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property. . . . This might be the case, for example, with respect to public facilities such as roads or sewers."[197] "[W]hen the property is of a kind seldom exchanged, it has no 'market price,' and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights."[198] "But that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant's property. [The courts] simply must be wary that they give these sparse sales less weight than they accord 'market' price, and take into consideration those special circumstances in other sales which would not have affected their hypothetical buyer."[199]

[J67] "The concept of just compensation is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. The owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking."[200] "This additional element of compensation has been measured in terms of reasonable interest. Thus, 'just compensation' in the constitutional sense, has been held, absent a settlement between the parties, to be fair market value at the time of taking plus 'interest' from that date to the date of payment."[201] This formula does not fit contractual arrangements for compensation.[202]

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196 United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950). *See also* Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10, n.14 (1984). For example, in case of damage to land due to erosion resulting from flooding, the Court has held that, if the erosion was in fact preventable by prudent measures, the cost of that prevention is a proper basis for determining the damage. *See* United States v. Dickinson, 331 U.S. 745, 751 (1947) *(per curiam)*.

197 United States v. 564.54 Acres of Land, 441 U.S. 506, 513 (1979) *(Lutheran Synod)*.

198 Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949). These considerations have special relevance where "property" is "taken" not in fee but for an indeterminate period.

199 United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 402 (1949). In this context, *past earnings* "are significant only when they tend to reflect future returns." *Id.* at 403.

Since the market value standard was developed in the context of a market largely free from government controls, *prices rigidly fixed by law* raise questions concerning whether a "market value" so fixed can be a measure of "just compensation." The Court has held that the necessities of a *wartime economy* require that ceiling prices be accepted as the measure of "just compensation" so far as that can be done consistently with the objectives of the Fifth Amendment. *See* United States v. Commodities Trading Corp., 339 U.S. 121, 123–25 (1950); United States v. John J. Felin & Co., 334 U.S. 624, 629–42 (1948). In this context, the Fifth Amendment does not require the government to compensate an owner of requisitioned goods for potential profits lost because of war and the consequent price controls. *See* Commodities Trading, *supra*, at 130.

200 Jacobs v. United States, 290 U.S. 13, 16–17 (1933).

201 Albrecht v. United States, 329 U.S. 599, 602 (1949).

202 *Id.* at 604.

[J68] Incidental damages or indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled. Thus, damages resulting from a loss or destruction of business incidental to a taking of land are not recoverable as part of the compensation for the land taken.[203] Additionally, attorneys' fees and expenses[204] or expenses in securing appraisals of the land involved in the condemnation action[205] are not embraced within just compensation.

[J69] In view of the principle that "just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner," and considering that "the Fifth Amendment does not require any award for consequential damages arising from a condemnation," the Court has held that fair market value constitutes "just compensation" even for those private citizens "who must replace their condemned property with more expensive substitutes."[206] Further, a city's legal obligation to maintain public services that are interrupted by a federal condemnation does not justify a distinction between public and private condemnees for the purpose of measuring just compensation. Hence, the Fifth Amendment does not require that the United States pay a public condemnee compensation measured by the cost of acquiring a substitute facility that the condemnee has a duty to acquire, when the market value of the condemned property is ascertainable and when there is no showing of manifest injustice.[207]

[J70] "When there is an entire taking of a condemnee's property, whether that property represents the interest in a leasehold or a fee, the expenses of removal or of relocation are not to be included in valuing what is taken."[208] This is an application of the general rule against allowance for consequential losses in condemnation proceedings. However, the foregoing rule is inapplicable where what is to be valued is "a right of temporary occupancy of a building equipped for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use."[209] *General Motors* "held that, when such occupancy is for a period less than an outstanding term, removal costs may be considered in the award of 'just compensation' to the temporarily ejected tenant—not as an independent item of damage, but as bearing on the rental value such premises would have on a voluntary sublease by a long-term tenant to a temporary

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[203] *See* Mitchell v. United States, 267 U.S. 341, 344 (1925).

[204] *See* Dohany v. Rogers, 281 U.S. 362, 368 (1930).

[205] *See* United States v. Bodcaw Co., 440 U.S. 202, 203–04 (1979) *(per curiam)*. There, the Court emphasized that the reimbursement of such costs is a matter of legislative grace, not constitutional entitlement.

[206] United States v. 50 Acres of Land, 469 U.S. 24, 33, 35 (1984), *discussing* United States v. 564.54 Acres of Land, 441 U.S. 506, 513–17 (1979) *(Lutheran Synod)*.

[207] *See* United States v. 50 Acres of Land, 469 U.S. 24, 31–36 (1984). The risk that a private condemnee might receive a "windfall," if its compensation were measured by the cost of a substitute facility that was never acquired or was later sold or converted to another use, is not avoided by a city's obligation to replace the facility. "If the replacement facility is more costly than the condemned facility, it presumably is more valuable, and any increase in the quality of the facility may be as readily characterized as a 'windfall' as the award of cash proceeds for a substitute facility that is never built." *Id.* at 34–35.

[208] United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 264 (1950).

[209] United States v. Gen. Motors Corp., 323 U.S. 373, 380 (1945).

occupier."[210] *Petty Motor* made clear that the taking of the whole of a tenant's lease does not fall within the *General Motors* doctrine.[211]

[J71] "The valuation of property which has been taken must be calculated as of the time of the taking. . . . [D]epreciation in value of the property by reason of preliminary government activity [such as legislation for or the beginning of the project] is not chargeable to the government."[212] Moreover, "the Government, as a condemnor, may not be required to compensate a condemnee for elements of value that the Government itself has created." Hence, "the increment of fair market value represented by knowledge of the Government's plan to construct the project for which the land is taken is not included within the constitutional definition of 'just compensation.'"[213] Nevertheless, "just compensation" does include the increment of value resulting from the completed project to neighboring lands, originally outside the project limits, but later brought within them.[214] And "the Government may not demand that a jury be arbitrarily precluded from considering as an element of value the proximity of a parcel to a post office building simply because the Government, at one time, built the post office."[215]

[J72] The Court "has held that, generally, the highest and best use of a parcel may be found to be a use in conjunction with other parcels, and that any increment of value resulting from such combination may be taken into consideration in valuing the parcel taken."[216] Similarly, "[i]f only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. . . . On the other hand, if the taking has in fact benefited the remainder, the benefit may be set off against the value of the land taken."[217]

[J73] "The 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain."[218] For example, a state

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[210] *See* United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 263–64 (1950), *discussing* United States v. Gen. Motors Corp., 323 U.S. 373, 383 (1945).

[211] *See* United States v. Petty Motor Co., 327 U.S. 372, 379–80 (1946). Where the government initially takes an occupancy for less than the outstanding term of a lease with an option for extension, so as to exhaust the entire lease, an award based on removal costs should be delayed until it is known whether the government's occupancy has exhausted the tenant's leasehold. *See* United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 265–68 (1950).

[212] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 320 (1987).

[213] United States v. Fuller, 409 U.S. 488, 491–92 (1973). *See also United States v. Cors*, 337 U.S. 325, 334 (1949), where the Court held that the just compensation required to be paid to the owner of a tug requisitioned by the government in October 1942, during the Second World War, could not include the appreciation in market value for tugs created by the government's own increased wartime need for such vessels. *See also* New York v. Sage, 239 U.S. 57, 61 (1915) (city need not pay for value added by unifying parcels where unification impracticable absent eminent domain).

[214] *See* United States v. Miller, 317 U.S. 369, 374–76 (1943). The crucial question is whether the lands at issue "were *probably* within the scope of the project from the time the Government was committed to it." *Id.* at 377 (emphasis added).

[215] United States v. Fuller, 409 U.S. 488, 492–93 (1973).

[216] Olson v. United States, 292 U.S. 246, 256 (1934). Nevertheless, this rule does not apply where the parcels to be aggregated with the land taken are themselves owned by the condemnor and used by the condemnee only under revocable permit from the condemnor. *See* United States v. Fuller, 409 U.S. 488, 490–92 (1973).

[217] United States v. Miller, 317 U.S. 369, 376 (1943).

[218] Brown v. Legal Found. of Washington, 538 U.S. 216, 235–36 (2003).

law requiring a lawyer's client funds (held by an attorney in connection with his practice of law) that could not otherwise generate net earnings for the client to be deposited in an "interest on lawyers' trust account" and that the interest on those funds be transferred to a different owner for a legitimate public use, such as the payment of legal services for the needy, does not violate the Just Compensation Clause, since the owner's pecuniary loss is zero whenever the state law is obeyed.[219]

[J74] "[O]nce a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[220] Hence, "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[221]

[J75] The holder of an unexpired leasehold interest in land is entitled to just compensation for the value of that interest when it is taken upon condemnation by the government.[222] In this case, "[t]he measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew, . . . less the agreed rent which the tenant would pay for such use and occupancy."[223] The fair rental value of the land may increase during the term of the lease. "If this takes place, the increase in fair rental value operates to create a compensable value in the leasehold interest."[224] In case of improvements on leased land, the concept of "just compensation" is measured by what a willing buyer would have paid for "the improvements in place over their useful life—taking into account the possibility that the lease might be renewed as well as the possibility that it might not."[225]

[J76] Ordinarily, fair compensation for a temporary possession of a business enterprise is "the rental that probably could have been obtained," not the difference between the market value of the fee on the date of the taking and its market value on the date of its return.[226] In such a case, the award for damage to the plant and machinery beyond

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[219] *Id.* at 235–41.

[220] San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting). This rule was endorsed by the Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315, 318, 321 (1987). *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 328 (2002).

[221] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987).

[222] *See* Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 303 (1976). Nevertheless, there is no compensable value in the leasehold interest, if the lease of land is revocable at will by the state which owns the land. *Cf. id.* at 304; United States v. Fuller, 409 U.S. 488, 490–92 (1973).

[223] United States v. Petty Motor Co., 327 U.S. 372, 380–381 (1946).

[224] Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 305 (1976).

[225] Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973). As the Court noted, if there had been no condemnation, the lessee "would have continued to use the improvements during a renewed lease term, or if he sold the improvements to the fee owner or to a new lessee at the end of the lease term, [he] would have been compensated for the buyer's ability to use the improvements in place over their useful life."

[226] Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949). *See also* United States v. Pewee Coal Co., 341 U.S. 114, 117 (1951) (plurality opinion); *id.* at 122 (dissenting opinion). The latter case concerned a losing operation in a temporary taking of a coal mine. The members of the Court differed over which losses suffered during the period of government control

ordinary wear and tear may "be justified on the theory that such indemnity would be payable by an ordinary lessee, though not fixed in advance as part of his rent because not then capable of determination."[227]

[J77] If there is a demonstrable loss of "going concern" value, the government must pay compensation for "whatever transferable value the temporary use" of trade routes may have had. In this context, the courts should consider "any evidence which would have been likely to convince a potential purchaser as to the presence and amount" of the enterprise's going concern value, including the record of past earnings and expenditures for soliciting business.[228]

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were compensable. The plurality held that the Fifth Amendment requires the United States to bear operating losses incurred during the period the government operates private property in the name of the public without the owner's consent, noting that it was immaterial that governmental operation had resulted in a smaller loss than Pewee would have sustained if there had been no seizure of the mines. *Id.* at 117–18. Justice Reed said in his concurring opinion that the "Government's supervision of a losing business for a temporary emergency ought not to place upon the Government the burden of the losses incurred during that supervision unless the losses were incurred by governmental acts, e.g., if the business would not have been conducted at all but for the Government, or if extra losses over what would have been otherwise sustained were occasioned by Government operations. Where the owner's losses are what they would have been without the taking, the owner has suffered no loss or damage for which compensation is due." *Id.* at 121. The four dissenters found that there was no showing that anything of compensable value had been taken by the government from the company, or that the government had subjected the company to any pecuniary loss. *Id.* at 122.

[227] Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949). *See also* United States v. Gen. Motors Corporation, 323 U.S. 373, 383 (1945) (the businessman is entitled to compensation for the destruction, damage, or depreciation in value of fixtures and permanent equipment, not as part of, but in addition to, the value of the occupancy).

[228] Kimball Laundry Co. v. United States, 338 U.S. 1, 16–20 (1949). In that case, the United States, on November 21, 1942, petitioned the district court to condemn the temporary use of a laundry, for a term ending June 30, 1943, subject to renewal annually. The government took possession of the property on November 22, 1942, and the term was renewed annually until June 30, 1946. Meanwhile the laundry suspended service to its regular customers. The district court awarded no compensation for diminution in the value of the business due to the destruction of "trade routes," a term that served as a general designation both for the lists of customers built up by solicitation over the years and for the continued hold of the Laundry upon their patronage. The Court reversed, saying, *inter alia:*

> The market value of land as a business site tends to be as high as the reasonably probable earnings of a business there situated would justify, and the value of specially adapted plant and machinery exceeds its value as scrap only on the assumption that it is income-producing. And income, in the case of a service industry, presupposes patronage. Since petitioner has been fully compensated for the value of its physical property, and separate value that its trade routes may have must therefore result from the contribution to the earning capacity of the business of greater skill in management and more effective solicitation of patronage than are commonly given to such a combination of land, plant, and equipment. The product of such contributions is an intangible which may be compendiously designated as "going concern value," but this is a portmanteau phrase that needs unpacking.
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> Though compounded of many factors in addition to relations with customers, that element of going concern value which is contributed by superior management may be transferable to the extent that it has a momentum likely to be felt even after a new

[J78] The Fifth Amendment does not require that "just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of

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owner and new management have succeeded to the business property. But because this momentum can be maintained only by the application of continued energy and skill, it would gradually spend itself if the effort and skill of the new management were not, in its turn, expended. Only that exercise of managerial efficiency, however, which has contributed to the future profitability of the business will have a transferable momentum that may give it value to a potential purchaser—that which has had only the effect of increasing current income of reducing expenses of operation has spent itself from year to year. The value contributed by the expenditure of money in soliciting patronage, although likewise of limited duration, differs from managerial efficiency in that it derives not merely from the contribution of personal qualities, but from original investment or the plowing back of income. As such, it may sometimes be more readily recognized as an asset of the business. It is clear, at any rate, that the value of both these elements, in combination, must be regarded as identical with the value alleged to inhere in the trade routes.

Assuming, then, that petitioner's business may have going concern value as defined above, the question arises whether the intangible character of such value alone precludes compensation for it. The answer is not far to seek. The value of all property . . . is dependent upon and inseparable from individual needs and attitudes, and these, obviously, are intangible. As fixed by the market, value is no more than a summary expression of forecasts that the needs and attitudes which made up demand in the past will have their counterparts in the future. . . . The only distinction to be made, therefore, between the attitudes which generate going concern value and those of which tangible property is compounded is as to the tenacity of the past's hold upon the future: in the case of the latter, a forecast of future demand can usually be made with greater certainty, for it is more probable on the whole that people will continue to want particular goods or services than that they will continue to look to a particular supplier of them. It is more likely, in other words, that people will persist in wanting to have their laundry done than that they will keep on sending it to a particular laundry. But, as the probability of continued patronage gains strength, this distinction become obliterated and the intangible acquires a value to a potential purchaser no different from the value of the business' physical property. Since the Fifth Amendment requires compensation for the latter, the former, if shown to be present and to have been "taken," should also be compensable. . . . 'In determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these, at least under some circumstances.' . . .

What, then, are the circumstances under which the Fifth Amendment requires compensation for such an intangible? Not, indeed, those of the usual taking of fee title to business property, but the denial of compensation in such circumstances rests on a very concrete justification: the going concern value has not been taken. Such are all the cases, most of them decided by State courts under constitutions with provisions comparable to the Fifth Amendment, in which only the physical property has been condemned, leaving the owner free to move his business to a new location. . . . In such a situation, there is no more reason for a taker to pay for the business' going concern value than there would be for a purchaser to pay for it who had not secured from his vendor a covenant to refrain from entering into competition with him. It is true that there may be loss to the owner because of the difficulty of finding other premises suit-

the taking."[229] "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."[230] Thus, the Court has held that taking claims against the federal government are premature until the property owner has availed itself of the process provided by the Tucker Act.[231] If one has valid property rights, which have been interfered with or partially taken, his remedy is not the stoppage of the government project but a suit against the United States under the Tucker Act for damages.[232] Similarly, "if a State provides an adequate procedure for seeking just com-

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ably situated for the transfer of his goodwill, and that such loss, like the cost of moving, is denied compensation as consequential. *See* Joslin Mfg. Co. v. Providence, 262 U.S. 668, 676. But such value as the goodwill retains the owner keeps, and the remainder dissipated by removal would not contribute to the value paid for by a transferee of the vacated premises, except perhaps to the extent that the prospect of its loss would induce the owner to hold out for a higher price for his land and building. . . . When a condemnor has taken fee title to business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going concern value. In the usual case, most of it can be transferred; in the remainder, the amount of loss is so speculative that proof of it may justifiably be excluded. By an extension of that reasoning, the same result has been reached even upon the assumption that no other premises whatever were available. . . . The situation is otherwise, however, when the Government has condemned business property with the intention of carrying on the business, as where public utility property has been taken over for continued operation by a governmental authority. If, in such a case, the taker acquires going concern value, it must pay for it. Omaha v. Omaha Water Co., 218 U.S. 180. *See* Denver v. Denver Union Water Co., 246 U.S. 178, 191. . . . Since a utility cannot ordinarily be operated profitably except as a monopoly, investment by the former owner of the utility in duplicating the condemned facilities could have no prospect of a profitable return. The taker has thus, in effect, assured itself of freedom from the former owner's competition. The owner retains nothing of the going concern value that it formerly possessed; so far as control of that value is concerned, the taker fully occupies the owner's shoes.

But the public utility cases plainly cannot be explained by the fact that the taker received the benefit of the utility's going concern value. If benefit to the taker were made the measure of compensation, it would be difficult to justify higher compensation for farm land taken as a firing range than for swamp or sandy waste equally suited to the purpose. . . . It would be equally difficult to deny compensation for value to the taker in excess of value to the owner. . . . The rationale of the public utility cases, as opposed to those in which circumstances have brought about a diminution of going concern value although the owner remained free to transfer it, must therefore be that an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going concern value of his business is a compensable "taking" of property. . . . If such a deprivation has occurred, the going concern value of the business is at the Government's disposal, whether or not it chooses to avail itself of it.

Id. at 8–13.

[229] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985), *quoting* Reg'l R.R. Reorganization Act Cases, 419 U.S. 102, 124–25 (1974).

[230] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194–95 (1985), *quoting* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 1018 n.21 (1984).

[231] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985), *citing* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016–20 (1984).

[232] Dugan v. Rank, 372 U.S. 609, 623–26 (1963).

pensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[233]

[J79] Finally, it must be noted that the Fifth Amendment does not prohibit landowners and the government from agreeing between themselves as to what is just compensation for property taken.[234] In addition, Congress has the power to authorize compensation greater than the constitutional minimum.[235]

6. Standing—Recipient of the Compensation

[J80] In a direct condemnation action, or when a state has physically invaded the property without filing suit, the fact and extent of the taking are known. "In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser."[236] Relatedly, the Court has rejected the suggestion that the total compensation should be divided between the first and second owners of the property (the former taking that portion of the award attributable to the government's use of the property until the passage of title and the latter receiving the balance), noting that "[t]o require the Government to deal with more than one party, particularly when division of the condemnation award would entail a complex apportionment, might severely impede the orderly progress of condemnation proceedings."[237]

[J81] By contrast, the Court has rejected a sweeping rule that a purchaser or a successive title holder is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a regulatory taking. Were the Court to accept that rule, "the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. . . . Future generations, too, have a right to challenge unreasonable limitations on the use and value of land. . . . [Moreover,] [s]hould an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim, under [such a] rule, the right to compensation may not by asserted by an heir or successor, and so may not be asserted at all. [Consequently the] rule would work a critical alteration to the nature of property, as the newly regulated landowner would be stripped of the ability to transfer the interest which was possessed prior to the regulation. . . . It would therefore be illogical and unfair to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."[238]

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[233] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985).

[234] *See* Albrecht v. United States, 329 U.S. 599, 603 (1947).

[235] *See* United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945).

[236] Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001), *citing* Danforth v. United States, 308 U.S. 271, 284 (1939).

[237] United States v. Dow, 357 U.S. 17, 26 (1958).

[238] Palazzolo v. Rhode Island, 533 U.S. 606, 627–28 (2001). *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), presented the question whether it was consistent with the Takings Clause for a state regulatory agency to require oceanfront landowners to provide lateral beach access to the public as the condition for a development permit. The principal dissenting opinion observed it was a policy of the California Coastal Commission to require the

[J82] The plaintiff generally must assert his own legal rights and interests. Nevertheless, since it has long been recognized that the surviving claims of a decedent must be pursued by a third party, one may assert that his decedents' right to pass the property at death has been taken.[239]

B. OTHER LIMITS ON ECONOMIC REGULATIONS[240]

1. In General—Substantive Economic Due Process

[J83] Due Process does place a limit, albeit a broad one, on legislative power to enact social and economic laws. The test traditionally applied in this area is whether the law has a rational relation to a valid state objective.[241] Economic and social legislation "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality."[242]

[J84] However, there was a time when the Due Process Clause was used by the Court to invalidate laws that were unwise or incompatible with some particular economic or social philosophy. *Lochner*, and the era to which that case gave its name, is now famous for striking down as arbitrary various sorts of economic regulations that post-New Deal courts have uniformly thought constitutionally sound. In *Lochner*, the Court held that a law providing that no laborer shall be required or permitted to work in bakeries more

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condition, and that the Nollans, who purchased their home after the policy went into effect, were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.* at 860 (Brennan, J., dissenting). A majority of the Court rejected the proposition. "So long as the Commission could not have deprived the prior owners of the easement without compensating them," the Court reasoned, "the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* at 834, n.2.

239 *See* Hodel v. Irving, 481 U.S. 704, 711–12 (1987).

240 *See also* paras. I 161 *et seq. (commercial speech)*; paras. K173 *et seq. (equal protection).*

241 *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955).

242 Hodel v. Indiana, 452 U.S. 314, 331–32 (1981); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 462 (1988). *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) ("legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . . and the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way").

"[U]nder the deferential standard of review applied in substantive due process challenges to economic legislation, there is no need for mathematical precision in the fit between justification and means." *See* Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 639 (1993).

Under the same standard of review, the ultimate economic efficacy of the challenged statute is not examined by the Court. *See, e.g.*, Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124–25 (1978). Due Process is satisfied if the legislature "*rationally could have believed* that the [statute] would promote its objective." *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984), *quoting* W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671–72 (1981).

A non-contractual claim to receive funds from the public treasury enjoys no constitutionally protected status. *See* Weinberger v. Salfi, 422 U.S. 749, 767, 772 (1975).

"A welfare recipient is not deprived of due process when the legislature adjusts benefit levels. [In such a case,] the legislative determination provides all the process that is due." *See* Atkins v. Parker, 472 U.S. 115, 129–30 (1985), *quoting* Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982). *See also* United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980) (welfare benefits "are not contractual, and may be altered or even eliminated at any time").

than sixty hours in a week or ten hours in a day was not, as to men, a legitimate exercise of the police power of the state but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor.[243] In *Adair*, an act of Congress prohibiting inter-state carriers from requiring one seeking employment, as a condition of such employment, to enter into an agreement not to become or remain a member of a labor organization was declared in conflict with the Fifth Amendment.[244] Similarly, in *Coppage*, a state statute, which declared it unlawful to require one to agree not to be a member of a labor association as a condition of securing employment, was held invalid under the Fourteenth Amendment.[245] *Adkins* held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards.[246] Due process was also used to deny a state the right to fix the price of gasoline[247] and even the right to prevent bakers from palming off smaller for larger loaves of bread.[248] While the cases in the *Lochner* line routinely invoked a correct standard of constitutional arbitrariness review, they harbored the spirit of *laissez faire* economics in their absolutist implementation of the standard they espoused.

[J85] In the early 1930s "the Depression had come and, with it, the lesson . . . that the interpretation of contractual freedom protected in [*Lochner* and] *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."[249] The Court, beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Lochner* line of cases. It is now settled that "[l]egislative bodies have broad scope to experiment with economic problems," and that states "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."[250] "The due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."[251] Hence, "certain kinds of business may be prohibited;[252] the right to conduct a business, or to pursue a calling, may be conditioned; [and] 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."[253] Similarly, states are empowered to regulate business activities, in

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243 ochner v. New York, 198 U.S. 45, 62 (1905).

244 Adair v. United States, 208 U.S. 161 (1908).

245 Coppage v. Kansas, 236 U.S. 1 (1915).

246 Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 559 (1923).

247 Williams v. Standard Oil Co., 278 U.S. 235 (1929).

248 Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924).

249 Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 861–62 (1992)

250 Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

251 New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 107 (1978), *quoting* Lincoln Union v. Nw. Co., 335 U.S. 525, 536–37 (1949).

252 For instance, a state may prohibit casino gambling altogether. *See* Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 346 (1986).

253 New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 107 (1978), *quoting* Nebbia v. New York, 291 U.S. 502, 528 (1934).

order to prevent "unfair or oppressive trade practices."[254] Moreover, states may, through general ordinances, restrict the commercial use of property,[255] and the geographical location of commercial enterprises.[256]

[J86] *Nebbia* affirmed the power of a state to fix a minimum price for milk in order to save producers, and with them the consuming public, from price-cutting so destructive as to endanger the supply. In so doing, the Court declared that if economic regulations "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied" and that "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."[257] *West Coast Hotel* signaled the demise of *Lochner*, by overruling *Adkins*, and approving a minimum wage law on the principle that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[258] In *Olsen*, the Court upheld a Nebraska statute, which limited the amount of the fee that could be charged by private employment agencies, noting that it was not concerned "with the wisdom, need, or appropriateness of the legislation."[259] *Carolene Products* sustained a federal law forbidding shipment in inter-state commerce of milk "to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk," on the basis of Congress' findings that filled milk was indistinguishable in the eyes of the average purchaser from the condensed or evaporated natural product, in spite of proper labeling.[260] *Lincoln Union* held that a state could legislate that no person should be denied the opportunity to obtain or retain employment, because he was or was not a member of a labor union.[261] And *Exxon* held that a state could enact a law prohibiting producers and refiners from operating their own stations, in response to evidence that producers and refiners were favoring company-operated stations in the allocation of gasoline, and that this would eventually decrease the competitiveness of the retail market.[262]

2. Restrictions on Professional Freedom

[J87] The liberty guaranteed by the Fifth and Fourteenth Amendments encompasses "the right of the individual to engage in any of the common occupations of life."[263] A

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254 New Motor Vehicle Bd. of California, 439 U.S. 96, 107 (1978). *See also* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 495 (1949) ("States have constitutional power to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade. . . . Agreements and combinations not to sell to or buy goods from particular persons or to dictate the terms under which transportation will be supplied are well recognized trade restraint practices which both state and national legislation can and do prohibit.").

A businessman may be prohibited from selling at retail any items of merchandise at prices less than statutory cost, even if his competitors sell below cost, in violation of state law. *See* Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc., 360 U.S. 334 (1959).

255 *See* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

256 *See* Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955).

257 Nebbia v. New York, 291 U.S. 502, 537 (1934).

258 W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

259 Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236, 246 (1941).

260 Carolene Prods. Co. v. United States, 323 U.S. 18, 31 (1944).

261 Lincoln Union v. Nw. Co., 335 U.S. 525, 531–37 (1949).

262 Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 (1978).

263 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

state cannot exclude a person from any occupation "by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."[264] *Meyer* held that the Fourteenth Amendment liberty included a teacher's right to teach and the rights of parents to direct their children's education without unreasonable interference by the states, with the result that Nebraska's prohibition on the teaching of foreign languages in the lower grades was arbitrary and without reasonable relation to any end within the competency of the state.[265]

[J88] As a matter of principle, the government may restrict entry into professions and vocations through licensing schemes. For example, it is within the power of the state to require licenses and reasonable license fees or non-excessive bonds for employment agencies,[266] private detectives,[267] or resellers of theater tickets.[268] Moreover, a state may require "high standards of qualification" before it admits an applicant to a profession, but "any qualification must have a rational connection with the applicant's fitness or capacity to practice" the profession.[269]

[J89] However, judicial deference to legislative judgment is appropriate with respect to regulations on entry into a profession. Emphasizing that "for protection against abuses by legislatures, the people must resort to the polls, not to the courts," *Lee Optical* decided that an Oklahoma statute making it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist, was not invalid under the Due Process Clause of the Fourteenth Amendment.[270] In *Ferguson v. Skrupa*, the Court sustained the constitutionality of a state law prohibiting persons, other than lawyers, from engaging in the business of debt adjusting and debt pooling. The Court concluded that "the Kansas legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there [we]re arguments showing that the business of debt adjusting had social utility, but such arguments [we]re properly addressed to the legislature." The Due Process Clause did not empower the judiciary to sit as "a superlegislature to weigh the wisdom of the law."[271] Similarly, *Snyder's Drug Stores* upheld a state statute requiring that an applicant for such a pharmacy operating permit be "a registered pharmacist in good standing" or "a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regu-

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[264] *Id.* at 400.

[265] *Id.* at 400–03.

[266] Brazee v. Michigan, 241 U.S. 340 (1916).

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

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

[269] *See* Schware v. Bd. of Bar Exam'rs of New Mexico, 353 U.S. 232, 239 (1957). There the Court held that a state can require good moral character and proficiency in its law, before it admits an applicant to the Bar.

[270] Williamson v. Lee Optical of Oklahoma, Inc. 348 U.S. 483, 484–88 (1955).

[271] Ferguson v. Skrupa, 372 U.S. 726, 731 (1963). The Court also rejected the contention that the statute's exception of lawyers was a denial of equal protection of the laws to non-lawyers, reasoning that "[t]he business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him remedies existing under state laws governing debtor-creditor relationships, or provisions of the Bankruptcy Act—advice which a non-lawyer cannot lawfully give him." *Id.* at 732.

larly employed in and responsible for the management, supervision, and operation of such pharmacy."[272]

3. Restrictions on Freedom of Contract

a. Generally

[J90] "[T]he right to make contracts about one's affairs is a part of the liberty protected by the due process clause."[273] However, freedom of contract is a qualified right. "There is no absolute freedom to do as one wills or to contract as one chooses. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."[274]

b. Impairment of Contracts

i. Federal Legislation and Due Process

[J91] "To prevail on a claim that federal economic legislation unconstitutionally impairs a private contractual right, the party complaining of unconstitutionality has the burden of demonstrating, first, that the statute alters contractual rights or obligations. . . . If an impairment is found, the reviewing court next determines whether the impairment is of constitutional dimension. If the alteration of contractual obligations is minimal, the inquiry may end at this stage . . . ; if the impairment is substantial, a court must look more closely at the legislation. . . . [This last] inquiry is especially limited, and the judicial scrutiny quite minimal. The party asserting a Fifth Amendment Due Process violation must overcome a presumption of constitutionality and 'establish that the legislature has acted in an arbitrary and irrational way.'"[275] Hence, federal economic legislation is not subject to constraints co-extensive with those imposed upon the states by the Contract Clause of Article I, Section 10 of the Constitution.[276]

[J92] "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[277] For example, "Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money."[278] While the

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[272] N. Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc. 414 U.S. 156 (1973).

[273] Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 610 (1936), *citing* Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 545–46 (1923).

[274] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937), *quoting* Chicago, Burlington and Quincy R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911).

[275] Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 472 (1985). In that case, the Court held that Congress did not violate the Due Process Clause by requiring private railroads to reimburse the National Railroad Passenger Corporation (Amtrak) for rail travel privileges that Amtrak provided to the railroads' employees and former employees.

[276] *See* Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 733 (1984); Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 640 (1993). *See also* paras. J125 *et seq. (retroactive imposition of liability).*

[277] Mobil Oil Exploration, Inc. v. United States, 530 U.S. 604, 607 (2000).

[278] Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 55 (1986), *citing* Perry v. United States, 294 U.S. 330, 350–51 (1935).

federal government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, the Court has declined in the context of commercial contracts to find that "a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in the contract."[279] Rather, it has emphasized that, "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in *unmistakable* terms."[280] Therefore, "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign."[281]

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[279] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982); Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52 (1986). Under the *"reserved powers"* doctrine, developed in the course of litigating claims that states had violated the Contract Clause, the government may not contract away "an essential attribute of its sovereignty." *See, in extenso*, para. J105.

[280] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982).

[281] Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52 (1986), *quoting* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 (1982). *Merrion* held that long-term oil and gas leases to private parties from an Indian tribe, providing for specific royalties to be paid to the tribe, did not limit the tribe's sovereign prerogative to tax the proceeds from the lessees' drilling activities. Because the lease made no reference to the tribe's taxing power, the Court held simply that a waiver of that power could not be "inferred . . . from silence," since the taxing power of any government remains "unless it is has been specifically surrendered in terms which admit of no other reasonable interpretation." *Id.* at 148.

In *Bowen v. Public Agencies Opposed to Social Society Entrapment*, 477 U.S. 41, 52 (1986), the Court confronted a state claim that Section 103 of the Social Security Amendments Act of 1983 was unenforceable to the extent it was inconsistent with the terms of a prior agreement with the national government. Under the law before 1983, a state could agree with the Secretary of Health and Human Services to cover the state's employees under the social security scheme subject to a right to withdraw them from coverage later. When the 1983 Act eliminated the right of withdrawal, the state of California and related plaintiffs sought to enjoin application of the new law to them or to obtain just compensation for loss of the withdrawal right. Although the Court read the terms of a state-federal coverage agreement to reserve the government's right to modify its terms by subsequent legislation, and emphasized that, absent an "unmistakable" provision to the contrary, "contractual arrangements, including those to which a sovereign itself is a party, remain subject to subsequent legislation by the sovereign." *Id.* at 52.

In *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 704–07 (1987), the Court refused to infer a waiver of federal sovereign power from silence. There, an Indian tribe with property rights in a river bed derived from a government treaty sued for just compensation for damage to its interests caused by the government's navigational improvements to the Arkansas river. The claim for compensation presupposed, and was understood to presuppose, that the government had conveyed to the tribe its easement to control navigation; absent that conveyance, the tribe's property included no right to be free from the government's river bed improvements. The Court found, however, that the treaty said nothing about conveying the government's navigational easement, which was an aspect of sovereignty. This, the Court said, could be surrendered only in unmistakable terms.

Regarding the scope of the unmistakability doctrine, *see United States v. Winstar Corp.*, 518 U.S. 839 (1996). The issue in that case was the enforceability of contracts between the government and participants in a regulated industry, according them favorable accounting treatment in exchange for their assumption of liabilities, which threatened to produce claims against the government as insurer. Although Congress subsequently changed the relevant law, and thereby barred the government from specifically honoring its agreements, the Court held that the terms

ii. State Legislation and the Contract Clause

[J93] *General Principles.* The language of the Contract Clause appears unambiguously absolute: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." (U.S. Constitution Article I, Section 10).[282] The purpose of the Clause is to "enable individuals to order their personal and business affairs according to their particular needs and interests."[283] Although it was perhaps the strongest single constitutional check on state legislation during the early years of the Republic,[284] the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern constitutional history.[285] Nonetheless, the Contract Clause remains part of the Constitution. It is not a dead letter. And its basic contours are brought into focus by several of the Court's 20th-century decisions.

[J94] Generally, the Court first asks whether the change in state law has operated as a substantial impairment of a contractual relationship. "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial."[286]

[J95] "The question whether a contract was made is a federal question for purposes of Contract Clause analysis. . . . [W]hether it turns on issues of general or purely local law, . . . [the Court is] bound to decide for [itself this question, although it] accord[s] respectful consideration and great weight to the relevant views of the State's highest court."[287] "[A]ll state regulations [cannot be considered] as implied terms of every contract entered into while they are effective, especially when the regulations themselves cannot be fairly interpreted to require such incorporation. . . . [Such a construction]

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assigning the risk of regulatory change to the government were enforceable, and that the government was therefore liable in damages for breach. A four-Justice plurality noted that government agreements to insure private parties against the costs of subsequent regulatory change do not directly impede the exercise of sovereign power and do not implicate the unmistakability doctrine. Pursuant to this opinion, the unmistakability doctrine will apply where a plaintiff either seeks injunctive relief to hold the government to its alleged surrender of sovereign authority (which generally means granting the plaintiff an exemption to the changed law) or seeks a damage award, which would be the equivalent of such an injunction or exemption. *Id.* at 878–80 (principal opinion of Justice Souter, in which Stevens, O'Connor, and Breyer, JJ. joined). Nevertheless, five members of the Court held that the doctrine will also apply where a plaintiff seeks an award for damage caused by the exercise of that sovereign authority. *Id.* at 924–31 (dissenting opinion of Rehnquist, C.J., in which Ginsburg, J. joined); *id.* at 920–21 (concurring opinion of Scalia, J., in which Kennedy and Thomas, JJ., joined).

[282] A simple breach of contract by a municipality is not a "law impairing the obligation of the contract" to which the Clause would apply. *See* Shawnee Sewerage & Drainage Co. v. Stearns, 220 U.S. 462, 471 (1911).

[283] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978).

[284] Perhaps the best known of all Contract Clause cases of that era was *Dartmouth Coll. v. Woodward*, 4 Wheat. 518, 675 (1819). In that case, the Court held that a corporate charter was a contract within the meaning of Article I, Section 10, of the Constitution, so that a state law altering such a charter in a material respect, without the consent of the corporation, was unconstitutional and void.

[285] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978).

[286] Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992).

[287] *Id.* at 187.

would expand the definition of contract so far that the constitutional provision would lose its anchoring purpose, . . . [and] would severely limit the ability of state legislatures to amend their regulatory legislation."[288] Hence, as a matter of principle, "state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts."[289]

[J96] "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation."[290] "Total destruction of contractual expectations is not necessary for a finding of substantial impairment. . . . On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment."[291] In determining the extent of the impairment, the courts are to consider, *inter alia*, whether the industry the complaining party has entered has been regulated in the past.[292] The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."[293]

[J97] "Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'"[294] The Court "has long recognized that a statute does not violate the Contract Clause simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment."[295] If the law were "[o]therwise, one would be able to obtain immunity from state regulation by making private contractual arrangements."[296]

[J98] "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, . . . such as the remedying of a broad and general social or economic problem. . . . The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests."[297] "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions

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288 *Id.* at 189–90.

289 *Id.* at 189.

290 Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978).

291 Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983), *citing* United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 26–27, 31 (1977) (four–three decision).

292 *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242, n.13 (1978), *citing* Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38 (1940) ("When [the petitioner] purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.").

293 Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

294 Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983), *quoting* Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 434 (1934).

295 *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241–42, n.13 (1978).

296 United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 22 (1977).

297 Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983).

and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'"[298] "Unless the State itself is a contracting party, . . . '[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'"[299]

[J99] The Contract Clause does not deprive the states "of their broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result."[300] As state rule that imposes a generally applicable rule of conduct is sharply distinguishable from measures directly adjusting the rights and responsibilities of contracting parties. Hence, a "state [economic] regulation is permissible under the Contract Clause notwithstanding its incidental effect on preexisting contracts."[301]

[J100] *Particular Applications.* The landmark case of *Blaisdell* addressed a Contract Clause attack against a mortgage moratorium law that Minnesota had enacted to provide relief for homeowners threatened with foreclosure. The statute, enacted in 1933, during the depth of the Depression and when that state was under severe economic stress, was a temporary measure that allowed judicial extension of the time for redemption; a mortgagor who remained in possession during the extension period was required to pay a reasonable income or rental value to the mortgagee. In upholding the statute, "the Court found five factors significant. First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. . . . Second, the state law was enacted to protect a basic societal interest, not a favored group. . . . Third, the relief was appropriately tailored to the emergency that it was designed to meet. . . . Fourth, the imposed conditions were reasonable. . . . And, finally, the legislation was limited to the duration of the emergency."[302] *East New York Savings Bank* upheld a moratory statute, in post-depression times, suspending, for the tenth year in succession, the mortgagee's right of foreclosure. The Court found that "[t]he whole course of the New York moratorium legislation show[ed] the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what ha[d] been done, readjustment to changing economic conditions, and safeguarding the future on the basis of responsible forecasts."[303]

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[298] *Id.* at 412, *quoting* United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 22 (1977).

[299] Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412–13 (1983) *quoting* United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 22–23 (1977). This principle does not apply when the state is a party to the contract. *See* United States Trust Co., *supra*, at 26.

[300] United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 22 (1977).

[301] Exxon Corp. v. Eagerton, 462 U.S. 176, 194 (1983). That case involved an Alabama statute that increased the severance tax on oil and gas extracted from Alabama wells and prohibited producers from passing on the increase to their purchasers. The Court upheld the statute against a Contract Clause challenge. In doing so, the Court emphasized that the prohibition imposed a generally applicable rule of conduct, the main effect of which was to shield consumers from the burden of the tax increase; its effect on existing contracts permitting producers to pass the increase through to consumers was only incidental.

[302] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978), *discussing* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444–47 (1934).

[303] E. New York Sav. Bank v. Hahn, 326 U.S. 230, 234–35 (1945). In *W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 434 (1934), the Court struck down an Arkansas law that exempted the

[J101] In *Allied Structural Steel*, the Court invalidated a Minnesota statute requiring a private employer that had contracted with its employees to provide pension benefits to pay additional benefits (a "pension funding charge" if its pension fund at the time was insufficient to provide full benefits for all employees with at least ten years' seniority) beyond those it had agreed to provide, if it terminated the pension plan or closed a Minnesota office. The Minnesota pension law severely impaired established contractual relations between employers and employees and invaded an area never before subject to regulation by the state. Moreover, it had not even purportedly been enacted to deal with a broad, generalized economic or social problem, but it had an extremely narrow

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proceeds of a life insurance policy from collection by the beneficiary's judgment creditors. The Court found that the relief sought to be afforded was neither temporary nor conditional: in placing insurance moneys beyond the reach of existing creditors, the Act contained no limitations as to time, amount, circumstances, or need. However, later decisions, such as *East New York Savings Bank* and *Veix*, abandoned these limitations as absolute requirements.

In *Veix v. Sixth Ward Bldging & Loan Association of Newark*, 310 U.S. 32, 38 (1940), the Court upheld a state statute that restricted the contractual rights of investors in a building and loan association to withdraw and recover by suit the amount of their investment. The Court noted that the contract was with a financial institution of major importance to the credit system of the state, and held that the obligation of the association to respond to an application for withdrawal was subject to the paramount police power.

In *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 129–31 (1937), a North Carolina statute, enacted after the execution of notes secured by a deed of trust, provided that, where a mortgagee caused the sale of mortgaged property by a trustee and, becoming the purchaser for a sum less than the amount of the debt, thereafter brought an action for a deficiency, the defendant was entitled to show, by way of defense and set-off, that the property sold was fairly worth the amount of the debt, or that the sum bid was substantially less than the true value of the property, and thus defeated the claim in whole or in part. Under the former law of that state, when the mortgagee became the purchaser at the trustee's sale under a power in the deed of trust, he might thereafter, in an action at law, recover the difference between the price he had bid and the amount of the indebtedness. The Court found that the other remedy by bill in equity to foreclose the mortgage was still available. And that, in such a proceeding, the chancellor could set aside the sale if the price bid was inadequate, and, in addition, he might award a money decree for the amount by which the avails of the sale fell below the amount of the indebtedness, but that his decree in that behalf would be governed by well-understood principles of equity. The Court was of the opinion that the statute modifying one of the existing remedies for realizing the value of the security could not "fairly be said to do more than restrict the mortgagee to that for which he contracted—namely, payment in full." The Act recognized the obligation of his contract and his right to its full enforcement, but it limited that right so as to prevent his obtaining more than his due. The new law as to proceedings for a deficiency judgment, after the exercise of a power of sale, merely restricted the exercise of the contractual remedy to provide a procedure that, to some extent, rendered the remedy by a trustee's sale consistent with that in equity. And that did not impair the obligation of the contract.

In *Honeyman v. Jacobs*, 306 U.S. 539, 543–45 (1939), a state statute providing that a mortgagee who bid at a foreclosure sale could not obtain a deficiency judgment if the value of the property equaled or exceeded the amount of the debt plus costs and interest. Relying on *Richmond Mortgage*, the Court said that the mortgagee under this law received all the compensation to which his contract entitled him, and that the statute merely restricted the exercise of the contractual remedy. This holding was reaffirmed by a unanimous Court in *Gelfert v. National City Bank*, 313 U.S. 221, 235 (1941), which sustained a New York law that redefined fair market value of property purchased by mortgagees at foreclosure sales.

focus: it applied only to private employers who had at least 100 employees, at least one of whom worked in Minnesota, who had established voluntary private pension plans, and only when such an employer closed its Minnesota office or terminated its pension plan. Hence, the presumption favoring legislative judgment as to the necessity and reasonableness of a particular measure simply could not stand in this case.[304]

[J102] In *Energy Reserves* the Court rejected a Contract Clause challenge against a Kansas regulation of the price of natural gas sold at wellhead in the intra-state market. First, the Court noted, the Kansas statute had not substantially impaired appellant's contractual rights. The parties were operating in a heavily regulated industry. "Price regulation existed and was foreseeable as the type of law that would alter contract obligations." Second, to the extent, if any, the Kansas Act impaired appellant's contractual interests, it rested on significant state interests in protecting consumers from the escalation of natural gas prices caused by deregulation and in correcting the imbalance between the inter-state and intra-state markets. Nor were the means chosen to implement these purposes deficient, particularly in light of the deference to which the Kansas legislature's judgment was entitled.[305]

[J103] *Keystone Bituminous* upheld a Pennsylvania regulation of bituminous coal mining. Petitioners claimed that the statute violated the Contracts Clause by not allowing them to hold the surface owners to their contractual waiver of liability for surface damage. The Court agreed that the statute operated as a substantial impairment of a contractual relationship. However, the statute plainly survived scrutiny under the Court's standards for evaluating impairments of private contracts. "The Commonwealth ha[d] determined that, in order to deter mining practices that could have severe effects on the surface, it [wa]s not enough to set out guidelines and impose restrictions, but that imposition of liability [wa]s necessary. By requiring the coal companies either to repair the damage or to give the surface owner funds to repair the damage, the Commonwealth accomplishe[d] both deterrence and restoration of the environment to its previous condition. [The Court] refuse[d] to second-guess the Commonwealth's determinations that these [we]re the most appropriate ways of dealing with the problem. [It] conclude[d,] therefore, that the impairment of petitioners' right to enforce the damages waivers [wa]s amply justified by the public purposes served by the state statute."[306]

[J104] *States' Contracts.* When a state itself enters into a contract,[307] "it cannot simply

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304 Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244–50 (1978).

305 Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 413–19 (1983).

306 Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 506 (1987).

307 "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State. . . . In addition, statutes governing the interpretation and enforcement of contracts may be regarded as forming part of the obligation of contracts made under their aegis." *See* United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 17, n.14 (1977). "The presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' . . . This . . . presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. . . . Thus, the party asserting the creation of a contract must overcome this well-founded presumption, and [the Court] proceed[s] cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *See* Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 466 (1985).

walk away from its financial obligations."[308] When the state is a party to the contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."[309]

[J105] When a state impairs the obligation of its own contract, "[t]he initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. As early as *Fletcher v. Peck*, the Court considered the argument that 'one legislature cannot abridge the powers of a succeeding legislature.'"[310] In this regard, it has been stated that "the legislature cannot bargain away the police power of a State."[311] "This doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty."[312]

[J106] "Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned."[313] The Court has regularly held that the states are bound by their debt con-

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[308] Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412, n.14 (1983).

[309] United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 26 (1977) (four–three decision).

[310] *Id.* at 23, *quoting* Fletcher v. Peck, 6 Cranch 87, 135 (1810).

[311] Stone v. Mississippi, 101 U.S. 814, 817 (1880). In that case, the Court sustained the state's revocation of a 25-year charter to operate a lottery. Other cases similarly have held that a state is without power to enter into binding contracts not to exercise its police power in the future. *E.g.*, Pierce Oil Corp. v. City of Hope, 248 U.S. 498, 501 (1919); Atl. Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 558 (1914); Douglas v. Kentucky, 168 U.S. 488, 502–05 (1897). *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 436–37 (1934).

[312] United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 23 (1977). "In deciding whether a State's contract was invalid *ab initio* under the reserved powers doctrine, earlier decisions relied on distinctions among the various powers of the State. Thus, the police power and the power of eminent domain were among those that could not be 'contracted away,' but the State could bind itself in the future exercise of the taxing and spending powers. In *New Jersey v. Wilson*, 7 Cranch 164 (1812), the Court held that a State could properly grant a permanent tax exemption, and that the Contract Clause prohibited any impairment of such an agreement. This holding has never been repudiated, although tax exemption contracts generally have not received a sympathetic construction. . . . By contrast, the doctrine that a State cannot contract away the power of eminent domain has been established since *W. River Bridge Co. v. Dix*, 6 How. 507 (1848). . . . The doctrine that a State cannot be bound to a contract forbidding the exercise of its police power is almost as old. *See* [Stone v. Mississippi, 101 U.S. 814 (1880)]." *See* United States Trust Co. of New York, *supra*, at 23–24, n.21.

In this context, the Court has adopted a canon of construction disfavoring implied governmental obligations in public contracts. Under the rule that "[a]ll public grants are strictly construed," the Court has insisted that "nothing can be taken against the state by presumption or inference," and that "neither the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken." *See* Delaware R.R. Tax, 18 Wall. 206, 225 (1874); Jefferson Branch Bank v. Skelly, 1 Black 436, 446 (1862). Hence, "sovereign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *See* Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52 (1986). *See also* para. J92, n.280–281.

[313] United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 24 (1977).

tracts. "States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised."[314]

[J107] State laws authorizing the impairment of municipal bond contracts have been held unconstitutional.[315] Similarly, a tax on municipal bonds was held unconstitutional, because its effect was to reduce the contractual rate of interest.[316] And a state may not authorize a municipality to borrow money and then restrict its taxing power so that the debt cannot be repaid.[317] Nevertheless, *Faitoute* sustained an alteration of a municipal bond contract. That case involved the New Jersey Municipal Finance Act, which provided that a bankrupt local government could be placed in receivership by a state agency. A plan for the composition of creditors' claims was required to be approved by the agency, the municipality, and 85 percent of the creditors. The plan would be binding on non-consenting creditors after a state court conducted a hearing and found that the municipality could not otherwise pay off its creditors, and that the plan was in the best interest of all creditors. Under the specific composition plan at issue in *Faitoute*, the holders of revenue bonds received new securities bearing lower interest rates and later maturity dates. The Court, however, rejected the dissenting bondholders' Contract Clause objections. "The reason was that the old bonds represented only theoretical rights; as a practical matter, the city could not raise its taxes enough to pay off its creditors under the old contract terms. The composition plan enabled the city to meet its financial obligations more effectively."[318] "The necessity compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation for the very reason that thereby the obligation is discharged, not impaired." Thus, the Court found that the composition plan was adopted with the purpose and effect of protecting the creditors, as evidenced by their more than 85 percent approval; indeed, the market value of the bonds increased sharply as a result of the plan's adoption.[319]

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[314] Murray v. Charleston, 96 U.S. 432, 445 (1878).

[315] In *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60–62 (1935), the Court was confronted with a state law that diluted the rights of mortgage bondholders. As a relief measure for financially depressed local governments, Arkansas enacted a statute that greatly diminished the remedies available to creditors under their bonds. This resulted in a remedial scheme whereby creditors were without an effective remedy for a minimum of six and a half years, during which time the government's obligation to pay principal or interest was suspended. The Court invalidated the statute, concluding: "[w]ith studied indifference to the interests of the mortgagee or to his appropriate protection [the state has] taken from the mortgage the quality of an acceptable investment for a rational investor. . . . So viewed, [the state's action is] seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."

[316] Murray v. Charleston, 96 U.S. 432, 443–46 (1878).

[317] Louisiana *ex rel.* Hubert v. New Orleans, 215 U.S. 170, 175–78 (1909); Wolff v. New Orleans, 103 U.S. 358, 365–68 (1881).

[318] *See* United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 28 (1977).

[319] Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 511–13 (1942).

[J108] *United States Trust Co.* "indicated that impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties."[320] There, a 1962 statutory covenant between New Jersey and New York limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves pledged as security for consolidated bonds issued by the Port Authority. A 1974 New Jersey statute, together with a concurrent and parallel New York statute, retroactively repealed the 1962 covenant. The Court held that New Jersey could not retroactively alter the statutory bond covenant relied upon by bond purchasers, noting that "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good, rather than the private welfare of its creditors." The outright repeal of the 1962 covenant totally eliminated an important security provision for the bondholders and thus impaired the obligation of the states' contract. Further, the Court stressed that the repeal of the 1962 covenant could be sustained only if "that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State." However, the impairment was neither necessary to achieve the states' plan to encourage private automobile users to shift to public transportation nor reasonable in light of changed circumstances. Total repeal of the 1962 covenant was not essential, since the states' plan could have been implemented with a less drastic modification of the covenant, and since, without modifying the covenant at all, the states could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit. Nor could the repeal be claimed to be reasonable on the basis of the need for mass transportation, energy conservation, and environmental protection, since these concerns were not unknown in 1962, and the subsequent changes were of degree and not of kind.[321]

[J109] *El Paso v. Simmons* concerned a 1941 Texas statute that limited, to a five-year period, the reinstatement rights of an interest-defaulting purchaser of land from the state. For many years prior to the enactment of that statute, such a defaulting purchaser, under Texas law, could have reinstated his claim to the land upon written request and payment of delinquent interest, unless rights of third parties had intervened. The program adopted at the turn of the century for the sale, settlement, forfeiture, and reinstatement of land was not wholly effectual to serve the objectives of the state's land program many decades later. The Texas statute of repose served significant state objectives: clarification of land titles, elimination of massive litigation over titles, and effective utilization of property. The measure taken to induce defaulting purchasers to comply with their contracts, requiring payment of interest in arrears within five years, was a mild one, hardly burdensome to the purchaser, who wanted to adhere to his contract of purchase, but nonetheless an important one to the state's interest. Consequently, the Court concluded that the Contract Clause did not forbid such a measure.[322]

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[320] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, n.15 (1978), *citing* United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 22–23 (1977).

[321] United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 29–32 (1977) (four-to-three decision).

[322] City of El Paso v. Simmons, 379 U.S. 497, 515–17 (1965).

4. Utility Regulation[323]

[J110] Public utilities, "from the public nature of the business by them carried on and the interest which the public have in their operation, are subject . . . to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end. . . . [However, since the right of ownership of public utility] property finds protection in constitutional guaranties, . . . wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment."[324]

[J111] If a railroad devotes its property to a use in which the public has an interest, it, in effect, grants to the public an interest in that use. So long as it maintains the use, it must submit to government control for the common good, but it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.[325] At the same time, a railroad estate may be required "to suffer interim losses for a reasonable period pending good faith efforts to develop a feasible reorganization plan, if the public interest in continued rail service justifies the requirement."[326]

[J112] "Enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of public utility property without due process of law."[327] For example, a state or its subdivisions may require a railroad to make certain improvements, in the interest of public safety and convenience, made necessary by the rapid growth of the communities. In such circumstances, the Court has held that the cost of such improvements may be allocated all to the railroads.[328] Of course, there is the proper limitation that "such allocation of costs must be fair and reasonable."[329]

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[323] *See also* paras. J39 *et seq. (public utility rate regulation).*

[324] Atl. Coast Line v. N. Carolina Corp. Comm'n, 206 U.S. 1, 19–20 (1907).

[325] *See* Brooks-Scanlon Co. v. R.R. Comm'n of Louisiana, 251 U.S. 396, 399 (1920); Munn v. Illinois, 94 U.S. 113, 126 (1876).

[326] Reg'l R.R. Reorganization Act Cases, 419 U.S. 102, 122–23 (1974), *citing* Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. R. Co., 294 U.S. 648, 677 (1935).

[327] New Orleans Pub. Serv., Inc. v. New Orleans, 281 U.S. 682 (1930)

[328] *See, e.g.*, Erie R.R. Co. v. Bd. of Pub. Util. Comm'rs, 254 U.S. 394, 409–11 (1921); Missouri Pac. Ry. Co. v. Omaha, 235 U.S. 121, 127 (1914).

For example, when a viaduct has long been in use, has become inadequate, and is also unsafe and in need of extensive repairs, the railroad company may be required to remove it and to construct in its place double tracks at street level crossing the railroad. *See* New Orleans Pub. Serv., Inc. v. New Orleans, 281 U.S. 682 (1930).

[329] *See* Atchison, Topeka & Santa Fe Ry. Co. v. Pub. Utils. Comm'n, 346 U.S. 346, 352 (1953), *citing* Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 415 (1935). *See also* Erie R.R. Co. v. Bd. of Pub. Util. Comm'rs, 254 U.S. 394, 411 (1921) ("if the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce"); Lehigh Valley Ry. Co. v. Pub. Util. Comm'rs, 278 U.S. 24, 34 (1928) (danger to the public will not ". . . justify great expenditures, unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it, and the police power may be exerted to that end.").

In *Nashville, Chattanooga & St. Louis Railway v. Walters*, 294 U.S. 405, 415 (1935), the railroad's share of the cost was fixed at 50 percent by a Tennessee statute. The grade separation

But the railroads are "in no position to complain because their share in the cost . . . is not based solely on the special benefits accruing to them from the improvements."[330]

5. Governmental Price Control[331]

[J113] "Price control is one of the means available to the states . . . and to the Congress . . . in their respective domains, for the protection and promotion of the welfare of the economy"[332] and of consumers.[333] For example, the government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly[334] or a discrepancy between supply and demand in the market for a certain product.[335] However, a price control regulation may properly be attacked as confiscatory and unconstitutional, if it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt."[336]

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ordered in that case was located in the rural community of Lexington, Tennessee, which had a population in 1910 of 1,497, in 1920 of 1,792, and in 1930 of 1,823. The improvement was not required to meet the transportation needs of Lexington and was being constructed without regard to that community's growth or to considerations of public safety and convenience resulting from such growth. The highway under improvement was part of the state highway system, and the grade was to be removed primarily as part of economic and engineering planning and to qualify the improvement of the highway for federal *aid*. Other facts pointed principally to the state and nationwide nature of the highway system and the particular highway involved, the competition afforded railroads by the users of such highways and the effect of such competition on the revenues of the railroads, and the increasing importance of grade separations as a means of assuring rapid movement of motor vehicles rather than as an exclusively safety measure. Under these circumstances, the judgment of the supreme court of Tennessee was reversed, and the case remanded thereto, because that court had refused to consider whether the special facts shown were of such persuasiveness as to have required the state court to hold that the statute and order complained of were arbitrary and unreasonable.

In *Chicago, St. Paul, Minneapolis & Omaha Railway Co. v. Holmberg*, 282 U.S. 162 (1930), the Court held that an order directing a railroad company to provide an underground cattle-pass across its right of way partly at the expense of the company, not as a safety measure but merely to save a farmer, owning the land on both sides of the railroad, from inconvenience attendant upon the use of an existing grade crossing that was otherwise adequate, had taken the company's property for a private use and without due process of law.

[330] Atchison, Topeka & Santa Fe Ry. Co. v. Pub. Utils. Comm'n, 346 U.S. 346, 352–53 (1953).

[331] *See also* para. B48 *(wartime regulations)*; para. C13 *(limitations on attorney fees)*; paras. J39 *et seq. (public utility rate regulation)*.

[332] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 394 (1940).

[333] *See* Permian Basin Area Rate Cases, 390 U.S. 747, 769–70 (1968); Pennell v. San Jose, 485 U.S. 1, 13 (1988).

[334] *See, e.g.*, Fed. Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 250–54 (1987) (approving limits on rates charged to cable companies for access to telephone poles); Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 397–98 (1974) (recognizing that federal regulation of the natural gas market was in response to the threat of monopoly pricing).

[335] *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 530, 538 (1934) (allowing a minimum price for milk to off-set a "flood of surplus milk"); Pennell v. San Jose, 485 U.S. 1, 12 (1988) (recognizing that a rent control ordinance, aimed at preventing excessive and unreasonable rent increases caused by the growing shortage of and increasing demand for housing in the city, is a legitimate exercise of municipal police power).

[336] Pennell v. San Jose, 485 U.S. 1, 11 (1988), *quoting* Nebbia v. New York, 291 U.S. 502,

[J114] No constitutional objection arises from the imposition of maximum prices merely because the value of regulated property is reduced as a consequence of regulation.[337] Regulation "may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness."[338]

[J115] A state "has power to annul and supersede rates previously established by contract between utilities and their customers."[339] The Constitution does not prohibit the determination of rates through group or class proceedings. Although high cost operators may be more seriously affected by price control than others, it has not been thought that price-fixing, otherwise valid, is improper because it is on a class, rather than an individual, basis.[340] The Court has "recognized that legislatures and administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class; it has been thought to be sufficient if the agency has before it representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties."[341]

[J116] A legitimate and rational goal of rent control regulations is the protection of tenants.[342] *Pennell* involved a rent control ordinance, under which a landlord could automatically raise the annual rent of a tenant in possession by as much as 8 percent, but if a tenant objected to a higher increase, a hearing was required to determine whether the landlord's proposed increase was "reasonable under the circumstances," and the hearing officer was directed to consider specified factors, including the history of the premises, the landlord's costs, the market for comparable housing, financial evidence regarding the landlord's own financial status, and "the hardship to a tenant." The Court found that the ordinance, which so carefully considered both the individual circumstances of the landlord and the tenant before determining whether to allow an additional increase in rent over and above certain amounts that were deemed reasonable, did not, on its face, violate the Fourteenth Amendment's Due Process Clause, for it "represent[ed] a rational attempt to accommodate the conflicting interests of protecting

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539 (1934). In several early cases, the constitutional validity of price-fixing legislation, at least in the absence of a so-called emergency, was dependent on whether or not the business in question was *"affected with a public interest."* It was said to be so affected if it had been "devoted to the public use" and if "an interest in effect" had been granted "to the public in that use." *See* Ribnik v. McBride, 277 U.S. 350, 355 (1928). That test, was discarded in *Nebbia v. New York*, 291 U.S. 502, 531–39 (1934). It was there stated that such criteria "are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices," and that the phrase "affected with a public interest" can mean "no more than that an industry, for adequate reason, is subject to control for the public good." *Id.* at 536.

337 Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 601 (1944).

338 Permian Basin Area Rate Cases, 390 U.S. 747, 769 (1968), *citing* Covington & Lexington Tpk. Co. v. Sandford, 164 U.S. 578, 596 (1896).

339 Midland Realty Co. v. Kansas City Power & Light Co., 300 U.S. 109, 113 (1937).

340 *See* Bowles v. Willingham, 321 U.S. 503, 518 (1944).

341 Permian Basin Area Rate Cases, 390 U.S. 747, 769 (1968), *citing* Tagg Bros. v. United States, 280 U.S. 420 (1930); Acker v. United States, 298 U.S. 426 (1936).

342 Pennell v. San Jose, 485 U.S. 1, 13 (1988). *See also* Bowles v. Willingham, 321 U.S. 503, 513, n.9 (1944) (one purpose of rent control is "to protect persons with relatively fixed and limited incomes, consumers, wage earners . . . from undue impairment of their standard of living").

tenants from burdensome rent increases while at the same time ensuring that landlords [we]re guaranteed a fair return on their investment."[343]

6. Liability Limitation

[J117] *Duke Power* involved a federal Act that imposed a $560 million limitation on liability for nuclear accidents resulting from the operation of federally licensed private nuclear power plants, required those indemnified by the $560 million fund established under the Act to waive all legal defenses in the event of a substantial nuclear accident, and further provided that, in the event of a nuclear accident involving damages in excess of the amount of aggregate liability, Congress "will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." Congress' purpose was to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power, while simultaneously providing the public compensation in the event of a catastrophic nuclear incident. The liability limitation provision thus emerged as a classic example of an economic regulation—a legislative effort to structure and accommodate the burdens and benefits of economic life. Hence, the Court found that it should defer to the congressional judgment unless it was demonstrably arbitrary or irrational. The Act passed constitutional muster, under this standard of review. The record of the case supported the need for the imposition of a statutory limit on liability to encourage private industry participation, and, consequently, the Act bore a rational relationship to Congress' concern for stimulating private industry's involvement in the production of nuclear electric energy. Moreover, assuming, *arguendo*, that the $560 million fund would not insure full recovery in all conceivable circumstances, it did not follow that the liability limitation was therefore irrational and violative of due process. When appraised in light of the extremely remote possibility of an accident in which liability would exceed the statutory limit and the strong likelihood that Congress would enact extraordinary relief provisions to provide additional relief, in accord with prior practice, the congressional decision to fix a $560 million ceiling was within permissible limits and not violative of due process. The district court's finding that the Act tended to encourage irresponsibility in matters of safety and environmental protection could not withstand careful scrutiny, since nothing in the liability limitation provision undermined or altered the rigor and integrity of the process involved in the review of applications for a license to construct or operate a nuclear power plant, and since, in the event of a nuclear accident, the utility itself would probably suffer the largest damages.[344]

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[343] Pennell v. San Jose, 485 U.S. 1, 13 (1988). Statutes regulating the economic relations of landlords and tenants are not *per se* takings, but they may constitute regulatory takings. *See* Pennell, *supra*, at 12, n.6; Yee v. Escondido, 503 U.S. 519, 532–34 (1992).

[344] Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 83–87 (1978). The Act also provided a reasonably just substitute for the common law or state tort law remedies it replaced, and nothing more was required by the Due Process Clause. The congressional assurance of a $560 million fund for recovery, accompanied by the statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a nuclear accident, was a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer whose resources might well be exhausted at an early stage. And, at the minimum, the statutorily mandated waiver of defenses established, at the threshold, the right of injured parties to compensation without

7. Retroactive Economic Legislation

a. In General[345]

[J118] "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. [Even though prospective economic legislation carries with it the presumption of constitutionality, it] does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process [—i.e., a legitimate legislative purpose furthered by rational means—] and the justifications for the latter may not suffice for the former."[346] Indeed, "[r]etroactive economic legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."[347]

b. Retroactive Taxation

[J119] The validity of a retroactive tax provision under the Due Process Clause depends upon whether "retroactive application is so harsh and oppressive as to transgress the constitutional limitation."[348] "The 'harsh and oppressive' formulation 'does not differ from the prohibition against arbitrary and irrational legislation' that applies generally to enactments in the sphere of economic policy."[349] "In each case, it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation."[350] "One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute."[351]

[J120] In *Untermyer*, the Court held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute. As the Court explained in a later case, this holding "was rested on the ground 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 statute later made the taxable event. . . . Since . . . the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift

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proof of fault and eliminated the burden of delay and uncertainty that would follow from the need to litigate the question of liability after an accident. *Id.* at 88–93.

In the course of adjudicating a similar challenge to the Workmen's Compensation Act in *New York Central Railroad Co. v. White*, 243 U.S. 188, 201 (1917), the Court observed that the Due Process Clause of the Fourteenth Amendment was not violated simply because an injured party would not be able to recover as much under the Act as before its enactment.

345 *See also* para. E57 *(retroactive civil penalties).*

346 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15–17 (1976).

347 Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

348 Welch v. Henry, 305 U.S. 134, 147 (1938).

349 United States v. Carlton, 512 U.S. 26, 30 (1994), *quoting* Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 733 (1984).

350 Welch v. Henry, 305 U.S. 134, 147 (1938).

351 United States v. Hemme, 476 U.S. 558, 569 (1986).

which he might well have refrained from making had he anticipated the tax was thought to be so arbitrary and oppressive as to be a denial of due process."[352]

[J121] In *Milliken*, the Court upheld the application of an early "gift in contemplation of death" statute, enacted in 1918, to draw into the estate of a decedent who died in 1920 a gift given in 1916, before enactment of the statute. In that case, the equities were especially favorable to the taxpayer, because the gift in question was stock that had appreciated substantially following the gift, and inclusion in the estate occasioned taxation of the higher amount. "Nevertheless, th[e] Court reasoned that the validity of the tax depended not upon its retroactive feature, but upon its nature and that of the gift. The Court upheld the levy of estate tax upon the gift on the ground that the notion of taxing gifts made in contemplation of death as part of the estate was not new, and that the donor should have known that there was a chance of increased tax burden if he chose to make what amounted to a testamentary gift during his lifetime."[353]

[J122] The Court consistently has held that the application of an income tax statute to the entire calendar year in which enactment took place does not, *per se*, violate the Due Process Clause of the Fifth Amendment.[354] In *Darusmont*, the Court held that the 1976 amendments of the Internal Revenue Code of 1954, which increased the rate of the minimum tax and decreased the allowable exemption as to enumerated items of tax preference, including the deduction for 50 percent of any net long-term capital gain, and made the amendments effective for the taxable years beginning after December 31, 1975, might be applied to appellee taxpayers' sale of a house, resulting in a long-term capital gain, which had taken place in 1976 prior to the enactment of the amendments, without violating the Due Process Clause.[355]

[J123] *Welch* upheld against a due process attack a state statute enacted in 1935 taxing 1933 dividend income that the 1933 taxing statute had explicitly exempted. Adopting the view that a stockholder would have continued to receive corporate dividends even if he knew that the dividends would subsequently be taxed, the Court distinguished *Untermyer* on the ground that the donor might have refrained from making the gift had he anticipated the tax.[356]

[J124] *Carlton* involved a 1987 amendment to the federal estate tax statute, limiting the availability of a then recently added deduction for the proceeds of sales of stock to employee stock ownership plans. Congress provided that the amendment would apply

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[352] *See* Welch v. Henry, 305 U.S. 134, 147 (1938), *discussing* Untermyer v. Anderson, 276 U.S. 440, 445 (1928). At the same time, the Court explicitly recognized a distinction between retroactive taxation of genuine gifts and that of gifts made in contemplation of death.

[353] *See* United States v. Hemme, 476 U.S. 558, 568 (1986), *discussing* Milliken v. United States, 283 U.S. 15, 24 (1931).

[354] *See, e.g.*, Brushaber v. Union Pac. R. Co., 240 U.S. 1, 20 (1916); Reinecke v. Smith, 289 U.S. 172, 175 (1933); Fernandez v. Wiener, 326 U.S. 340, 355 (1945).

[355] United States v. Darusmont, 449 U.S. 292, 299–300 (1981) *(per curiam)*. Assuming, *arguendo*, that personal notice of tax changes was relevant, the Court found that appellee could not claim surprise, since the proposed increase in the minimum tax rate had been under public discussion for almost a year before its enactment. Moreover, the amendments to the minimum tax did not create a "new tax," since the minimum tax provision was imposed in 1969, and one of the original items of tax preference subjected to the minimum tax was the untaxed portion of any net long-term capital gain.

[356] Welch v. Henry, 305 U.S. 134, 147–48 (1938).

retroactively, as if incorporated in the original deduction provision, which had been adopted in October 1986. The Court decided that the retroactive application of the amendment did not violate due process. The Court began its analysis by noting that a tax statute's retroactive application must be "supported by a legitimate legislative purpose furthered by rational means." Congress' purpose in enacting the 1987 amendment was neither illegitimate nor arbitrary. The relevant provision was originally intended to create an incentive for stockholders to sell their companies to their employees, but the absence of a decedent stock ownership requirement resulted in the deduction's broad availability to virtually any estate at an estimated loss to the government of up to $7 billion in anticipated revenues. Thus, Congress undoubtedly had intended the amendment to correct what it reasonably viewed as a mistake in the original provision. Moreover, the amendment's retroactive application was rationally related to its legitimate purpose, since Congress had acted "promptly" in proposing the amendment within a few months of the original enactment and had established a "modest" retroactivity period that extended only slightly longer than one year. Finally, the Court did not consider Carlton's lack of advance notice regarding the 1987 amendment to be dispositive.[357]

c. Imposition of Retroactive Liability

[J125] In *Turner Elkhorn*, the Court reviewed provisions of the Black Lung Benefits Act of 1972, which required coal operators to compensate certain miners and their survivors for death or disability due to black lung disease caused by employment in coal mines. Coal operators challenged the provisions of the Act relating to miners who were no longer employed in the industry, arguing that those provisions violated substantive due process by imposing an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time. In rejecting the operators' challenge, the Court noted that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." The Court observed that stricter limits may apply to Congress' authority when legislation operates in a retroactive manner, but concluded that the assignment of liability for black lung benefits was "justified as a rational measure to spread the costs of the employees' disabilities to those who had profited from the fruits of their labor—the operators and the coal consumers."[358]

[J126] Several years later, the Court confronted a due process challenge to the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). The MPPAA was enacted to supplement the Employee Retirement Income Security Act of 1974 (ERISA), which established the Pension Benefit Guaranty Corporation (PBGC) to administer an insurance program for vested pension benefits. For a temporary period, the PBGC had discretionary authority to pay benefits upon the termination of multi-employer pension plans, after which insurance coverage would become mandatory. If the PBGC exercised that authority, employers who had contributed to the plan during the five years before its termination faced liability for an amount proportional to their share of contributions

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357 United States v. Carlton, 512 U.S. 26, 30–35 (1994).

358 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15–18 (1976).

to the plan during that period. Despite Congress' effort to insure multi-employer plan benefits through ERISA, many multi-employer plans were in a precarious financial position as the date for mandatory coverage approached. After a series of hearings and debates, Congress passed the MPPAA, which imposed a payment obligation upon any employer withdrawing from a multi-employer pension plan, the amount of which depended on the employer's share of the plan's unfunded vested benefits. The MPPAA applied retroactively to withdrawals within the five months preceding the statute's enactment. In *R.A. Gray*, an employer that had participated in a multi-employer pension plan brought a due process challenge to the statutory liability stemming from its withdrawal from the plan four months before the MPPAA was enacted. Relying on *Turner Elkhorn*, the Court rejected the employer's claim. It was rational, the Court determined, for Congress to impose retroactive liability "to prevent employers from taking advantage of a lengthy legislative process [by] withdrawing while Congress debated necessary revisions in the statute." In addition, as the MPPAA "progressed through the legislative process, Congress advanced the effective date chosen so that it would encompass only that retroactive time period that Congress believed would be necessary to accomplish its purposes." Accordingly, the Court concluded that the MPPAA exemplified the "customary congressional practice" of enacting "retroactive statutes confined to short and limited periods required by the practicalities of producing national legislation."[359]

[J127] The Court again considered the constitutionality of the MPPAA in *Connolly*, which presented the question whether the Act's withdrawal liability provisions effected an unconstitutional taking. The action was brought by trustees of a multi-employer pension plan that, under collective bargaining agreements, received contributions from employers on the basis of the hours worked by their employees. The Court agreed that the liability imposed by the MPPAA constituted a permanent deprivation of assets, but it rejected the notion that "such a statutory liability to a private party always constitutes an uncompensated taking prohibited by the Fifth Amendment." "In the course of regulating commercial and other human affairs," the Court explained, "Congress routinely creates burdens for some that directly benefit others." Consistent with *Gray* and *Turner Elkhorn*, the Court reasoned that legislation "is not unlawful solely because it upsets otherwise settled expectations." Moreover, given its holding in *Gray* that the MPPAA did not violate due process, the Court emphasized that "it would be surprising indeed to discover" that the statute effected a taking. Although the employers in *Connolly* had contractual agreements expressly limiting their contributions to the multi-employer plan, the Court observed that "the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." Focusing on the three factors of "particular significance"—the economic impact of the regulation, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action—it determined that the MPPAA did not violate the Takings Clause. The governmental action at issue was not a physical invasion of employers' assets; rather, it safeguarded the participants in multi-employer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. In addition, although the amounts assessed under the MPPAA were substantial, the Court found it important that "[t]he assessment of withdrawal liability [wa]s not made in a vacuum, but directly depend[ed] on the relationship between the employer and the plan to which it had made contributions."

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[359] Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 720–31 (1984).

Further, a significant number of provisions in the Act moderated and mitigated the economic impact of an individual employer's liability. Accordingly, the Court found "nothing to show that the withdrawal liability actually imposed on an employer [would] always be out of proportion to its experience with the plan." Nor did the MPPAA interfere with employers' reasonable investment-backed expectations, for, by the time of the MPPAA's enactment, "[p]rudent employers . . . had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations." For those reasons, the Court determined that "fairness and justice" did not require anyone, other than the withdrawing employers and the remaining parties to the pension agreements, to bear the burden of funding employees' vested benefits.[360]

[J128] The Court once more faced challenges to the MPPAA under the Due Process and Takings Clauses in *Concrete Pipe*. There, the Court first rejected the employer's substantive due process challenge. Since the withdrawing employer's liability to the plan was based on the proportion of the plan's contributions (and coincident service credits) provided by the employer during the employer's participation in the plan, the imposition of withdrawal liability was clearly rational. Further, relying on *Connolly*, the Court rejected petitioner's takings claim. In doing so, it noted, *inter alia*, that, although the employer's liability under the MPPAA exceeded ERISA's original cap on withdrawal liability, there was "no reasonable basis to expect that [ERISA's] legislative ceiling would never be lifted."[361]

[J129] In *Eastern Enterprises*, the Court considered a challenge under the Due Process and Takings Clauses to the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), which established a mechanism for funding health care benefits for retirees from the coal industry and their dependents. In 1946, a labor agreement between coal operators and the United Mine Workers of America (UMWA) led to the creation of benefit funds that provided for the medical expenses of miners and their dependents, with the precise benefits determined by UMWA-appointed trustees. Those trusts served as the model for the United Mine Workers of America Welfare and Retirement Fund (1947 W&R Fund), which was established by the National Bituminous Coal Wage Agreement of 1947 (1947 NBCWA). The Fund used proceeds of a royalty on coal production to provide benefits to miners and their families, and trustees determined benefit levels and other matters. The 1950 NBCWA created a new fund (1950 W&R Fund), which used a fixed amount of royalties for benefits, gave trustees the authority to establish and adjust benefit levels so as to remain within the budgetary restraints, and did not guarantee lifetime health benefits for retirees and their dependents. The 1950 W&R Fund continued to operate with benefit levels subject to revision until the Employee Retirement Income Security Act of 1974 (ERISA) introduced specific funding and vesting requirements for pension plans. To comply with ERISA, the UMWA and the Bituminous Coal Operators' Association entered into the 1974 NBCWA, which created four new trusts. It was the first agreement to expressly establish health benefits for retirees, but it did not alter the employers' obligation to contribute a fixed amount of royalties, nor did it extend employers' liability beyond the life of the agreement. Miners who retired before 1976 were covered by the 1950 Benefit Plan and Trust (1950 Benefit Plan), and those retiring after 1975 were covered by the 1974 Benefit Plan and Trust (1974 Benefit Plan).

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[360] Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 222–27 (1986).

[361] Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 636–47 (1993).

The increase in benefits and other factors—the decline in coal production, the retirement of a generation of miners, and rapid acceleration in health care costs—quickly caused financial problems for the 1950 and 1974 Benefit Plans. To ensure the Plans' solvency, the 1978 NBCWA obligated signatories to make sufficient contributions to maintain benefits as long as they were in the coal business. As the Plans continued to suffer financially, employers began to withdraw, leaving the remaining signatories to absorb the increasing cost of covering retirees left behind. Ultimately, Congress passed the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) to stabilize funding and provide for benefits to retirees by merging the 1950 and 1974 Benefit Plans into a new fund (Combined Fund) that provided substantially the same benefits as provided by the 1950 and 1974 Plans and was funded by premiums assessed against coal operators that had signed any NBCWA or other agreement requiring contributions to the 1950 or 1974 Benefit Plans. The Court decided that it was unconstitutional for Congress to require Eastern Enterprises to pay the health care costs of retired miners who worked for Eastern before 1965, when Eastern stopped mining coal. A four-Justice plurality found that the Coal Act's allocation of liability to Eastern violated the Takings Clause. The plurality noted that legislation may be unconstitutional "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and if the extent of that liability is substantially disproportionate to the parties' experience." The Coal Act's allocation scheme, as applied to Eastern, presented such a case. As to the economic impact, Eastern's Coal Act liability was substantial, and the company was clearly deprived of the $50 to $100 million it should pay to the Combined Fund. Moreover, Eastern's statutory liability for multi-employer plan benefits should reflect some proportionality to its experience with the plan. Eastern had contributed to the 1947 and 1950 W&R Funds, but it had ceased its coal mining operations in 1965 and had neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans established under the 1974, 1978, or subsequent NBCWAs. It was the latter agreements, however, that first suggested an industry commitment to funding lifetime health benefits for retirees and their dependents. During the years that Eastern employed miners, such benefits were far less extensive than under the 1974 NBCWA, were unvested, and were fully subject to alteration or termination. For similar reasons, the Coal Act substantially interfered with Eastern's reasonable investment-backed expectations. It operated retroactively, reaching back 30 to 50 years to impose liability based on Eastern's activities between 1946 and 1965. Thus, the Coal Act's scheme for allocating Combined Fund premiums was "not calibrated either to Eastern's past actions or to any agreement—implicit or otherwise—by the company. Nor would the pattern of the Federal Government's involvement in the coal industry have given Eastern 'sufficient notice' that lifetime health benefits might be guaranteed to retirees several decades later." Although, under *Turner Elkhorn*, Eastern might be responsible for employment-related health problems of all former employees, whether or not the cost was foreseen at the time of employment, there was no such connection in that case. Since the Coal Act "single[d] out certain employers to bear a burden that [wa]s substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers [had] made or to any injury they [had] caused, the [challenged] governmental action implicate[d] fundamental principles of fairness underlying the Takings Clause."[362] Justice Kennedy concurred in the judgment, concluding, on similar grounds,

[362] E. Enters. v. Apfel, 524 U.S. 498, 528–37 (1998), (opinion of Justice O'Connor, in which Rehnquist, C.J., and Scalia, and Thomas, JJ., joined).

that application of the Coal Act to Eastern would violate the Due Process Clause.[363] The four dissenters agreed with Justice Kennedy that the Takings Clause did not apply, because the case did not implicate a "specific interest in physical or intellectual property" but held that the statute was not repugnant to the Due Process Clause.[364]

[J130] In 1980, the Michigan legislature raised maximum weekly workers' compensation benefits and provided an annual supplemental adjustment to workers injured before 1980. The following year, it enacted a statute allowing employers to decrease workers' compensation benefits to those disabled employees eligible to receive wage-loss compensation from other employer-funded sources. Some employers, including *General Motors*, took the position that the 1981 law's "benefit coordination" provision allowed them to reduce workers' compensation benefits to workers injured before the statute's effective date, who were receiving benefits from other sources. The state supreme court ultimately accepted this interpretation. In 1987, the Michigan legislature enacted a statute that had the effect of requiring General Motors to repay workers' compensation benefits it had withheld in reliance on a 1981 workers' compensation statute. The purpose of this statute was to correct the unexpected results of the Michigan supreme court's opinion. "The retroactive repayment provision of the 1987 statute was a rational means of meeting this legitimate objective: it preserved the delicate legislative compromise that had been struck by the 1980–1981 laws—giving workers injured before 1982 their full benefits without coordination, but not the greater increases given to subsequently injured workers. Also, it equalized the payments made by employers who had gambled on the [state supreme court's] decision with those made by employers who had not." Under these considerations, the Court held that the 1987 statute did not violate the Due Process Clause.[365]

8. Limitations on Fiscal Powers[366]

[J131] "A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government."[367] Congress may spend money in aid of the "general welfare" (Article I, Section 8, of the Constitution). In drawing the line between what is "general" welfare, and what is particular, the determination of Congress must be respected by the courts, unless it is "clearly wrong, a display of arbitrary power, not an exercise of judgment." Moreover, the concept of "general

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[363] *Id.* at 539–50.

[364] *Id.* at 553–67 (dissenting opinion of Justice Breyer, in which Stevens, Ginsburg, and Souter, JJ., joined). The dissenters reasoned that (1) for many years, Eastern benefited from the labor of miners; (2) Eastern helped to create conditions that led the miners to expect continued health care benefits for themselves and their families after they retired; (3) Eastern, until 1987, continued to draw sizable profits from the coal industry though a wholly owned subsidiary.

[365] Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

[366] *See also* paras. J119 *et seq. (retroactive taxation)*; paras. J140 *et seq. (Dormant Commerce Clause)*; paras. K181 *et seq. (Equal Protection Clause)*; paras. I8, I9, I18, I229, I230 *(freedom of speech)*; paras. I276 *et seq. (taxation of the press)*; paras. H48 *et seq. (free exercise of religion)*; paras. H105 *et seq. (establishment of religion).*

[367] United States v. Butler, 297 U.S. 1, 61 (1936). If an exaction is clearly a penalty for an unlawful act, it cannot be converted into a tax by calling it such. *See* United States v. La Franca, 282 U.S. 568, 572 (1931). *See, in extenso,* para. E12.

welfare" is not static but adapts itself to the necessities of the times.[368] Similarly, under the Fourteenth Amendment, "state taxing power can be exerted only to effect a public purpose, and does not embrace the raising of revenue for private purposes. . . . [However,] the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest."[369] The requirement that a tax shall be for a public purpose "has regard to the use to be made of the revenue derived from the tax, and not to any ulterior motive or purpose which may have influenced the Legislature in passing the tax statute. And a tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class."[370]

[J132] "[T]he appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution."[371] In this context, the Due Process Clause is applicable to a taxing statute if the act is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. . . . Collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. . . . Nor may a tax within the lawful power of a state be judicially stricken down under the Due Process Clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses, . . . unless . . . its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state."[372] A tax statute does not lose its character as a tax or revenue-raising measure, and may not be invalidated as too burdensome under the Due Process Clause, merely because "the taxing authority, directly or through an instrumentality enjoying various forms of tax exemption, competes with the taxpayer in a manner thought to be unfair by the judiciary. This approach would demand not only that the judiciary undertake to separate those taxes that are too burdensome from those that are not, but also would require judicial oversight of the terms and circumstances under which the government or its tax-exempt instrumentalities may undertake to compete with the private sector."[373] "Moreover, there is

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368 *See* Helvering v. Davis, 301 U.S. 619, 640–41 (1937).

369 Carmichael v. S. Coal Co., 301 U.S. 495, 514 (1937).

370 Magnano Co. v. Hamilton, 292 U.S. 40, 43 (1934).

371 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 627 (1981).

372 Magnano Co. v. Hamilton, 292 U.S. 40, 44–45 (1934). In that case, the Court sustained against due process attack a state excise tax of 1 cent per pound on all butter substitutes sold in the state, although the tax might result in destroying the intra-state business of appellant. *See also Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 48–49 (1921), where the Court said: "Even if the tax should destroy a business, it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. . . . We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation."

373 City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 376–77 (1974). There, the Court sustained a city ordinance imposing an increased 20-percent tax on the gross receipts from parking or storing automobiles at non-residential parking places. In doing so, the Court rejected the proposition that the tax was so unreasonably high and burdensome that, in the context of

no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity."[374]

[J133] The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[375] However, it requires no physical presence in a state for the imposition of duty to collect a use tax; "if a foreign corporation purposefully avails itself of the benefits of an economic market in a State, it may subject itself to the State's" taxing power.[376] Hence, the Due Process Clause does not preclude a state from requiring an out-of-state mail-order house, with neither outlets nor sales representatives in the state, to collect and pay a use tax on goods purchased for use in the state. "Such a corporation clearly has fair warning that its activity may subject it to the jurisdiction of a foreign sovereign."[377]

[J134] Moreover, the Due Process Clause requires that "the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State."[378] "[T]he proper inquiry looks to 'the underlying unity or diversity of business enterprise,' . . . not to whether the non-domiciliary parent derives some economic benefit—as it virtually always will—from its ownership of stock in another corporation."[379] "Because of the complications and uncertainties in allocating the income of multi-state businesses to the several States, [the Court] permit[s] States to tax a corporation on an apportionable share of the multi-state business carried on in part in the taxing State."[380] That is the unitary business principle. The unitary business rule "is a recognition of two imperatives: the States' wide authority to devise formulae for an accurate assessment of a corporation's intra-state value or income and the necessary limit on the States' authority to tax value or income which cannot in fairness be attributed to the taxpayer's activities within the State."[381] "A State may tax a proportionate share of the income of a

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competition from public lots operated by the city parking authority, which enjoyed certain tax exemptions and other advantages, the ordinance was contrary to the Due Process Clause. The parking tax ordinance recited that "[n]on-residential parking places for motor vehicles, by reason of the frequency rate of their use, the changing intensity of their use at various hours of the day, their location, their relationship to traffic congestion and other characteristics, present problems requiring municipal services and affect the public interest, differently from parking places accessory to the use and occupancy of residences." The Court concluded that "[b]y enacting the tax, the city insisted that those providing and utilizing non-residential parking facilities should pay more taxes to compensate the city for the problems incident to off-street parking. The city was constitutionally entitled to put the automobile parker to the choice of using other transportation or paying the increased tax." *Id.* at 378–79.

374 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622 (1981).

375 Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954).

376 Quill Corp. v. N. Dakota, 504 U.S. 298, 307 (1992).

377 *Id.* at 308. However, the Commerce Clause requires a taxpayer's "physical presence" in the taxing jurisdiction before that jurisdiction can constitutionally impose a sales or use tax. *Id.* at 317–18. *See also* para. J142, n.420.

378 Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978).

379 F.W. Woolworth Co. v. Taxation and Revenue Dep't of New Mexico, 458 U.S. 354, 363–64 (1982), *quoting* Mobil Oil Corp. v. Comm'r of Taxes of Vermont, 445 U.S. 425, 440 (1980).

380 Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 778 (1992).

381 *Id.* at 780.

non-domiciliary corporation that carries out a particular business both inside and outside that State. . . . The State, however, may not tax income received by a corporation from an 'unrelated business activity' which constitutes a 'discrete business enterprise.'"[382]

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[382] Hunt-Wesson, Inc. v. Franchise Tax Bd. of California, 528 U.S. 458, 460 (2000), *quoting* Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 773 (1992). "[T]his 'nonunitary' income may not constitutionally be taxed by a State other than the corporation's domicile, unless there is some other connection between the taxing state and the income." *See* Hunt-Wesson, *supra*, at 464.

On the determination whether a business is "unitary," *see Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 304, n.1 (1994), *citing* Allied-Signal, *supra*, at 781–82 ("business may be treated as unitary, compatibly with constitutional limitations, if it exhibits *functional integration, centralization of management*, and *economies of scale*") (emphasis added); Edison California Stores, Inc. v. McColgan, 30 Cal.2d 472, 481, 183 P.2d 16, 21 (1947) ("If the operation of the portion of the business done within the state is dependent upon or contributes to the operation of the business without the state, the operations are unitary."); Butler Bros. v. McColgan, 17 Cal.2d 664, 678, 111 P.2d 334, 341 (1941), *aff'd*, 315 U.S. 501 (1942) (A business is unitary if there is "unity of ownership; unity of operation as evidenced by central purchasing, advertising, accounting and management divisions; and unity of use of its centralized executive force and general system of operation."). "[A] unitary business may exist without a flow of goods between the parent and subsidiary if, instead, there is a flow of value between the entities." *See* Allied-Signal, *supra*, at 783, *citing* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 178 (1983).

In *ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation and Revenue Department of New Mexico*, 458 U.S. 354 (1982), the Court struck down a state attempt to include in the apportionable tax base income not derived from the unitary business. In those cases the states sought to tax unrelated business activity.

The principal question in *ASARCO* concerned Idaho's attempt to include in the apportionable tax base of ASARCO certain dividends received from, among other companies, the Southern Peru Copper Corporation. ASARCO was one of four of Southern Peru's shareholders, owning 51.5 percent of its stock. Under an agreement with the other shareholders, ASARCO was prevented from dominating Southern Peru's board of directors. ASARCO had the right to appoint six of Southern Peru's 13 directors, while eight votes were required for the passage of any resolution. Southern Peru was in the business of producing unrefined copper (a non-ferrous ore), some of which it sold to its shareholders. ASARCO purchased approximately 35 percent of Southern Peru's output, at average representative trade prices quoted in a trade publication and over which neither Southern Peru nor ASARCO had any control. The Court concluded that ASARCO's Idaho silver mining and Southern Peru's autonomous business were insufficiently connected to permit the two companies to be classified as a unitary business. *See* Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 780–81 (1992), *discussing* ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982).

In *Woolworth*, the taxpayer company was domiciled in New York and operated a chain of retail variety stores in the United States. In the company's apportionable state tax base, New Mexico sought to include earnings from four subsidiaries operating in foreign countries. The subsidiaries also engaged in chain-store retailing. The Court "observed that, although the parent company had the potential to operate the subsidiaries as integrated divisions of a single unitary business, that potential was not significant if the subsidiaries in fact comprise discrete business operations." *See* Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 780–81 (1992), *discussing Woolworth*. The Court inquired whether any of the three objective indicia of a unitary business were present. The Court found that, "except for the type of occasional oversight—with respect to capital structure, major debt, and dividends—that any parent gives to an investment in a subsidiary," none of these factors was present. The subsidiaries were found not to be part

[J135] The Sixteenth Amendment, ratified in 1913, states: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." "While it is true that economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset. Gain may occur as a result of exchange of property, payment of the taxpayer's indebtedness, relief from a liability, or other profit realized from the completion of a transaction."[383] Indeed, the Court "has recognized that 'income' may be realized by a variety of indirect means."[384] For example, payment of an employee's income taxes by an employer constitutes income to the employee.[385] Noting that "the substance, not the form, of the agreed transaction controls,"[386] *Diedrich* held that "a donor who makes a gift of property on condition that the donee pay the resulting gift taxes realizes taxable income to the extent that the gift taxes paid by the donee exceed the donor's adjusted basis in the property."[387]

[J136] The Uniformity Clause conditions Congress' power to impose indirect taxes. It provides that "all Duties, Imposts and Excises shall be uniform throughout the United States" (Article I, Section 8, Clause 1 of the Constitution). The general purpose of the Clause was to limit the exercise of the federal power over commerce to the disadvantage of particular states.[388] The Court has held that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found."[389] The

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of a unitary business. *See* F.W. Woolworth Co. v. Taxation and Revenue Dep't of New Mexico, 458 U.S. 354, 369 (1982).

In *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), the taxpayer was a vertically integrated corporation that manufactured custom-ordered paperboard packaging. California sought to tax income it received from its wholly owned and mostly owned foreign subsidiaries, each of which was in the same business as the parent. The foreign subsidiaries were given a fair degree of autonomy: they purchased only 1 percent of their materials from the parent, and personnel transfers from the parent to the subsidiaries were rare. The Court recognized, however: "In certain respects, the relationship between appellant and its subsidiaries was decidedly close. For example, approximately half of the subsidiaries' long-term debt was either held directly, or guaranteed, by appellant. Appellant also provided advice and consultation regarding manufacturing techniques, engineering, design, architecture, insurance, and cost accounting to a number of its subsidiaries, either by entering into technical service agreements with them or by informal arrangement. Finally, appellant occasionally assisted its subsidiaries in their procurement of equipment, either by selling them used equipment of its own or by employing its own purchasing department to act as an agent for the subsidiaries." Based on these facts, the Court found that the taxpayer had not met its burden of showing by "clear and cogent evidence" that the state sought to tax extra-territorial values. *Id.* at 171–75.

383 Helvering v. Bruun, 309 U.S. 461, 469 (1940).

384 Diedrich v. Comm'r, 457 U.S. 191, 195 (1982).

385 *See* Old Colony Trust Co. v. Comm'r, 279 U.S. 716, 729 (1929).

386 Diedrich v. Comm'r, 457 U.S. 191, 195 (1982).

387 *Id.* at 199–200.

388 *See* United States v. Ptasynski, 462 U.S. 74, 81 (1983).

389 Head Money Cases, 112 U.S. 580, 594 (1884). In that case, the Court recognized that, in imposing a head tax on persons coming into the country, Congress could choose to tax those persons, who immigrated through the ports, but not those who immigrated at inland cities. As the Court explained, "the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation." The tax applied to all ports alike, and the Court concluded that "there is substantial uniformity within the meaning and purpose of the Constitution." *Id.* at 595.

Clause does not prevent Congress "from defining the subject of a tax by drawing distinctions between similar classes."[390] Moreover, the Clause does not preclude "all geographically defined classifications. . . . The Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems. . . . But where Congress does choose to frame a tax in geographic terms, the Court will examine the classification closely to see if there is actual geographic discrimination."[391]

9. The Commerce Clause

a. Federal Commerce Power

[J137] The Constitution delegates to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Article I, Section 8, Clause 3). The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, . . . is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . [But it does not concern that commerce,] which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States."[392]

[J138] In *United States v. Lopez*, the Court has identified three broad categories of activity that Congress may regulate under its commerce power. "First, Congress may regulate the use of the channels of interstate commerce."[393] "Second, Congress is empowered

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Knowlton v. Moore, 178 U.S. 41, 83–106 (1900), represents the Court's most detailed consideration of the Uniformity Clause. The issue in *Knowlton* presented a variation on the question addressed in the *Head Money Cases*. Rather than distinguishing between port and inland cities, the statute at issue in *Knowlton* imposed a progressive tax on legacies and varied the rate of the tax among classes of legatees. The argument was that Congress could not distinguish among legacies or people receiving them; it was required to tax all legacies at the same rate or none. In rejecting this argument, the Court reaffirmed its conclusion in the *Head Money Cases* that Congress may distinguish between similar classes in selecting the subject of a tax.

390 United States v. Ptasynski, 462 U.S. 74, 82 (1983).

391 *Id.* at 84–85. That case involved a provision of The Crude Oil Windfall Profit Tax Act of 1980 that exempted from the tax imposed by the Act domestic crude oil produced from wells located north of the Arctic Circle or on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline system. Noting that nothing in the Act's legislative history suggested that Congress intended to grant Alaska an undue preference at the expense of other oil-producing states, and that there was ample evidence of the disproportionate costs and difficulties—the fragile ecology, the harsh environment, and the remote location—associated with extracting oil from Alaska, the Court held that Congress could not be faulted for determining, based on neutral factors, that "exempt Alaskan oil" required separate favorable treatment. Such determination reflected "Congress' considered judgment that unique climatic and geographic conditions require[d] that oil produced from this exempt area be treated as a separate class of oil. . . . Accordingly, Congress chose to exempt oil produced in the defined region from the windfall profit tax. It determined that imposing such a tax would discourage exploration and development of reservoirs in areas of extreme climatic conditions.'" *Id.* at 78–79.

392 Gibbons v. Ogden, 9 Wheat. 1, 194–96 (1824).

393 United States v. Lopez, 514 U.S. 549, 558 (1995), *citing* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) ("The authority of Congress to keep the channels of

to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[394] "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce,"[395] even if they "may not be regarded as commerce,"[396] i.e., "those activities that exert a *substantial* economic effect on interstate commerce."[397] When Congress has determined that an activity affects inter-state commerce, the courts need inquire only whether the finding is rational. "This established, the only remaining question for judicial inquiry is whether the means chosen by Congress are reasonably adapted to the end permitted by the Constitution. . . . The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme."[398]

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interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.").

394 United States v. Lopez, 514 U.S. 549, 558 (1995), *citing* S. Ry. Co. v. United States, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act, as applied to vehicles used in intra-state commerce, which aimed to avoid danger to persons and property moving in interstate commerce).

395 United States v. Lopez, 514 U.S. 549, 558–59 (1995).

396 Wickard v. Filburn, 317 U.S. 111, 125 (1942).

397 *Id.* (emphasis added). "[T]he scope of the interstate commerce power 'must be considered in the light of the dual system of government and may not be extended so as to embrace effects upon inter-state commerce so *indirect and remote* that to embrace them, in view of the complexity of the modern society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *See* United States v. Lopez, 514 U.S. 549, 557 (1995), *quoting* Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (emphasis added). Congress therefore may not "regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce." *See* United States v. Morrison, 529 U.S. 598, 608, 617 (2000).

398 Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). *See also* Gonzales v. Raich, 545 U.S. 1, 22 (2005) (in assessing the scope of Congress' Commerce Clause authority, the Court need not determine whether the activities at issue, "taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding").

In this context, the Court has "never required Congress to legislate with scientific exactitude. When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *See* Gonzales v. Raich, 545 U.S. 1, 17 (2005), *citing* Perez v. United States, 402 U.S. 146, 154–55 (1971), *quoting, in turn*, Westfall v. United States, 274 U.S. 256, 259 (1927) ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so."). In this vein, the Court has not declared "that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. . . . [t]he Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *See* Maryland v. Wirtz, 392 U.S. 183, 196, n.27 (1968).

Not-for-profit institutions are subject to laws regulating commerce. In *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937), for example, the Court held the National Labor Relations Act, as applied to the Associated Press' (A.P.) newsgathering activities, to be an enactment entirely within Congress' Commerce Clause power, despite the fact that the A.P. did not sell news and did not operate for a profit. Noting that the A.P.'s activities "involve[d] the constant use of channels of interstate and foreign communication," the Court concluded that its operations "amount[ed] to commercial intercourse, and such intercourse was commerce within the meaning of the Constitution." *Id.* at 128–129.

[J139] The Court has upheld a wide variety of congressional Acts regulating intra-state economic activity where it has concluded that the activity substantially affected inter-state commerce. Examples include the regulation of intra-state coal mining;[399] intra-state extortionate credit transactions;[400] restaurants utilizing substantial inter-state supplies,[401] inns and hotels catering to inter-state guests;[402] production and consumption of home-grown wheat;[403] and local cultivation and use of marijuana in compliance with state law.[404] However, congressional authority under the Commerce Clause cannot be converted "to a general police power of the sort retained by the States."[405] A federal law making it an offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone" exceeds the authority of Congress to regulate inter-state commerce, for it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."[406] Similarly, the Commerce Clause does not give Congress the authority to enact a statute providing a federal civil remedy for the victims of gender-motivated violence.[407]

Likewise, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997), the Court held that, even though petitioner's church camp for children did not make a profit, it was "unquestionably engaged in commerce, not only as a purchaser, . . . but also as a provider of goods and services."

399 Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 275–83 (1981).

400 Perez v. United States, 402 U.S. 146, 155–56 (1971).

401 Katzenbach v. McClung, 379 U.S. 294, 299–301 (1964).

402 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252–53 (1964).

403 Wickard v. Filburn, 317 U.S. 111, 128 (1942).

404 Gonzales v. Raich, 545 U.S. 1, 22 (2005). There, "[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, [the Court had] no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intra-state manufacture and possession of marijuana would leave a gaping hole in" the Controlled Substances Act.

405 United States v. Lopez, 514 U.S. 549, 567 (1995).

406 *Id.* at 551. The Court also observed that the link between gun possession and a substantial effect on inter-state commerce was attenuated. The United States argued that the possession of guns may lead to violent crime, and that violent crime "can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe." The government also argued that the presence of guns at schools poses a threat to the educational process, which, in turn, threatens to produce a less efficient and productive workforce, which will negatively affect national productivity and thus inter-state commerce. The Court rejected these "costs of crime" and "national productivity" arguments, because they would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to inter-state commerce." *Id.* at 564. The Court noted that, under this reasoning "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under these theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Id.* at 564.

407 United States v. Morrison, 529 U.S. 598, 608–19 (2000). Congress "has the power to authorize state regulations that burden or discriminate against interstate commerce, . . . but [the Court] will not assume that it has done so unless such an intent is clearly expressed." *See* Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003).

b. Restrictions on State Regulatory Powers

[J140] The constitutional provision of power "to regulate Commerce . . . among the several States" has also been seen as a limitation on state regulatory powers, even without implementing legislation by Congress. In its negative aspect, the Commerce Clause prohibits "economic protectionism—that is, *regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.*"[408] This reading effectuates the Framers' purpose to prevent a state "from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear."[409] Hence, the dormant Commerce Clause prevents "state taxes and regulatory measures impeding free private trade in the national marketplace."[410]

[J141] The Court has generally distinguished between two types of impermissible state regulations under the Commerce Clause. "[W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[411] Where, however, "a state statute clearly discriminates against interstate commerce,"[412] "either on its face or in prac-

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[408] Associated Indus. of Missouri v. Lohman, 511 U.S. 641, 647 (1994) (emphasis added). "It is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *See* Goldberg v. Sweet, 488 U.S. 252, 266 (1989).

[409] Oklahoma Tax Comm'n v. Jefferson Lines, Inc. 514 U.S. 175, 180 (1993). *See also* Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977), referring to the Commerce Clause's overriding requirement of a national "common market."

[410] Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980). "[I]f a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 93 (1984).

From 1919 until 1933, the Eighteenth Amendment to the Constitution totally prohibited "the manufacture, sale, or transportation of intoxicating liquors" in the United States and its territories. Section 1 of the *Twenty-first Amendment* repealed that prohibition, and Section 2 delegated to the states the power to prohibit commerce in, or the use of, alcoholic beverages. "The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass non-uniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." *See Granholm v. Heald*, 544 U.S. 460, 484–85 (2005) *(per curiam)*, where the Court held that two state laws which allowed in-state wineries to sell wine directly to consumers in that state but prohibited out-of-state wineries from doing so, or, at the least, made direct sales impractical from an economic standpoint, violated the Commerce Clause and were neither authorized nor permitted by the Twenty-first Amendment.

[411] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). *See also* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986). Indeed, "the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980).

In *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), the Court struck down a state statute limiting passenger trains to 14 cars and freight trains to 70 cars. In so doing, the Court noted that the statute afforded "at most slight and dubious advantage, if any" with respect to safety, and concluded that the state safety interest was "outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service."

[412] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992).

tical effect,"[413] it will be struck down, unless "it serves a legitimate local purpose, [which] could not be served as well by available nondiscriminatory means."[414] Of course, there is no clear line separating these categories. "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity."[415] "[F]acial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."[416] "The burden to show discrimination rests on the party challenging the validity of the statute,[417] but, when discrimination against inter-state commerce is demonstrated, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[418] "Furthermore, when considering the purpose of a challenged statute, th[e] Court is not bound by '[the name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law."[419]

[J142] With respect to state taxes, the Court considers "not the formal language of the tax statute, but rather its practical effect, and sustains a state tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[420] A discriminatory tax will

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413 Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

414 Maine v. Taylor, 477 U.S. 131, 138 (1986).

415 Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

416 Hughes v. Oklahoma, 441 U.S. 322, 337 (1979)

417 *Id.* at 336.

418 Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333, 353 (1977)

419 Hughes v. Oklahoma, 441 U.S. 322, 336 (1979), *quoting* Lacoste v. Louisiana Dep't of Conservation, 263 U.S. 545, 550 (1924).

420 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the state of New York attempted to protect its dairy farmers from the adverse effects of Vermont competition by establishing a single minimum price for all milk, whether produced in New York or elsewhere. The Court decided to strike it down, reasoning that "[n]either the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin." *Id.* at 527. "Thus, because the minimum price regulation had the same effect as a tariff or customs duty—neutralizing the advantage possessed by lower cost out-of-state producers—it was held unconstitutional." See W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994), *discussing Complete Auto Transit.*

In a number of cases involving the application of state taxing statutes to out-of-state sellers, the Court has relied on both the *Due Process Clause* and the Commerce Clause. Although the two claims are closely related, the clauses pose distinct limits on the taxing powers of the States. The Due Process Clause and the Commerce Clause reflect different constitutional concerns. "Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that [the Court] ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. [The Court has,] therefore, often identified 'notice' or 'fair warning' as the analytic touchstone of due process nexus analysis. In contrast, the Commerce Clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. . . . Thus, the 'substantial-nexus' requirement is not, like due process' 'minimum-con-

not be invalidated if the state shows that "it advances a legitimate local purpose, which cannot be adequately served by reasonable nondiscriminatory alternatives."[421] The Court has also recognized, that "a facially discriminatory tax may still survive Commerce Clause scrutiny if it is a truly 'compensatory tax designed simply to make interstate commerce bear a burden already borne by intrastate commerce.'"[422] The Court's cases have distilled three conditions necessary for a valid compensatory tax. First, a state "must iden-

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tacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. Accordingly, . . . a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *See* Quill Corp. v. N. Dakota, 504 U.S. 298, 312–13, (1992). For example, while the Due Process Clause does not prohibit a state from imposing the duty of use tax collection and payment upon a seller whose only connection with the state is through common carrier or the United States mail, the Commerce Clause requires a taxpayer's "physical presence" in the taxing jurisdiction before that jurisdiction can constitutionally impose a use tax. *See id.* at 305–18.

When a court examines whether a state tax violates the *Foreign Commerce Clause*, "[i]n addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speak[ing] with one voice when regulating commercial relations with foreign governments.'" *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979). *See also* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983).

421 *See, e.g.*, New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988). "A pure *subsidy* funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." Nevertheless when a non-discriminatory state tax on products is coupled with a subsidy to local producers hurt by the tax, the State violates the cardinal principle that it may not "benefit in-state economic interests by burdening out-of-state competitors." *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994) (emphasis added).

Although "[d]irect subsidization of domestic industry does not ordinarily run afoul of the [dormant Commerce Clause,] discriminatory taxation of out-of-state manufacturers does." *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988), where the Court found unconstitutional, under the Commerce Clause, an Ohio tax scheme that provided a sales tax credit for ethanol produced in state or manufactured in another state, to the extent that state gave similar tax advantages to ethanol produced in Ohio. Similarly, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), the Court held that an otherwise generally applicable state property tax violates the Commerce Clause, if its exemption for property owned by charitable institutions excludes organizations operated principally for the benefit of non-residents.

In *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366, 378–79 (1976), the Court struck down a Mississippi "reciprocity clause," holding that a *"reciprocity" requirement* cannot be justified as a response to another state's unreasonable burden on commerce. The regulation at issue in *Cottrell* permitted milk from out of state to be sold in Mississippi, only if the state of origin accepted Mississippi milk on a reciprocal basis. Mississippi put forward, among other arguments, the assertion that the reciprocity requirement was in effect a free-trade provision, advancing the identical national interest served by the Commerce Clause. In response, the Court said that "Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement." In *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 275 (1988), the Court made clear that it makes no difference for purposes of Commerce Clause analysis whether "the effect of a State's refusal to accept the offered reciprocity is not total elimination of all transport of the subject product into or out of the offering State, [or] the only effect of refusal is that the out-of-state product is placed at a substantial commercial disadvantage through discriminatory tax treatment."

422 Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996), *quoting* Associated Indus. of Missouri v. Lohman, 511 U.S. 641, 647 (1994).

tify the intrastate tax for which it seeks to compensate, and . . . this intrastate tax must serve some purpose for which the State may otherwise impose a burden on interstate commerce."[423] "Second, 'the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intra-state commerce.'"[424] "Finally, the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent;' that is, they must be sufficiently similar in substance to serve as mutually exclusive prox[ies] for each other."[425]

[J143] "[A] charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike."[426] In *Evansville*, the Court held that the Commerce Clause does not prohibit states or municipalities from charging commercial airlines a "head tax" on passengers boarding flights at airports within the jurisdiction, to defray the costs of airport construction and maintenance. There, the Court stated: "At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users."[427] Hence, "a levy is reasonable under *Evansville* if it (1) is based on some fair approximation of use of the facilities; (2) is not excessive in relation to the benefits conferred; and (3) does not discriminate against interstate commerce."[428]

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[423] Fulton Corp. v. Faulkner, 516 U.S. 325, 334 (1996).

[424] *Id.* at 332–33, *quoting* Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon, 511 U.S. 103 (1994).

[425] Fulton Corp. v. Faulkner, 516 U.S. 325, 333 (1996), *quoting* Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon, 511 U.S. 103 (1994). In *Fulton*, the Court struck down a state regime that taxed stock held by in-state shareholders only to the degree its issuing corporation participated in inter-state commerce.

In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), the Court upheld the state of Washington's tax on the privilege of using any article of tangible personal property within the state. The statute exempted the use of any article that had already been subjected to a sales tax equal to the use tax or greater, so that the use tax effectively applied only to goods purchased out of state. Although the use tax was itself facially discriminatory, the Court held that the combined effect of the sales and use taxes was to subject intra-state and inter-state commerce to equivalent burdens.

[426] Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 714 (1972).

[427] *Id.* at 716–17.

[428] *See* Nw. Airlines, Inc. v. County of Kent, 510 U.S. 355, 369 (1994).

The charges at issue in *Evansville-Vanderburgh* met those standards. First, the fees did not discriminate against inter-state commerce and travel. "While the vast majority of passengers who board[ed] flights at the airports involved [we]re traveling interstate, both interstate and intrastate flights [we]re subject to the same charges. Furthermore, there [wa]s no showing of any inherent difference between these two classes of flights, such that the application of the same fee to both would amount to discrimination against one or the other. . . . Second, the charges reflect[ed] a fair, if imperfect, approximation of the use of facilities for whose benefit they [we]re imposed." *See* Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 717 (1972). The challenged measures exempted in whole or part non-passenger users and certain classes of passengers, such as active members of the military and temporary layovers, deplaning commercial passengers, and passengers on non-commercial flights, non-scheduled commercial flights, and commercial flights on light aircraft. Nevertheless, these exceptions were

10. The Bankruptcy Clause [429]

[J144] Article I, Section 8, Clause 4, of the United States Constitution provides that Congress shall have power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Distinguishing a congressional exercise of power under

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not unreasonable. Third, the airlines did not show these fees to be excessive in relation to costs incurred by the taxing authorities. *Id.* at 718–19.

"Even if the revenues in any one year excee[d] the outlays, it would not follow that the charge is invalid as applied. . . . [T]he validity of the tax is determined by comparing total revenue with total outlays: *i.e.*, a surplus of revenue over outlays in any one year can be off-set against actual deficits of past years, and perhaps against projected deficits of future years." *See* Massachusetts v. United States, 435 U.S. 444, 470, n.25 (1978).

As the Court noted in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 715–16 (1972), its earlier decisions concerning *highway tolls* had established that the states are empowered to develop "uniform, fair and practical" standards for this type of fee. *See, in particular*, Hendrick v. Maryland, 235 U.S. 610, 624 (1915). While the Court invalidated, as wholly unrelated to road use, a toll based on the carrier's seating capacity (*see* Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931); Sprout v. S. Bend, 277 U.S. 163 (1928)), and the amount of gasoline over 20 gallons in the carrier's gas tank (*see* McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 (1940)), the Court sustained numerous tolls based on a variety of measures of actual use, including:

(1) horsepower (Hendrick v. Maryland, 235 U.S. 610 (1915); Kane v. New Jersey, 242 U.S. 160 (1916));
(2) number and capacity of vehicles (Clark v. Poor, 274 U.S. 554 (1927));
(3) mileage within the state (Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1928));
(4) gross-ton mileage (Continental Baking Co. v. Woodring, 286 U.S. 352 (1932));
(5) carrying capacity (Hicklin v. Coney, 290 U.S. 169 (1933)); and
(6) manufacturer's rated capacity and weight of trailers (Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72 (1939)).

The Court had also held that a state may impose a *flat fee for the privilege of using its roads*, without regard to the actual use by particular vehicles, so long as the fee was not excessive (*see* Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n, 295 U.S. 285 (1935); Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs, 332 U.S. 495 (1947)). Nevertheless, this holding was overruled by *American Trucking Associaions, Inc. v. Scheiner*, 483 U.S. 266, 290–96 (1987), where the Court found that a flat tax on trucks for the privilege of using Pennsylvania's roads, which largely helped to raise revenue to improve and maintain the state's highways and bridges—thereby helping to cover costs likely to vary significantly with truck-miles traveled—discriminated against inter-state travel, by imposing a cost per mile upon out-of-state trucks far exceeding the cost per mile borne by local trucks that generally traveled more miles on Pennsylvania roads and did not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads.

In *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 545 U.S. 429, 434–37 (2005), the Court upheld a state's flat $100 annual fee imposed on trucks engaged in intra-state commercial hauling, since (1) the fee did not facially discriminate against inter-state or out-of-state activities or enterprises; (2) the record showed no special circumstances suggesting that the fee operated as anything other than an unobjectionable exercise of the state's police power; (3) the record showed that the flat assessment unfairly discriminated against inter-state truckers, because the costs the fee sought to defray, e.g., those of regulating vehicular size and weight, would seem more likely to vary per-truck or per-carrier than per-mile traveled, a per-truck, rather than a per-mile, assessment was likely fair; (4) petitioners provided no details of their preferred alternative miles-traveled system and failed to point to record evidence showing its practicality. In light of these considerations, the Court found no reason to infer that the state's lump-sum levy on purely local activity erected an impermissible discriminatory road block.

[429] *See also* para. J48.

the Commerce Clause from an exercise under the Bankruptcy Clause is admittedly not an easy task, for the two Clauses are closely related. Although the Court has noted that "[t]he subject of bankruptcies is incapable of final definition," it has defined "bankruptcy" as the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief."[430] Congress' power under the Bankruptcy Clause "extends to all cases where the law causes to be distributed the property of the debtor among his creditors. . . . [It] includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the states [a]re forbidden to do."[431]

[J145] "Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause."[432] "[T]he Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws" to relieve individual debtors.[433] This requirement "is not a straitjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner. A bankruptcy law may be uniform and yet 'may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States.' . . . Thus, uniformity does not require the elimination of any differences among the States in their laws governing commercial transactions."[434] The uniformity requirement, moreover, permits Congress to treat "railroad bankruptcies as a distinctive and special problem," and "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems."[435]

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[430] Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513–14 (1938).

[431] Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186, 188 (1902).

[432] Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 468 (1982).

[433] *Id.* at 472.

[434] *Id.* at 469. There, the Court held that a statute designed to aid one bankrupt railroad violated the uniformity provision of the Bankruptcy Clause. The Court stated: "The conclusion is . . . inevitable that [the statute] is not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of one railroad." *Id.* at 470.

[435] Reg'l R.R. Reorganization Act Cases, 419 U.S. 102, 159 (1974) (3R Act Cases). In *Reconstruction Finance Corp. v. Denver & Rio Grande Western Railroad Co.*, 328 U.S. 495 (1946), the Court sustained the a provision of the Bankruptcy Act authorizing a reorganization court to confirm a plan despite its rejection by creditors. The Court said: "[T]he provisions for confirmation by the courts over the creditors' objection are within the bankruptcy powers of Congress. Those powers are adequate to eliminate claims by administrative valuations with judicial review and they are adequate to require creditors to acquiesce in a fair adjustment of their claims, so long as the creditor gets all the value of his lien and his share of any free assets." *Id.* at 533. *See also* Regional Railroad Reorganization Act Cases, *supra*, at 152–55.

In the same context, the Court has held that bondholders "cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created. But they invested their capital in a public utility that does owe an obligation to the public. . . . [B]y their entry into a railroad enterprise, [they] assumed the risk that, in any depression or any reorganization, the interests of the public would be considered, as well as theirs." *See* Reconstruction Finance Corp., *supra*, at 535–36.

11. The Patent and Copyright Clause [436]

[J146] The Patent and Copyright Clause of the Constitution, Article I, Section 8, Clause 8, empowers Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[437]

[J147] As the text of the Constitution makes plain, "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product."[438] "Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim."[439] "[T]his task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[440] Hence, in considering whether copyright and patent legislation is a rational exercise of the authority conferred by the Clause, courts should defer substantially to the judgment of Congress.[441]

"While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders." *See* Penn Cent. Merger Cases, 389 U.S. 486, 510–11 (1968).

436 *See also* paras. I98–I100 *(copyright legislation and freedom of expression)*; paras. J51–J52 *(regulatory takings and trade secrets)*.

437 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). "[T]he Patent and Copyright Clauses do not, by their own force or by negative implication, deprive the States of the power to adopt rules for the promotion of intellectual creation within their own jurisdictions." *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 165 (1989), *citing* Goldstein v. California, 412 U.S. 546, 552–61 (1973). "Thus, where 'Congress determines that neither federal protection nor freedom from restraint is required by the national interest,' the States remain free to promote originality and creativity in their own domains." *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 165 (1989), *quoting* Goldstein v. California, 412 U.S. 546, 559 (1973).

438 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

439 Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966).

440 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

441 Eldred v. Ashcroft, 537 U.S. 186, 212–13 (2003). There, the Court sustained the 1998 Copyright Term Extension Act (CTEA), which enlarged the duration of copyrights by 20 years and provided for application of the enlarged terms to existing and future copyrights alike. In so doing, the Court rejected the proposition that "extending the duration of existing copyrights is categorically beyond Congress' Copyright Clause authority." *Id.* at 204. Further, the Court decided that the CTEA was a rational exercise of the authority conferred by the Copyright Clause: in addition to international concerns (a 1993 European Union directive instructing EU members to establish a baseline copyright term of life plus 70 years and to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term),

[J148] "The *sine qua non* of copyright is originality, . . . [which] is a constitutional requirement."[442] "Original . . . means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be. . . . Originality does not signify novelty; a work may be original even though it closely resembles other works, so long as the similarity is fortuitous, not the result of copying."[443]

[J149] "'No matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking. The very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas.' . . . It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. . . . [However, this is] the essence of copyright, . . . and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.' . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. . . . This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's original selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."[444]

[J150] "The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated . . . purpose [of Article I, Section 8, Clause 8, of the Constitution.] Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation,

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Congress passed the CTEA "in light of demographic, economic, and technological changes, . . . and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works." *Id.* at 206–07.

"*[T]he protection given to copyrights [or patents] is wholly statutory*. . . . The remedies for infringement are only those prescribed by Congress. . . . In a case . . . in which Congress has not plainly marked the course to be followed by the judiciary, courts must be circumspect in construing the scope of rights created by a statute that never contemplated such a calculus of interests. . . . [Ambiguities in the law of copyright (or patent) are to be resolved in light of the basic purpose of the Copyright Clause, which is] 'to stimulate artistic and scientific creativity for the general public good.'" *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431–32 429 (1984), *quoting* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

442 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345–46 (1991).

443 *Id.* at 345.

444 *Id.* at 349–350. In that case, the Court held that copyright protection is not available to typical telephone directory white pages. Noting that, "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," the Court concluded that "Rural's white pages, limited to basic subscriber information and arranged alphabetically, [fe]ll short of the mark." *Id.* at 363.

advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which, by constitutional command, must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution, and it may not be ignored."[445] In *Hotchkiss*, the Court posited the condition that a patentable invention evidenced "more ingenuity and skill" than that "possessed by an ordinary mechanic acquainted with the business."[446]

[445] Graham v. John Deere Co., 383 U.S. 1, 5–6 (1966).

[446] Hotchkiss v. Greenwood, 11 How. 248, 267 (1851). There, the patent involved a mere substitution of materials—porcelain or clay for wood or metal in doorknobs—and the Court condemned it.

CHAPTER 11

EQUAL PROTECTION

A. GENERAL PRINCIPLES

[K1] The Fourteenth Amendment to the Constitution says: "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, "the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals."[1] "Although both Amendments require the same type of analysis, . . . the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has the same significance as the Equal Protection Clause."[2]

[K2] The equal protection guarantee "creates no substantive rights. . . . Instead, it embodies a general rule that [government] must treat like cases alike but may treat unlike cases accordingly."[3] The equal protection guarantee "does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state."[4] If a legislative classification neither burdens a fundamental right, such as the right to travel, nor is drawn upon inherently suspect distinctions,[5] such as race or religion, it is accorded a strong presumption of validity, and

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[1] Washington v. Davis, 426 U.S. 229, 239 (1976), *citing* Bolling v. Sharpe, 347 U.S. 497 (1954). "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[2] Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

[3] Vacco v. Quill, 521 U.S. 793, 799 (1997).

[4] Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 70–71 (1978), *quoting* Fort Smith Light Co. v. Paving Dist., 274 U.S. 387, 391 (1927).

[5] In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), the Court identified the *"traditional indicia of suspectness:"* whether a group has been *"saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."* (Emphasis added.)

In *Plyler v. Doe*, 457 U.S. 202, 216, n.14 (1982), the Court stated: "Several formulations might explain our treatment of certain classifications as suspect. Some classifications are more likely than others to reflect deep-seated prejudice, rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and

the Court will uphold it so long as it bears a rational relation to some legitimate end.[6] "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the Court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[7] That rational basis review in equal protection analysis is not a license for courts to judge the wisdom, desirability, or fairness of legislative choices.[8] Further, a legislature need not "actually articulate at any time the purpose or rationale supporting its classification."[9] Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification;"[10] it is "constitutionally irrelevant [what] reasoning in fact underlay the legislative decision."[11] Thus, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,"[12] and "to convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[13] In this context, the defender of the classification "has no obligation to produce evidence to sustain the

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is entitled to equal justice under the law. *Classifications treated as suspect tend to be irrelevant to any proper legislative goal.* Finally, certain groups, indeed largely the same groups, have historically been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." (Emphasis added.) Further the Court noted: "We reject the claim that 'illegal aliens' are a 'suspect class.' . . . Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a 'constitutional irrelevancy.'" *Id.* at 219, n.19.

See also Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432, 440 (1985): *"These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."* (Emphasis added.)

In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), the Transit Authority had a policy against employing persons using narcotic drugs, including those receiving methadone maintenance treatment for curing heroin addiction. The Court noted that the challenged exclusionary line "is not one which is *directed 'against' any individual or category of persons*, but rather it represents a policy choice. . . . Because it does not circumscribe *a class of persons characterized by some unpopular trait or affiliation*, it does not *create or reflect any special likelihood of bias on the part of the ruling majority. Id.* at 592–93 (emphasis added).

In *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), the Court said: "Close relatives are not a suspect or quasi-suspect class. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless."

6 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996); Heller v. Doe, 509 U.S. 312, 319–20 (1993); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 462 (1988).

7 Romer v. Evans, 517 U.S. 620, 633 (1996). "[A] bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

8 *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976) *(per curiam).*

9 Nordlinger v. Hahn, 505 U.S. 1, 11 (1992).

10 Fed. Communications Comm'n v. Beach Commc'n, Inc., 508 U.S. 307, 313 (1993).

11 United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980).

12 Heller v. Doe, 509 U.S. 312, 320 (1993), *quoting* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973).

13 Vance v. Bradley, 440 U.S. 93, 111 (1979).

rationality of a statutory classification;"[14] "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[15] But "even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation."[16] In addition, "courts are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it 'is not made with mathematical nicety or because, in practice, it results in some inequality.'"[17] Finally, a legislature need not "strike at all evils at the same time or in the same way;"[18] [l]egislatures may implement their program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations."[19]

[K3] Hence, "[i]n the ordinary case, a statutory classification will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[20] Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Such classifications are valid if the government demonstrates that they have been "precisely tailored to serve a compelling governmental interest."[21] "Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. . . . To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."[22]

[K4] This equal protection guarantee applies as well to a facially "neutral law [that] has a disproportionately adverse effect upon a [certain group,] . . . if that impact can be traced to a discriminatory purpose."[23] "[W]hen a neutral federal statute is challenged on equal protection grounds, it is incumbent upon the challenger to prove that [the legislature] '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.'"[24]

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[14] Heller v. Doe, 509 U.S. 312, 320 (1993).

[15] Fed. Communications Comm'n v. Beach Commc'n, Inc., 508 U.S. 307, 315 (1993).

[16] Heller v. Doe, 509 U.S. 312, 321 (1993).

[17] *Id.* at 321, *quoting* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[18] Semler v. Oregon State Bd. of Dental Exam'rs, 294 U.S. 608, 610 (1935).

[19] New Orleans v. Dukes, 427 U.S. 297, 303 (1976) *(per curiam)*, *citing* Williamson v. Lee Optical Co., 348 U.S. 483, 488–89 (1955).

[20] *See* Romer v. Evans, 517 U.S. 620, 632 (1996), *citing* New Orleans v. Dukes, 427 U.S. 297 (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) (assumed health concerns justified law favoring optometrists over opticians); Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban); Kotch v. Bd. of River Port Pilot Comm'rs for Port of New Orleans, 330 U.S. 552 (1947) (licensing scheme that disfavored persons unrelated to current river boat pilots justified by possible efficiency and safety benefits of a closely knit pilotage system).

[21] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 217 (1982).

[22] *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988).

[23] Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

[24] Harris v. McRae, 448 U.S. 297, 324, n.26 (1980), *quoting* Personnel Adm'r of

[K5] Finally, it must be noted that "[t]he Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution. [For example, if] tuition reimbursements for the benefit of sectarian schools violate the Establishment Clause, nothing in the Equal Protection Clause will suffice to revive that program."[25]

B. CLASSIFICATIONS BASED ON RACE OR ETHNIC ANCESTRY[26]

1. Historical Development

a. The Fourteenth Amendment and the "Separate but Equal" Doctrine

[K6] In the first cases in the Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against African-Americans.[27] In *Plessy v. Ferguson*, the Court announced the doctrine of *separate but equal* facilities for whites and blacks.[28] Under that doctrine, equality of treatment was accorded when the races were "provided substantially equal facilities, even though these facilities be separate."[29] In the decisions leading up to *Brown I*, the Court had attempted to curtail the ugly legacy of *Plessy*, by insisting on a searching inquiry into whether "separate" African-American schools were genuinely "equal" to white schools in terms of physical facilities, curricula, quality of the faculty and certain "intangible" considerations.[30] In Brown I, the Court finally liberated the Equal Protection Clause from the doctrinal tethers of *Plessy*, declaring that, "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[31] The Court based this conclusion on its recognition of the particular social harm that racially segregated schools inflicted on African-American children: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[32]

Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (internal quotation marks omitted). *See, in extenso*, paras. K26 *et seq.* (racial discrimination); paras. K94–K95 (sex discrimination).

25 Sloan v. Lemon, 413 U.S. 825, 834 (1973).

26 *See also* paras. F12, F35 *(statutes outlawing miscegenation and inter-racial cohabitation)*; paras. K167 *et seq. (racial gerrymandering).*

27 *See* Slaughter-House Cases, 16 Wall. 36, 67–72 (1873); Strauder v. W. Virginia, 100 U.S. 303, 307–08 (1880).

28 Plessy v. Ferguson, 163 U.S. 537 (1896). There, the Court held that legislatively mandated racial segregation in public transportation worked no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treated the black race as inferior. The *Plessy* Court considered "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 551.

29 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 488 (1954).

30 *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Bd. of Regents of Univ. of Oklahoma, 332 U.S. 631 (1948).

31 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954).

32 *Id.* at 494.

Subsequent cases confirmed that a state may not constitutionally require segregation of public facilities,[33] and stressed that, "because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race," such classifications must be subject to the most rigid scrutiny.[34]

b. The Fifth Amendment and Anti-Japanese Measures During World War II

[K7] Through the 1940s, the Court had routinely taken the view in non-race-related cases that, unlike the Fourteenth Amendment, the Fifth Amendment contained no equal protection clause, and it provided no guaranty against discriminatory legislation by Congress.[35] When the Court first faced a Fifth Amendment equal protection challenge to a federal racial classification, it adopted a similar approach, with most unfortunate results. In *Hirabayashi*, the Court considered a curfew applicable only to persons of Japanese ancestry. The Court observed—correctly—that "[d]istinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality," and that "racial discriminations are in most circumstances irrelevant and therefore prohibited." But it also cited *Detroit Bank* for the proposition that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process," and it upheld the curfew, because "circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made."[36]

[K8] Eighteen months later, the Court again approved wartime measures directed at persons of Japanese ancestry. *Korematsu* concerned an order that completely excluded such persons from particular areas. The Court did not address the view, expressed in cases like *Hirabayashi* and *Detroit Bank*, that the federal government's obligation to provide equal protection differed significantly from that of the states. Instead, it began by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." But in spite of the "most rigid scrutiny" standard it had just set forth, the Court then inexplicably relied on "the principles announced in the *Hirabayashi* case" to conclude that, although "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m.," the racially discriminatory order was nonetheless within the federal government's power.[37]

[K9] In *Bolling*, the Court, for the first time, explicitly questioned the existence of any difference between the obligations of the federal government and the states to avoid racial classifications. *Bolling* did note that "the 'equal protection of the laws' is a more

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[33] *See, e.g.*, Johnson v. Virginia, 373 U.S. 61, 62 (1963) (courtrooms); Turner v. Memphis, 369 U.S. 350, 353 (1962) and Lombard v. Louisiana, 373 U.S. 267 (1963) (restaurants); Wright v. Georgia, 373 U.S. 284 (1963), and Watson v. Memphis, 373 U.S. 526 (1963) (parks); Mayor and City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955) (beaches); Gayle v. Browder, 352 U.S. 903 (1956) (buses).

[34] Hunter v. Erickson, 393 U.S. 385, 391–92 (1969); James v. Valtierra, 402 U.S. 137, 141 (1971).

[35] *See, e.g.*, Detroit Bank v. United States, 317 U.S. 329, 337 (1943).

[36] Hirabayashi v. United States, 320 U.S. 81, 100–02 (1943). *See also* para. B46.

[37] Korematsu v. United States, 323 U.S. 214, 216–18 (1944). *See also* para. B46.

explicit safeguard of prohibited unfairness than 'due process of law,'" but then stressed that "that the Constitution of the United States . . . forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race," and concluded that, "in view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[38] Later cases in contexts other than school desegregation continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable. Finally, in 1976, the Court stated explicitly that "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[39]

2. Applicable Standard of Review

[K10] It is now settled that racial and ethnic distinctions of any sort are constitutionally suspect and must be strictly scrutinized. Laws classifying citizens on the basis of race cannot be upheld unless they are "*narrowly tailored to achieving a compelling state interest.* . . . This rule obtains with equal force regardless of the race of those burdened or benefited by a particular classification."[40] "The purpose of the narrow tailoring requirement is to ensure that the means chosen 'fit' the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. . . . Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the [goal sought.]"[41]

[K11] "When racial classifications are explicit, no inquiry into legislative purpose is necessary. . . . A facially neutral law, on the other hand, warrants strict scrutiny only if it can be proved that the law was 'motivated by a racial purpose or object,' or if it is 'unexplainable on grounds other than race.' . . . The task of assessing a jurisdiction's motivation . . . is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"[42]

3. Racial Information

[K12] *Anderson v. Martin* held that a Louisiana statute requiring the designation of a candidate's race on the ballot violated the Equal Protection Clause. The Court reasoned: "In the abstract, Louisiana imposes no restriction upon anyone's candidacy, nor upon an elector's choice in the casting of his ballot. But, by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because, by

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38 Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

39 Buckley v. Valeo, 424 U.S. 1, 93 (1976).

40 Miller v. Johnson, 515 U.S. 900, 904 (1995) (emphasis added).

41 Grutter v. Bollinger, 539 U.S. 306, 333, 339 (2003).

42 Hunt v. Cromartie, 526 U.S. 541, 546 (1999).

directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines."[43]

4. Differential Treatment of Indian Tribes

[K13] "[F]ederal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution"[44] (Article I, Section 8, gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes") and "supported by the ensuing history of the Federal Government's relations with Indians."[45] "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory;"[46] they are "a separate people" possessing "the power of regulating their internal and social relations."[47] As the Court has established in a series of cases, "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs."[48]

[K14] *Mancari* presented the issue of a preference in hiring and promoting at the federal Bureau of Indian Affairs (BIA), a preference that favored individuals who were "'one-fourth or more degree Indian blood and member[s] of a Federally-recognized tribe." Although the classification had a racial component, the Court found it important that the preference was not directed towards a "racial" group consisting of "Indians" but rather "only to members of "federally recognized" tribes. In this sense, the Court held, "the preference [wa]s political rather than racial in nature;" "the preference, as applied, [wa]s granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities [we]re governed by the BIA in a unique fashion." Because the BIA preference "could be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," and was "reasonably and rationally designed to further Indian self-government," the Court held that it did not offend the Constitution. The opinion was careful to note, however, that the case was confined to the authority of the BIA, an agency described as *"sui generis."*[49]

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43 Anderson v. Martin, 375 U.S. 399, 402 (1964).

44 United States v. Antelope, 430 U.S. 641, 645 (1977).

45 *Id.*

46 Worcester v. Georgia, 6 Pet. 515, 557 (1832).

47 United States v. Mazurie, 419 U.S. 544, 557 (1975).

48 *See* Rice v. Cayetano, 528 U.S. 495, 519 (2000), *citing* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673, n.20 (1979) (treaties securing preferential fishing rights); United States v. Antelope, 430 U.S. 641, 645–47 (1977) (exclusive federal jurisdiction over crimes committed by Indians in Indian country); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84–85 (1977) (distribution of tribal property); Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 479–80 (1976) (Indian immunity from state taxes); Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana, 424 U.S. 382, 390–91 (1976) *(per curiam)* (exclusive tribal court jurisdiction over tribal adoptions).

49 Morton v. Mancari, 417 U.S. 535, 553–55, n.24 (1974). It does not follow from *Mancari*, however, that Congress may authorize a state to establish a voting scheme that limits the elec-

5. Affirmative Action—Benign or Remedial Racial Discrimination[50]

[K15] In 1978, the Court confronted for the first time the question whether race-based governmental action designed to *benefit* groups that have suffered discrimination in the American society should be subject to "the most rigid scrutiny." The landmark *Bakke* case involved a racial quota employed by the University of California at Davis Medical School. Under the plan, 16 out of 100 seats in each entering class at the school were reserved exclusively for certain minority groups. The petitioners argued that "strict scrutiny" should apply only to classifications that disadvantage discrete and insular minorities. *Bakke* did not produce an opinion for the Court, but Justice Powell's opinion announcing the Court's judgment rejected the argument. Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color,"[51] and concluded that "racial and ethnic distinctions of any sort are inherently suspect, and thus call for the most exacting judicial examination."[52] On the other hand, four Justices in *Bakke* would have applied a less stringent standard of review to racial classifications designed to further remedial purposes.[53] And four Justices thought the case should be decided on statutory grounds.[54] Among the justifications offered in support of the plan were the desire to reduce the historic deficit of traditionally disfavored minorities in medical school and the medical profession and the need to counter the effects of societal discrimination. Five members of the Court determined that none of these interests could justify a plan that completely eliminated non-minorities from consideration for a specified percentage of opportunities.[55]

[K16] Two years after *Bakke*, the Court faced another challenge to remedial race-based action, this time involving action undertaken by the federal government. In *Fullilove*, the Court upheld Congress' inclusion of a 10-percent set-aside for minority-owned businesses in the Public Works Employment Act of 1977. A majority of the Court did not apply strict scrutiny to the race-based classification at issue. Three members inquired "whether th[e] *objectives* of the legislation are within the power of Congress" and "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible means for achieving the congressional objectives." They then upheld the program under that test, adding at the end of the opinion that the program also would survive judicial review under either test articulated in the several *Bakke* opinions.[56] Three other

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torate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens. *See* Rice v. Cayetano, 528 U.S. 495, 520–22 (2000).

50 *See also* para. K168 *(racial gerrymandering).*

51 Regents of the Univ. of California v. Bakke, 438 U.S. 265, 289–90 (1978).

52 *Id.* at 291.

53 *Id.* at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part, and concluding that racial classifications designed to further remedial purposes "must serve important governmental objectives, and must be substantially related to achievement of those objectives").

54 *Id.* at 411–12, 421 (Stevens, J., joined by Burger, C.J., Stewart, and Rehnquist, JJ., concurring in judgment in part and dissenting in part).

55 *Id.* at 271–72 (Powell, J.) (addressing constitutionality of Davis plan); *id.* at 408 (Stevens, J., joined by Burger, C.J., Stewart, and Rehnquist, JJ., concurring in judgment in part and dissenting in part) (addressing only legality of Davis admissions plan under Title VI of the Civil Rights Act of 1964).

56 Fullilove v. Klutznick, 448 U.S. 448, 473–92 (1980) (principal opinion of Burger, C.J.,

members would have upheld benign racial classifications that "serve important governmental objectives and are substantially related to achievement of those objectives," and concluded that, judged under this standard, the 10-percent minority set-aside provision of the 1977 Act was plainly constitutional, the racial classifications being substantially related to the achievement of the important and congressionally articulated goal of remedying the then-present effects of past racial discrimination.[57]

[K17] *Wygant* considered a Fourteenth Amendment challenge to another form of remedial racial classification. The issue in that case was whether a school board could adopt race-based preferences in determining which teachers to lay off. Justice Powell's plurality opinion observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," and it stated the two-part inquiry as "whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored."[58] The lower courts had upheld the challenged scheme, based on the theory that minority students were in need of "role models" to alleviate the effects of prior discrimination in society. The Court reversed. A four-Justice plurality pointed out that "[s]ocietal discrimination, without more, is too

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joined by White and Powell, JJ.). On the issue of congressional power, the Chief Justice found that Congress' commerce power was sufficiently broad to allow it to reach the practices of prime contractors on federally funded local construction projects. Congress could mandate state and local government compliance with the set-aside program under its Section 5 power to enforce the Fourteenth Amendment. The Chief Justice next turned to the constraints on Congress' power to employ race-conscious remedial relief. His opinion stressed two factors in upholding the provision at issue. First was the unique remedial powers of Congress under Section 5 of the Fourteenth Amendment. Because of these powers, the Chief Justice held that "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may authorize and induce state action to avoid such conduct." *Id.* at 483–84. Further, the principal opinion found that Congress had an abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. The second factor was the flexible nature of the 10-percent set-aside. Two "congressional assumptions" underlay the program: first, that the effects of past discrimination had impaired the competitive position of minority businesses, and second, that "adjustment for the effects of past discrimination" would assure that at least 10 percent of the funds from the federal grant program would flow to minority businesses. The Chief Justice noted that both of these "assumptions" could be "rebutted" by a grantee seeking a waiver of the 10-percent requirement. Thus, a waiver could be sought where minority businesses were not available to fill the 10-percent requirement or, more importantly, where a minority business attempted "to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the then-present effects of prior discrimination." *Id.* at 488. The Chief Justice indicated that, without this fine tuning to remedial purpose, the statute would not have passed muster.

The principal opinion in *Fullilove* also found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. *See id.* at 463–67. *See also id.* at 511 (Powell, J., concurring) ("by the time Congress enacted [the MBE set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry").

[57] *Id.* at 517–21 (concurring opinion of Marshall, J., joined by Brennan and Blackmun, JJ.).

[58] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–74 (1986) (opinion of Powell, J., joined by Burger, C.J., Rehnquist, and O'Connor, JJ.).

amorphous a basis for imposing a racially classified remedy" working against innocent people, and insisted instead that, before a public employer embarks on an affirmative action program, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.[59] No such finding had been made there. Justice White concurred only in the judgment, although he agreed that the school board's asserted interests could not justify the racially discriminatory layoff policy.[60]

[K18] The Court's failure to produce a majority opinion in *Bakke, Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action. The Court resolved the issue at least in part, in 1989. *Richmond v. Croson* concerned a city's plan requiring prime contractors awarded city construction contracts to sub-contract at least 30 percent of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBE), which the plan defined to include a business from anywhere in the country at least 51 percent of which was owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. A majority of the Court held that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification, and that the single standard of review for racial classifications should be strict scrutiny.[61] As to the classification before the Court, the plurality agreed that a state or local subdivision has the authority to eradicate the effects of public and private discrimination within its own legislative jurisdiction,[62] but the Court thought that the factual predicate supporting the plan did not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause.[63] The Court emphasized that "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to rem-

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[59] *Id.* at 276.

[60] *Id.* at 295.

[61] Richmond v. J. A. Croson Co., 488 U.S. 469, 493–94 (1989) (opinion of O'Connor, J., joined by Rehnquist, C.J., White, and Kennedy, JJ.); *id.* at 520 (Scalia, J., concurring in judgment).

[62] *Id.* at 491–92 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White, J.); *id.* at 518 (concurring opinion of Kennedy, J.). As Justice O'Connor noted, "if the city could show that it had essentially become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, . . . the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."

[63] For the state's *interest in remedying the effects of past or present racial discrimination* "to rise to the level of a compelling state interest, it *must satisfy two conditions.* First, the discrimination must be 'identified discrimination.' . . . 'While the States and their subdivisions may take remedial action when they possess evidence' of past or present discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." . . . A generalized assertion of past discrimination in a particular industry or region is not adequate because it 'provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.' . . . Accordingly, an effort to alleviate the effects of societal discrimination is not a compelling interest. . . . Second, the institution that makes the racial distinction must have a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative action program'." *See* Shaw v. Hunt, 517 U.S. 899, 909–10

edy. It 'has no logical stopping point.'"[64] Moreover, none of the "facts" cited by the city provided a basis for a *prima facie* case of a constitutional or statutory violation by anyone in the city's construction industry. Reliance on the disparity between the number of prime contracts awarded to minority businesses and the city's minority population was misplaced, since the proper statistical evaluation would compare the percentage of MBE's in the relevant market that were qualified to undertake city sub-contracting work with the percentage of total city construction dollars that were awarded to minority subcontractors, neither of which was known to the city. The fact that MBE membership in local contractors' associations was extremely low was also not probative, absent some link to the number of MBE's eligible for membership, since there were numerous explanations for the dearth of minority participation, including past societal discrimination in education and economic opportunities, as well as both black and white career and entrepreneurial choices. Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry also had extremely limited probative value, since, by including a waiver procedure in the national program, Congress had explicitly recognized that the scope of the problem would vary from market area to market area. Besides, the city's history of school desegregation and numerous congressional reports did little to define the scope of any injury to minority contractors in the city or the necessary remedy and could justify a preference of any size or duration. Finally, the majority rejected the suggestion that discrimination findings may be "shared" from jurisdiction to jurisdiction.[65] The Court also thought it obvious that the program was not narrowly tailored to remedy the effects of prior discrimination, since it entitled a black, Hispanic, or Oriental entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race. "First, there d[id] not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. . . . Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear[ed] to be race-neutral. If MBE's disproportionately lack[ed] capital or [could not] meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation. . . . Second, the 30% quota . . . rest[ed] upon the completely unrealistic assumption that minorities would choose a particular trade in lockstep proportion to their representation in the local population."[66] Moreover, unlike the program upheld in *Fullilove*, the Plan's waiver system focused upon the availability of MBE's, and it did not inquire whether the particular MBE seeking a racial preference had suffered from the effects of past discrimination by the city or prime contractors. Given the fact that the city should already consider bids and waivers on a case-by-case basis, the city's only interest in maintaining a quota system, rather than investigating the need for remedial action in particular cases, would seem to be simply administrative convenience, which cannot justify the use of a suspect classification under equal protection strict scrutiny.[67]

[K19] With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* had

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(1996) *(Shaw II)*, *citing* and *quoting* Richmond v. J. A. Croson Co., 488 U.S. 469, 498–500, 504, 505, 507, 509 (1989) and Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–77 (1986).

64 Richmond v. J. A. Croson Co., 488 U.S. 469, 498 (1989), *quoting* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986).

65 Richmond v. J. A. Croson Co., 488 U.S. 469, 499–506 (1989).

66 *Id.* at 507.

67 *Id.* at 508.

no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the federal government. *Croson* observed simply that the Court's treatment of an exercise of congressional power in *Fullilove* could not be dispositive there, because *Croson*'s facts did not implicate Congress' broad power under Section 5 of the Fourteenth Amendment.[68]

[K20] A year later, however, *Metro Broadcasting* held that "benign" federal racial classifications need only satisfy intermediate scrutiny, noting that the Court owed appropriate deference to the Congress, in light of Congress' institutional competence as the national legislature, charged by the Constitution with the power "to provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. Benign federal racial classifications mandated by Congress, the Court said, "even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." The Court did not explain how to tell whether a racial classification should be deemed "benign" other than to express confidence that an examination of the legislative scheme and its history would separate benign measures from other types of racial classifications. Applying this test, the Court first noted that the Federal Communications Commission's minority preference policies at issue—a program awarding an enhancement for minority ownership in comparative proceedings for new licenses, and the minority "distress sale" program, which permitted a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms—did not serve as a remedy for past discrimination. Proceeding on the assumption that the policies were nonetheless "benign," it concluded that they served the important governmental objective of enhancing broadcast diversity, and that they were substantially related to that objective. It therefore upheld the policies.[69]

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[68] *Id.* at 491 (plurality opinion); *id.* at 522 (Scalia, J., concurring in judgment).

[69] Metro Broad., Inc. v. Fed. Communications Comm'n, 497 U.S. 547, 563–601, n.12 (1990). The Court relied upon the following grounds for holding that the minority ownership policies were substantially related to the achievement of the government's interest in broadcast diversity:

(1) The FCC's conclusion that there was an empirical nexus between minority ownership and greater diversity, which was consistent with its longstanding view that ownership was a prime determinant of the range of programming available, was a product of its expertise and was entitled to deference.

(2) By virtue of a long history of support for minority participation in the broadcasting industry, Congress had also made clear its view that the minority ownership policies advanced the goal of diverse programming.

(3) The judgment that there was a link between expanded minority ownership and broadcast diversity did not rest on impermissible stereotyping. Rather Congress and the FCC maintained simply that expanded minority ownership of broadcast outlets would, in the aggregate, result in greater broadcast diversity. This judgment was corroborated by a host of empirical evidence suggesting that an owner's minority status influenced the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities, and had a special impact on the way in which images of minorities were presented. In addition, studies showed that a minority owner was more likely to employ minorities in managerial and other important roles where they could

[K21] By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications, *Metro Broadcasting* departed from prior cases in two significant respects.[70] First it repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a state to afford equal protection of the laws.[71] Second, *Metro Broadcasting* turned its back on *Croson*'s explanation of why strict scrutiny of all governmental racial classifications is essential: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[72] The Court adhered to that view in *Adarand*, which overruled *Metro Broadcasting*, in relevant part, and stressed that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[73]

[K22] *Bakke* was the first case in which the Court addressed the constitutionality of race-based affirmative action programs in public higher education. As noted above, there the Court reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. The decision produced

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have an impact on station policies. The FCC's policies were thus a product of analysis, rather than a stereotyped reaction based on habit.

(4) The FCC had adopted and Congress had endorsed minority ownership preferences only after long study, painstaking consideration of all available alternatives, and the emergence of evidence demonstrating that race-neutral means had not produced adequate broadcasting diversity.

(5) The policies were appropriately limited in extent and duration and subject to reassessment and reevaluation before renewal.

(6) Finally, the policies imposed only slight burdens on non-minorities. Award of a preference contravened no legitimate, firmly rooted expectation of competing applicants, since the limited number of frequencies available means that no one has First Amendment right to a license, and the granting of licenses requires consideration of public interest factors. Nor did the distress sale policy impose an undue burden on non-minorities, since it could be invoked only with respect to a small fraction of broadcast licenses—those designated for revocation or renewal hearings to examine basic qualification issues—and only when the licensee chose to sell out at a distress price rather than to go through with the hearing, and no competing application for the station in question had been filed. The distress sale policy was not a quota or fixed quantity set-aside, and non-minorities were free to compete for the vast remainder of other available license opportunities.

70 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995).

71 *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954); Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975).

72 Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

73 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to remedy disadvantages cast on minorities by past racial prejudice.[74] Four other Justices avoided the constitutional question altogether and struck down the program under Title VI of the 1964 Civil Rights Act.[75] Justice Powell provided a fifth vote not only for invalidating the set-aside program but also for reversing the state court's injunction against any use of race whatsoever. The only holding for the Court was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[76] Thus, the Court reversed that part of the lower court's judgment that enjoined the university from any consideration of the race of any applicant.

[K23] Justice Powell's opinion announcing the judgment of the *Bakke* Court has served as the touchstone for constitutional analysis of race-conscious university admissions policies. In Justice Powell's view, when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."[77] Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny. First, Powell rejected an interest in reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession as an unlawful interest in racial balancing. Second, he rejected an interest in remedying societal discrimination, indicating that for the governmental interest in remedying past discrimination to be triggered, "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made. In the absence of such findings, legislative mandates and legislatively determined criteria, the university could not justify a classification that imposed disadvantages upon persons who bore no responsibility for whatever harm the beneficiaries of the special admissions program were thought to have suffered. Third, he rejected an interest in increasing the number of physicians who would practice in communities currently underserved, concluding that, even if such an interest could be compelling in some circumstances, the program under review was not geared to promote that goal.[78] Justice Powell approved the university's use of race to further only one interest: *"the attainment of a diverse student body."*[79] He emphasized that nothing less than the "nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples," and held that, in seeking the "right to select those students who will contribute the most to the robust exchange of ideas," a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission."[80] Justice Powell was, however, careful to emphasize that race "is only one element in a range of factors a university properly may consider in attaining the goal

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74 Regents of the Univ. of California v. Bakke, 438 U.S. 265, 325 (1978) (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).

75 *Id.* at 408 (Stevens, J., joined by Burger, C.J., Stewart, and Rehnquist, JJ., concurring in judgment in part and dissenting in part) (addressing only legality of Davis admissions plan).

76 *Id.* at 320.

77 *Id.* at 299.

78 *Id.* at 306–10.

79 *Id.* at 311 (emphasis added).

80 *Id.* at 313.

of a heterogeneous student body." For him, "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," which can justify the use of race; rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[81]

[K24] In 2003, *Grutter* endorsed Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions. That case involved an official admissions policy followed by the University of Michigan Law School, which sought to achieve student body diversity through compliance with Justice Powell's opinion in *Bakke*. Focusing on students' academic ability coupled with a flexible assessment of their talents, experiences, and potential, the policy required admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, an essay describing how the applicant would contribute to Law School life and diversity, and the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score. Additionally, officials should look beyond grades and scores to so-called "soft variables," such as recommenders' enthusiasm, the quality of the undergraduate institution and the applicant's essay, and the areas and difficulty of undergraduate course selection. The policy did not define diversity solely in terms of racial and ethnic status and did not restrict the types of diversity contributions eligible for "substantial weight," but it did reaffirm the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers. By enrolling a "critical mass" of underrepresented minority students, the Law School sought "ensure their ability to make unique contributions to the character of the Law School." The policy was aimed at guiding admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise[d] to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession." The Court noted that "attaining a diverse student body [wa]s at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university [wa]s 'presumed' absent 'a showing to the contrary.'"[82] Enrolling a "critical mass" of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional. But "the Law School's concept of critical mass [wa]s defined by reference to the educational benefits that diversity [wa]s designed to produce," including "cross-racial understanding" and the breaking down of racial stereotypes.[83] The Law School's claim was further bolstered by numerous expert studies and reports showing that such diversity would promote learning outcomes and better prepare students for an increasingly diverse workforce, for society, and for the legal profession. Moreover, "law schools cannot be effective in isolation from the individuals and institutions with which the law interacts. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of the American heterogeneous society may participate in the educational institutions that provide the

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81 *Id.* at 314–15.

82 Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

83 *Id.* at 330.

training and education necessary to succeed in" the United States.[84] Thus, the Law School had a compelling interest in attaining a diverse student body. Second, the Law School's admissions program was narrowly tailored to accomplish that purpose. The Court stressed that "[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.' . . . Instead, a university may consider race or ethnicity only as a 'plus in a particular applicant's file,' without 'insulat[ing] the individual from comparison with all other candidates for the available seats.' In other words, an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'"[85] The challenged program satisfied these requirements. The Law School was engaging in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. There was no policy of automatic acceptance or rejection based on any single "soft" variable. The Law School did not limit, in any way, the broad range of qualities and experiences that could be considered valuable contributions to student body diversity, and it was actually giving substantial weight to diversity factors besides race; indeed, it frequently accepted non-minority applicants with grades and test scores lower than underrepresented minority applicants (and other non-minority applicants) who were rejected. Relatedly, the Court rejected the argument that the Law School should have used other race-neutral means to obtain the educational benefits of student body diversity, e.g., a lottery system or decreasing the emphasis on GPA and LSAT scores. These alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both. The Court emphasized that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."[86] Moreover, the program did not unduly harm non-minority applicants. Finally, the Court observed that "race-conscious admissions policies must be limited in time. . . . [This] durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[87] As the Court noted, it expected that 25 years from its decision, the use of racial preferences would no longer be necessary to further this interest.[88]

[K25] In *Gratz*, the University of Michigan's College of Literature, Science, and the Arts was considering a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race. The University considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it was using a selection method under which every applicant from an underrepresented racial or ethnic minority group was automatically awarded 20 points of the

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84 *Id.* at 332–33.

85 *Id.* at 334, *quoting* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 315, 317 (1978) (opinion of Powell, J.).

86 Grutter v. Bollinger, 539 U.S. 306, 339 (2003).

87 *Id.* at 342.

88 *Id.* at 343.

100 needed to guarantee admission. As a consequence, the university admitted virtually every qualified applicant from these groups. The Court held that the university's use of race in its freshman admissions policy violated the Equal Protection Clause, because it was not narrowly tailored to achieve its asserted interest in educational diversity. In reaching this conclusion, the Court stressed "the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education," without automatically considering any single characteristic as "a specific and identifiable contribution to a university's diversity."[89] The challenged policy did not provide such an individualized consideration. The only consideration that accompanied the 20-point automatic distribution to all applicants from underrepresented minorities was a factual review to determine whether an individual was a member of one of these minority groups. Moreover, the 20-point distribution had the effect of making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant.[90]

6. De Jure/De Facto *Racial Discrimination*

a. Generally

[K26] *Washington v. Davis* stressed that "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."[91] But, in this case, the Court also made it clear that "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. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[92] In this context, proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.[93] "'Discriminatory purpose' . . . implies more than intent as volition

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89 Gratz v. Bollinger, 539 U.S. 244, 271 (2003).

90 *Id.* at 272.

91 Washington v. Davis, 426 U.S. 229, 241 (1976).

92 *Id.* at 242. That case involved a verbal skill test administered to prospective public employees. A far greater proportion of blacks—four times as many—failed the test than did whites. But the successful test takers included members of both races, as did the unsuccessful examinees. Disproportionate impact, standing alone, the Court held, was insufficient to prove unconstitutional racial discrimination. As the Court pointed out, "[a] rule that [state action] designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching, and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Id.* at 248. Moreover, the Court found that the Constitution does not prevent "the Government from seeking, through the test at issue, modestly to upgrade the communicative abilities of its employees, rather than to be satisfied with some lower level of competence, particularly where the job requires special abilities to communicate orally and in writing." *Id.* at 246.

93 *See id.* at 241. The holding in *Davis* reaffirmed a principle well established in a variety of contexts. *See, e.g.*, Keyes v. Sch. Dist. No. 1, Denver, Colorado, 413 U.S. 189, 208 (1973) (schools: "The differentiating factor between *de jure* segregation and so-called *de facto* segrega-

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."[94] "With a *prima facie* case [of discriminatory purpose] made out, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.'"[95]

[K27] *Arlington Heights* "set out a checklist of considerations for assessing evidence going to discriminatory intent: the historical background of a challenged decision, its relative impact on minorities, specific antecedent events, departures from normal procedures, and contemporary statements of decision makers."[96] As the Court pointed out, in that case, "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."[97] "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—'whether it bears more heavily on one race than another' . . . —may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a stark pattern, . . . impact alone is not determinative, and the Court must look to other evidence. . . . This is not to say that a consistent pattern of official racial discrimination is a necessary predicate to a violation of the Equal Protection guarantee. A single invidiously discriminatory governmental act . . . would not necessarily be immu-

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tion . . . is purpose or intent to segregate"); Jefferson v. Hackney, 406 U.S. 535, 548 (1972) (welfare benefits: there, the Court rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act, because "the acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be"); Wright v. Rockefeller, 376 U.S. 52, 56–58 (1964) (election districting: the challengers there did not prevail, because they failed to prove that the New York legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"); Akins v. Texas, 325 U.S. 398, 403–04 (1945) (jury selection: "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination").

[94] Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). *See also* McCleskey v. Kemp, 481 U.S. 279, 298 (1987).

[95] Washington v. Davis, 426 U.S. 229, 241 (1976), *quoting* Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

[96] *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 343 (2000) (opinion of Souter, J.), *discussing* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

[97] Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

nized by the absence of such discrimination in the making of other comparable decisions."[98] "The historical background of the decision is another evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decision maker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached."[99] "The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports."[100]

[K28] In *Hunter*, the Court invalidated an Alabama law disenfranchising persons convicted of crimes involving moral turpitude. There was indisputable evidence that the law had a discriminatory effect on blacks as compared to similarly situated whites: blacks were, by even the most modest estimates, at least 1.7 times as likely as whites to suffer disfranchisement under the law in question. Moreover, there was convincing direct evidence that the law had been motivated, at least in part, by a desire to disenfranchise blacks.[101]

b. Selective Prosecution

[K29] In the American criminal justice system, "the Government retains 'broad discretion' as to whom to prosecute."[102] "[S]o long as the prosecutor has probable cause

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[98] *Id.* at 266, n.14.

[99] *Id.* at 267.

[100] *Id.* at 268. There, the Court upheld a zoning board decision that tended to perpetuate racially segregated housing patterns, since, apart from its effect, the board's decision was shown to be nothing more than an application of a constitutionally neutral zoning policy.

In *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 616–21 (1974), the mayor was empowered by the city charter to appoint a nominating panel, which, in turn, submitted to him nominees to fill vacancies on the school board. The panel consisted of 13 members. The mayor should appoint four members from the citizenry at large; each of the remaining nine would be the highest ranking officer of one of nine designated categories of city-wide organizations. Respondents charged that mayor Tate had violated the Equal Protection Clause by discriminating against blacks in appointments to the 1971 panel. The Court rejected the claim, for the record was devoid of reliable proof of racial discrimination. In reaching this conclusion, the Court held, *inter alia*, that (1) it was unable to conclude that an ambiguous statement purportedly made in 1969 with regard to the racial composition of the then school board proved anything with regard to the mayor's motives two years later in appointing the 1971 nominating panel; (2) racial-composition percentage comparisons were not appropriate in the context of the specific case, where it could be assumed that all citizens were fungible for purposes of determining whether members of a particular class had been unlawfully excluded, since, at least with regard to nine seats on the panel and assuming, *arguendo*, that percentage comparisons would be meaningful in a case involving discretionary appointments, the relevant universe for comparison purposes should consist of the highest ranking officers of the categories of organizations and institutions specified in the city charter, not the population at large.

[101] Hunter v. Underwood, 471 U.S. 222, 227–29 (1985). The provision had been enacted by the Alabama Constitutional Convention of 1901, the president of which had stated that the purpose of the convention was the establishment of white supremacy in this state.

[102] Wayte v. United States, 470 U.S. 598, 607 (1985), *quoting* United States v. Goodwin, 457 U.S. 368, 380, n.11 (1982).

to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[103] "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."[104] "As a result, '[t]he presumption of regularity supports . . . prosecutorial decisions.'"[105] However, "although prosecutorial discretion is broad, it is not 'unfettered. Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints.'"[106] "In particular, the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' . . . including the exercise of protected statutory and constitutional rights."[107] "It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. . . . [T]hese standards require petitioner to show, through clear evidence, both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose."[108] "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."[109]

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[103] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[104] Wayte v. United States, 470 U.S. 598, 607 (1985).

[105] United States v. Armstrong, 517 U.S. 456, 464 (1996), *quoting* United States v. Chem. Found., Inc., 272 U.S. 1, 14 (1926).

[106] Wayte v. United States, 470 U.S. 598, 608 (1985), *quoting* United States v. Batchelder, 442 U.S. 114, 125 (1979).

[107] Wayte v. United States, 470 U.S. 598, 608 (1985), *quoting* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[108] Wayte v. United States, 470 U.S. 598, 608 (1985).

[109] United States v. Armstrong, 517 U.S. 456, 465 (1996).

The requirement that the claimant show that similarly situated individuals of a different race were not prosecuted has been established in the Court's case law since *Ah Sin v. Wittman*, 198 U.S. 500 (1905). Ah Sin, a subject of China, petitioned a California state court for a writ of habeas corpus, seeking discharge from imprisonment under a San Francisco County ordinance prohibiting persons from setting up gambling tables in rooms barricaded to stop police from entering. He alleged in his habeas petition "that the ordinance is enforced solely and exclusively against persons of the Chinese race, and not otherwise." The Court rejected his contention that this averment made out a claim under the Equal Protection Clause, because it did not allege "that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced." *Id.* at 507–08.

The similarly situated requirement does not make a selective prosecution claim impossible to prove. Twenty years before *Ah Sin*, the Court invalidated an ordinance, also adopted by San Francisco, that prohibited the operation of laundries in wooden buildings. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry shop operators. The authorities had denied the applications of 200 Chinese subjects for permits to operate shops in wooden buildings, but they granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings under similar conditions.

c. Jury Selection

[K30] The Court "has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors."[110] "Purposeful racial discrimination in selection of jurors violates a defendant's right to equal protection, because it denies him the protection that a trial by jury is intended to secure."[111] Moreover, considering that "[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial," the Court has recognized that, "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminates against the excluded juror."[112] Finally, "[t]he harm from discriminatory jury selection touch[es] the entire community," for such discrimination "undermine[s] public confidence in the fairness of [the American] system of justice."[113]

[K31] In *Strauder*, the Court invalidated a state statute providing that only white men could serve as jurors. While stating that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race," the Court held that a defendant does have the right to be tried by a jury whose members are selected by non-discriminatory criteria.[114]

[K32] The Constitution requires, however, that courts "look beyond the face of the statute defining juror qualifications, and also consider challenged selection practices to afford 'protection against action of the State through its administrative officers in effecting the prohibited discrimination.'"[115] Thus, "the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds."[116]

[K33] The Court has explained that its "cases concerning selection of the venire reflect the general equal protection principle that the 'invidious quality' of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.'"[117] The burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination.[118] The Court has recognized that a "defendant alleging that members of his race have been impermissibly excluded from the venire may make out a *prima facie* case of purposeful discrimination, by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."[119] "The defendant initially must show

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110 Batson v. Kentucky, 476 U.S. 79, 88 (1986).

111 *Id.* at 86.

112 *Id.* at 87.

113 *Id.*

114 Strauder v. W. Virginia, 100 U.S. 303, 305 (1880).

115 Batson v. Kentucky, 476 U.S. 79, 88 (1986), *quoting* Norris v. Alabama, 294 U.S. 587, 589, 599 (1935) (a state cannot exclude African-Americans from jury venire on the false assumption that they, as a group, are not qualified to serve as jurors).

116 Batson v. Kentucky, 476 U.S. 79, 88 (1986), *citing* Sims v. Georgia, 389 U.S. 404, 407 (1967) *(per curiam)*; Whitus v. Georgia, 385 U.S. 545, 548–49 (1967); Avery v. Georgia, 345 U.S. 559, 561 (1953).

117 Batson v. Kentucky, 476 U.S. 79, 93 (1986), *quoting* Washington v. Davis, 426 U.S. 229, 240 (1976).

118 Whitus v. Georgia, 385 U.S. 545, 550 (1967).

119 Batson v. Kentucky, 476 U.S. 79, 93–94 (1986), *citing* Washington v. Davis, 426 U.S. 229, 239–42 (1976).

that he is a member of a racial group capable of being singled out for different treatment. . . . In combination with that evidence, a defendant may then make a *prima facie* case by proving that, in the particular jurisdiction, members of his race have not been summoned for jury service over an extended period of time. . . . Proof of systematic exclusion from the venire raises an inference of purposeful discrimination, because the result bespeaks discrimination.'"[120] "Since the ultimate issue is whether the State has discriminated in selecting the defendant's venire, however, the defendant may establish a *prima facie* case 'in other ways than by evidence of long-continued unexplained absence' of members of his race 'from many panels.'"[121] The Court also has found "a *prima facie* case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing the 'opportunity for discrimination.'"[122] "This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse."[123] In this context, the Court "has never announced mathematical standards, . . . but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors."[124] Once the defendant makes the requisite showing, the burden shifts to the state to explain adequately the racial exclusion. The state must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result. . . . [A]ffirmations of good faith in making individual selections are insufficient to dispel a *prima facie* case of systematic exclusion."[125]

[K34] "While decisions of th[e] Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid dis-

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[120] Batson v. Kentucky, 476 U.S. 79, 94 (1986), *quoting* Hernandez v. Texas, 347 U.S. 475, 482 (1954).

[121] Batson v. Kentucky, 476 U.S. 79, 95 (1986), *quoting* Cassell v. Texas, 339 U.S. 282, 290 (1950) (plurality opinion).

[122] Batson v. Kentucky, 476 U.S. 79, 95 (1986), *quoting* Whitus v. Georgia, 385 U.S. 545, 552 (1967). In the latter case, the Court reversed the conviction of a defendant who had been tried before an all-white petit jury. Jurors had been selected from a one-volume tax digest divided into separate sections of blacks and whites; black taxpayers also had a "(c)" after their names, as required by Georgia law at the time. The jury commissioners testified that they were not aware of the "(c)" appearing after the names of the Negro taxpayers; that they had never included or excluded anyone because of race; that they had placed on the jury list only those persons whom they knew personally; and that the jury list they compiled had had no designation of race on it. The county from which jury selection was made was 42 percent black, and 27 percent of the county's taxpayers were blacks. Of the 33 persons drawn for the grand jury panel, three (9 percent) were blacks, while, on the 19-member grand jury, only one was black; on the 90-man venire from which the petit jury was selected, there were seven blacks (8 percent), but no blacks appeared on the actual jury that tried petitioner. The Court held that this combination of factors constituted a *prima facie* case of discrimination.

Similarly, the Court found that the proof offered by the defendant was sufficient to demonstrate a *prima facie* case of intentional discrimination in *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (two-to-one disparity between Mexican-Americans in county population and those summoned for grand jury duty), and in *Turner v. Fouche*, 396 U.S. 346, 369 (1970) (1.6–to-1 disparity between blacks in county population and those on grand jury lists).

[123] *See* Batson v. Kentucky, 476 U.S. 79, 95 (1986).

[124] Alexander v. Louisiana, 405 U.S. 625, 630 (1972).

[125] *Id.* at 632.

crimination on account of race in selection of the grand and petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, . . . the State may not draw up its jury lists pursuant to neutral procedures, but then resort to discrimination at 'other stages in the selection process.'"[126]

[K35] In *Swain*, the Court was confronted with the question whether an African-American defendant was denied equal protection by the state's exercise of peremptory challenges to exclude members of his race from the petit jury. The Court declined to permit an equal protection claim premised on a pattern of jury strikes in a particular case, but it acknowledged that proof of systematic exclusion of black persons through the use of peremptories over a period of time might establish an equal protection violation.[127]

[K36] *Batson* discarded *Swain*'s evidentiary formulation. The *Batson* Court held that "a defendant may establish a *prima facie* case of purposeful discrimination in selection of the petit jury based solely on the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of

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[126] Batson v. Kentucky, 476 U.S. 79, 88 (1986), *quoting* Avery v. Georgia, 345 U.S. 559, 562 (1953). The rule requiring reversal of the conviction of a defendant indicted by a grand jury from which members of his own race were systematically excluded is not to be abandoned on the theory that discrimination in the grand jury amounted to harmless error, and that the defendant's conviction after a fair trial purged any taint attributable to the grand jury process. Intentional discrimination in the selection of grand jurors is a grave constitutional trespass. "[E]ven if the grand jury's determination of probable cause to believe that a defendant has committed a crime is confirmed in hindsight by a conviction on the indicted offense, that confirmation does not suggest that discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or existence of the proceedings to come." And "[j]ust as a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race, . . . a conviction cannot be understood to cure the taint attributable to a grand jury selected on the basis of race." *See* Vasquez v. Hillery, 474 U.S. 254, 263–64 (1986).

In *Hobby v. United States*, 468 U.S. 339 (1984), the Court acknowledged that discriminatory selection of grand jury foremen violated the Constitution, but it concluded that reversing the petitioner's conviction was an inappropriate remedy for the violation, since grand jury foremen played a minor part ("essentially clerical in nature") in federal prosecutions. *Id.* at 344–45.

In *Holland v. Illinois*, 493 U.S. 474 (1990), the Court held that a defendant could not rely on the Sixth Amendment to object to the exclusion of members of any distinctive group at the peremptory challenge stage. The Court noted that the peremptory challenge procedure has acceptance in the American legal tradition. On this reasoning, it declined to permit an objection to the peremptory challenge of a juror on racial grounds as a Sixth Amendment matter. As the *Holland* Court made explicit, however, racial exclusion of prospective jurors violates the overriding command of the Equal Protection Clause, and "race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage." *Id.* at 479.

[127] Swain v. Alabama, 380 U.S. 202, 224–28 (1965).

their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."[128] "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose."[129] "Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, the Court has emphasized that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. . . . But the prosecutor may not rebut the defendant's *prima facie* case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race. . . . Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, . . . so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. . . . Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' . . . The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination."[130]

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[128] Batson v. Kentucky, 476 U.S. 79, 96 (1986).

[129] *Id.* at 96–97.

[130] *Id.* at 97–98. The trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded appropriate deference on appeal. *Id.* at 98, n.21. The Court reviews for "clear error" the trial court's finding as to discriminatory intent. *See* Hernandez v. New York, 500 U.S. 352, 364 (1991) (plurality opinion); *id.* at 372 (O'Connor, J., concurring in judgment).

The prosecutor must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges. *See* Batson v. Kentucky, 476 U.S. 79, 98, n.20 (1986), *quoting* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981).

Under *Batson*, "once the opponent of a peremptory challenge has made out a *prima facie* case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." *See* Purkett v. Elem, 514 U.S. 765, 767 (1995) *(per curiam).*

Batson does not permit a state to require at step one that the objector show that it is "more likely than not" the other party's peremptory challenges, if unexplained, were based on impermissible group bias. "Instead, a defendant satisfies *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *See* Johnson v. California, 545 U.S. 162, 170 (2005).

At the second step of the inquiry, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. . . . [Hence,] [i]t is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimina-

[K37] In the early 1990s, the Court applied the *Batson* framework in three other contexts. In *Powers v. Ohio*, it held that, in the trial of a white criminal defendant, a prosecutor is prohibited from excluding African-American jurors on the basis of race. Bearing in mind that racial discrimination in jury selection harms the excluded jurors and "casts doubt on the integrity of the judicial process," the Court announced that racial identity between the objecting defendant and the excluded jurors does not constitute a relevant pre-condition for a *Batson* challenge, and would, in fact, contravene the substantive guarantees of the Equal Protection Clause.[131] Further, *McCollum* held that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. In so holding, the Court observed, *inter alia*, that racially discriminatory challenges harm the individual juror by subjecting him to "open and public racial discrimination" and harm the community by undermining public confidence in this country's system of justice.[132] On similar grounds, *Edmonson* decided that in a civil case, private litigants cannot exercise their peremptory strikes in a racially discriminatory manner.[133]

d. Capital Sentencing

[K38] A criminal defendant alleging an equal protection violation "must prove that the purposeful discrimination had a discriminatory effect on him." Thus, to prevail under the equal protection guarantee, one who received the death penalty "must prove that the decisionmakers in *his* case acted with discriminatory purpose."[134] The nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in other contexts, where the Court has accepted statistics as proof of intent to discriminate, such as the venire selection. "Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. . . . Thus, the application of an infer-

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tion. At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *See* Purkett v. Elem, 514 U.S. 765, 768 (1995) *(per curiam)*.

131 Powers v. Ohio, 499 U.S. 400, 406 (1991). A criminal defendant has standing to raise the third-party equal protection claims of jurors excluded by the prosecution because of their race. *See, in extenso*, para. A26.

132 Georgia v. McCollum, 505 U.S. 42, 49–50 (1992). The Court also pointed out that removing a juror whom the defendant believes harbors racial prejudice is different from exercising a peremptory challenge to discriminate invidiously against jurors on account of race. *Id.* at 59.

133 Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991). A private civil litigant may raise the equal protection claim of a person whom the opposing party has excluded from jury service on account of race. *See, in extenso*, para. A26.

134 McCleskey v. Kemp, 481 U.S. 279, 292 (1987).

ence drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection."[135] Another important difference between the cases in which statistics are proof of discriminatory intent and a capital sentencing case is that, in the former cases, the decisionmaker has an opportunity to explain the statistical disparity. By contrast, controlling considerations of public policy, dictate that jurors "'cannot be called . . . to testify to the motives and influences that led to their verdict.' . . . Similarly, the policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of requiring prosecutors to defend their decisions to seek death penalties, often years after they were made. . . . Because discretion is essential to the criminal justice process, exceptionally clear proof [is required before the Court will] infer that the discretion has been abused."[136]

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[135] *Id.* at 294.

[136] *Id.* at 296–97. In that case, an African-American, argued that the Georgia capital sentencing scheme was administered in a racially discriminatory manner, in violation of the Fourteenth Amendment. However, he offered no evidence specific to his own case that would support an inference that racial considerations had played a part in his sentence; instead, he relied solely on a statistical study (the Baldus study). In addition, there was no evidence that the legislature had either enacted the statute to further a racially discriminatory purpose or maintained the statute, because of the racially disproportionate impact, suggested by the Baldus study. Hence, the Court rejected the allegation.

The Court also found that the Baldus study did not demonstrate that the Georgia capital sentencing system violated the Eighth Amendment. First, McCleskey could not successfully argue that the sentence in his case was disproportionate to the sentences in other murder cases. On the one hand, he could not base a constitutional claim on an argument that his case differed from other cases in which defendants had received the death penalty. The Georgia supreme court had found that his death sentence was not disproportionate to other death sentences imposed in the state. On the other hand, absent a showing that the Georgia capital punishment system operated in an arbitrary and capricious manner, he could not prove a constitutional violation by demonstrating that other defendants who might be similarly situated had not received the death penalty. The opportunities for discretionary leniency under state law do not render the capital sentences imposed arbitrary and capricious. Because petitioner's sentence had been imposed under Georgia sentencing procedures that focused discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," it might be presumed that his death sentence had not been "wantonly and freakishly" imposed, and, thus, the sentence was not disproportionate within any recognized meaning under the Eighth Amendment. Further, the Court rejected the contention that the Baldus study showed that Georgia's capital punishment system was arbitrary and capricious in application. The statistics did not prove that race entered into any capital sentencing decisions or that race had been a factor in petitioner's case. At most, the Baldus study indicated a discrepancy that appeared to correlate with race, but this discrepancy did not constitute a major systemic defect. Any mode for determining guilt or punishment has its weaknesses and the potential for misuse. Despite such imperfections, constitutional guarantees are met when the mode for determining guilt or punishment has been surrounded with safeguards to make it as fair as possible. The Court emphasized that "where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious," and it concluded that the Constitution "does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment." *Id.* at 292–319.

e. In the School Context[137]

[K39] A "finding that the pupil population in [a school district] is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the [School] Board."[138] "[E]xisting policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities [a]re among the most important indicia of a segregated system."[139] *Keyes*, the first case that involved a school system without a history of statutorily mandated racial assignment, held that proof of "intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a *prima facie* case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions."[140]

7. Remedying Segregation

a. Public Schools and Universities

[K40] On May 17, 1954, *Brown I* decided that segregation of the races in the public schools was unconstitutional.[141] In that case, the Court left undecided the manner in which the transition from segregated to unitary school systems would be achieved, and set the case down for another hearing, inviting the Attorney General of the United States and the Attorneys General of the states providing for racial segregation in the public schools to present their views on the best ways to implement and enforce the judgment. The Court devoted four days to the argument on this single problem, and all the affected parties were given the opportunity to present their views at length. After careful consideration of the many viewpoints so fully aired by the parties, the Court announced its decision in *Brown II*. There, the Court "held that the primary responsibility for abolishing the system of segregated schools would rest with the local school authorities. In some of the States that [had] argued before [the Court,] the laws permitted, but did not require, racial segregation, and, in some of these States, 'substantial steps to eliminate racial discrimination in public schools ha[d] already been taken.'

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137 *See also* para. K42, n.149.

138 Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413 (1977) *(Dayton I)*.

139 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971).

140 Keyes v. Sch. Dist. No. 1, Denver, Colorado, 413 U.S. 189, 201, 208 (1973). *See also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 467–68 (1979) ("[P]urposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a system-wide discriminatory intent unless otherwise rebutted, and . . . given the purpose to operate a dual school system, one could infer a connection between such a purpose and racial separation in other parts of the school system.").

In *Keyes, supra*, at 197–98, the Court also held that though of different origins, African-Americans and Latinos in Denver suffered identical discrimination in treatment when compared with the treatment afforded Caucasian students. Hence, petitioners were entitled to have schools with a combined predominance of blacks and Hispanics included in the category of "segregated" schools.

141 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) *(Brown I)*.

. . . Many other States had for many years maintained a completely separate system of schools for whites and nonwhites, and the laws of these States, both civil and criminal, had been written to keep this segregated system of schools inviolate. The practices, habits, and customs had for generations made this segregated school system a fixed part of the daily life and expectations of the people. Recognizing these indisputable facts, [the Court] neither expected nor ordered that a complete abandonment of the old and adoption of a new system be accomplished overnight. The changes were to be made 'at the earliest practicable date,' and with 'all deliberate speed.' . . . [The Court was] not content, however, to leave this task in the unsupervised hands of local school authorities, trained as most would be under the old laws and practices, with loyalties to the system of separate white and [black] schools. . . . The problem of delays by local school authorities during the transition period was therefore to be the responsibility of courts, local courts so far as practicable, those courts to be guided by traditional equitable flexibility to shape remedies in order to adjust and reconcile public and private needs."[142] These courts were charged in the *Brown II* opinion with a duty to: "require that the defendants [local school authorities] make a prompt and reasonable start toward full compliance with [the Court's] May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system."[143]

[K41] In this context, federal courts are required "to focus upon three factors. In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. . . . The remedy must therefore be related to 'the condition alleged to offend the Constitution.' . . . Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they

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[142] *See* United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 226–27 (1969), *discussing* and *quoting* Brown v. Bd. of Educ. of Topeka, 349 U.S. 294, 299–301 (1955) *(Brown II).*

[143] Brown v. Board of Education of Topeka, 349 U.S. 294, 300–01 (1955).

Whether the action affecting dismantling of a dual school system is initiated by the legislature or by the school board is immaterial; the criterion is whether the process of school desegregation. *See* United States v. Scotland Neck Bd. of Educ., 407 U.S. 484, 488–89 (1972).

Recognition of the possible need for delay was not extended to desegregation of state colleges or universities in which like problems were not presented. *See, e.g., Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 414 (1956), where, in remanding on the authority of *Brown*, the Court said that, "[a]s this case involves the admission of a Negro to a graduate professional school, there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates."

In *Cooper v. Aaron*, 358 U.S. 1, 16 (1958), the Court declared that "[t]he constitutional rights of [black students] are not to be sacrificed or yielded to [interracial] violence and disorder."

would have occupied in the absence of such conduct.' . . . Third, the federal courts, in devising a remedy, must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[144]

[K42] "In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but 'to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.'"[145] The earliest post-*Brown* school cases in the Court only intimated that a transition to a racially nondiscriminatory school system required adoption of a policy of non-discriminatory admission.[146] It was not until the 1967 Term that the Court indicated that school systems with a history of statutorily mandated separation of the races would have to do more than simply permit black students

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[144] Milliken v. Bradley, 433 U.S. 267, 280–81 (1977) *(Milliken II), quoting* Milliken v. Bradley, 418 U.S. 717, 738, 746 (1974). *See also* Missouri v. Jenkins, 515 U.S. 70, 89 (1995) ("Proper analysis of the District Court's orders challenged . . . must rest upon their serving as proper means to the end of restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct and their eventual restoration of state and local authorities to the control of a school system that is operating in compliance with the Constitution.").

"The concept of unitariness has been a helpful one in defining the scope of the district courts' authority, for it conveys the central idea that a school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn. But . . . the term 'unitary' is not a precise concept, . . . [and] does not confine the discretion and authority of the District Court in a way that departs from traditional equitable principles." *See* Freeman v. Pitts, 503 U.S. 467, 486–87 (1992).

In *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977), the Court said: "If . . . violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the . . . 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."

[145] Bd. of Educ. of Oklahoma City v. Dowell, 498 U.S. 237, 250 (1991), *quoting* Green v. New Kent County Sch. Bd., 391 U.S. 430, 435 (1968).

[146] *See* Cooper v. Aaron, 358 U.S. 1 (1958); Goss v. Bd. of Educ., 373 U.S. 683 (1963); Griffin v. Sch. Bd., 377 U.S. 218 (1964). In *discussing* the *Brown II* mandate, the Court in *Cooper v. Aaron, supra*, at 7, observed: "Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the Court should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation." A similar limited expectation pervades *Goss v. Board of Education*, 373 U.S. 683, 687 (1963), where the Court invalidated court-ordered desegregation plans that permitted transfers on the basis of race. Specifically, the desegregation plan called for the redrawing of school districts without reference to race, but explicitly authorized transfers by students of one race from a school where their race was a minority to a school where their race was a majority. There was no provision for majority-to-minority school transfers. The Court objected to the explicit racial character of the transfer program.

to attend white schools and *vice versa*. In *Green*, the Court had before it a "freedom of choice" plan, put forward as a desegregation remedy, under which individual students could specify which of two local schools they would attend. The Court held that adoption of a freedom of choice plan did not, by itself, satisfy a school district's mandatory responsibility to eliminate all vestiges of a dual system. As the Court pointed out, school boards operating such systems were "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."[147] *Green* was a turning point in the Court's law in a further respect. Concerned by more than a decade of inaction, the Court stated that "the time for mere 'deliberate speed' has run out."[148] The Court added that the obligation of school districts, once segregated by law, was to come forward with a plan that "promises realistically to work, and promises realistically to work *now* . . . until it is clear that state-imposed segregation has been completely removed."[149]

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[147] Green v. New Kent County Sch. Bd., 391 U.S. 430, 437–38 (1968) (emphasis added).

[148] *Id.* at 438.

[149] *Id.* at 439. The Court found that the challenged plan had proved to be ineffective, since the school system remained a dual system. In the three years following court approval of the "freedom of choice" plan in the county, not a single white child had chosen to attend the historically black school, which continued to serve 85 percent of the county's black schoolchildren. The *Green* Court concluded that, in the absence of other efforts at desegregation, the plan was not sufficient to provide the remedy mandated by *Brown II*. *Id.* at 441.

In *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538 (1979) *(Dayton II)* (emphasis added), the Court made clear that the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is "*the effectiveness, not the purpose, of the actions* in decreasing or increasing the segregation caused by the dual system." Hence, the board had "to do more than abandon its prior discriminatory purpose." The board had "an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices 'are not used and do not serve to perpetuate or re-establish the dual school system,' . . . and *the Board has a heavy burden of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends.*"

Monroe v. Board of Commissioners, 391 U.S. 450 (1968) was handed down on the same day as *Green*. At issue in that case was a "free transfer," rather than "freedom of choice" plan. The "free transfer" provisions were part of a court-ordered plan that essentially instituted a neighborhood school policy for the three junior high schools in the system. Any child could transfer to another school if space was available, i.e., if there were no neighborhood zone residents to fill the spaces. No bus service was provided. The Court did not object to the neighborhood school policy as part of a remedy, even though some neighborhoods were racially identifiable, but it found that the effect of the free transfer policy was to maintain the racial characters of the three junior high schools. One remained all black, and another 99 percent white. Since it had not been shown that the "free-transfer" plan would further, rather than delay conversion to a unitary nonracial system, it was found to be unacceptable, and the school board should formulate a new plan promising realistically to convert promptly to a system without a "white" school and a "black" school, but just schools.

Bazemore v. Friday, 478 U.S. 385, 407 (1986) "raised the issue whether the financing and operational assistance provided by a state university's extension service to voluntary 4-H and Homemaker Clubs was inconsistent with the Equal Protection Clause because of the existence of numerous all-white and all-black clubs. Though, prior to 1965, the clubs were supported on a segregated basis, the District Court had found that the policy of segregation had been completely abandoned, and that no evidence existed of any lingering discrimination in either services or membership; any racial imbalance resulted from the wholly voluntary and unfettered

[K43] That brings the history of school desegregation litigation to *Swann*, which permitted federal courts to order busing, to set racial targets for school populations, and to alter attendance zones. *Swann* stated that, "[i]n devising remedies for legally imposed segregation, the responsibility of the local authorities and district courts is to ensure that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual school system."[150] The Court identified four essential problem areas with respect to student assignments:

> (1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;
>
> (2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;
>
> (3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and
>
> (4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.[151]

As to the first question, the Court stressed that "[t]he constitutional command to desegregate schools does not mean that every school in the community must always reflect the racial composition of the system as a whole. . . . [However,] [a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. [Hence, a] limited use made of mathematical ratios was within the equitable remedial discretion of the District Court."[152] Second, the Court held that, while "the existence of some small number of one-race, or virtually one-race, schools within a district is not, in and of itself, the mark of a system that still practices segregation by law, [district courts] or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but, in a system with a history of segregation, the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools

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choice of private individuals. . . . In this context, the Court held inapplicable the *Green* Court's judgment that a voluntary choice program was insufficient to dismantle a *de jure* dual system in public primary and secondary schools, but only after satisfying itself that the State had not fostered segregation by playing a part in the decision of which club an individual chose to join." *See* United States v. Fordice, 505 U.S. 717, 730 (1992).

There were two school desegregation cases heard in the Court in the years between *Green* and *Swann*. *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), reiterated that the era of "all deliberate speed" had ended. *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969), allowed federal courts to desegregate faculty and staff according to specific mathematical ratios, with the ultimate goal that each school in the system would have roughly the same proportions of white and black faculty.

150 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971).

151 *Id.* at 22.

152 *Id.* at 24–25.

that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory."[153] In this context, "[a]n optional majority-to-minority transfer provision constitutes a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move."[154] Third, the Court decided that the remedial altering of attendance zones is not, "as an interim corrective measure, . . . beyond the remedial powers of a court."[155] "'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral."[156] "[T]he pairing and grouping of noncontiguous school zones is a permissible tool, and such action is to be considered in light of the objectives sought. . . . Maps do not tell the whole story, since noncontiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically closer together. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations."[157] As to transportation of students, the remedial technique of requiring bus transportation as a tool of school desegregation is within a district court's power to provide equitable relief. "An objection to transportation may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process."[158] Finally, the *Swann* Court noted that "[n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."[159]

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153 *Id.* at 26.

154 *Id.* at 26–27.

155 *Id.* at 27.

156 *Id.* at 28.

157 *Id.* at 28–29.

158 *Id.* at 30–31.

159 *Id.* at 31–32. In *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), held that a district court had exceeded its remedial authority in requiring annual readjustment of school attendance zones in the Pasadena school district when changes in the racial makeup of the schools were caused by demographic shifts "not attributed to any segregative acts on the part of the [school district]." *Id.* at 436.

North Carolina Board of Education v. Swann, 402 U.S. 43 (1971), invalidated a state law that flatly forbade assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and that prohibited busing for such purposes. As the Court noted, "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To for-

[K44] Substantial local control of public education in the United States is a deeply rooted tradition. Hence, "school district lines may [not] be casually ignored or treated as a mere administrative convenience."[160] In *Milliken I*, the Court determined that a desegregation remedy that would require mandatory inter-district reassignment of students throughout the Detroit metropolitan area was an impermissible inter-district response to the intra-district violation identified. In that case, the lower courts had ordered an inter-district remedy, because "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area." The Court held that, before a district court can order an inter-district remedy, there must be a showing 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 substantial cause of inter-district segregation. Thus, an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race."[161] Because the record contained evidence of *de jure* segregated conditions only in the Detroit schools, and there had been no showing of significant violation by the 53 outlying school districts and no evidence of inter-district violation or effect, the Court reversed the district court's grant of inter-district relief.[162]

[K45] A formerly *de jure* segregated school district has to provide its victims with "make whole" relief. A school desegregation decree must "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[163] Children who have been educationally and culturally set apart from the larger community may acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. In light of the above, *Milliken II* upheld remedial education programs and other measures (such as guidance and counseling programs) for schoolchildren who had been subjected to past acts of *de jure* segregation.[164]

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bid . . . all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems. . . . [L]ikewise an absolute prohibition against transportation of students assigned on the basis of race, or for the purpose of creating a balance or ratio, will similarly hamper the ability of local authorities to effectively remedy constitutional violations." *Id.* at 46.

160 Milliken v. Bradley, 418 U.S. 717, 741 (1974) *(Milliken I)*.

161 *Id.* at 745.

162 Justice Stewart provided the Court's fifth vote and wrote separately to underscore his understanding of the decision. In describing the requirements for imposing an "inter-district" remedy, Justice Stewart stated: "Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines; by transfer of school units between districts; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for the transfer of pupils across district lines or for restructuring of district lines might well be appropriate. In this case, however, no such interdistrict violation was shown." *Id.* at 755 (concurring opinion). Justice Stewart concluded that the Court properly rejected the district court's interdistrict remedy because "[t]here were no findings that the differing racial composition between schools in the city and in the outlying suburbs was caused by official activity of any sort." *Id.* at 757.

163 Milliken v. Bradley, 418 U.S. 717, 746 (1974).

164 Milliken v. Bradley, 433 U.S. 267, 280, n.15, 287–88 (1977) *(Milliken II)*.

[K46] Federal court injunctions entered in school desegregation cases are not intended to operate in perpetuity; "federal supervision of local school systems always was intended as a temporary measure to remedy past discrimination. . . . The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time" is proper.[165] Among the factors that must inform the court's discretion to order the incremental withdrawal of its supervision in an equitable manner are the following: "whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance."[166] "In considering these factors, a court should give particular attention to the school system's record of compliance. A school system is better positioned to demonstrate its good faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations. And with the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision."[167]

[K47] In *Fordice*, the Court decided what standards to apply in determining whether a state has met its affirmative obligation to dismantle its prior *de jure* segregated system in the university context. There, the Court held that "[i]f the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even if the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose."[168]

b. Desegregation and Private Schools that Discriminate Racially [169]

[K48] "Racial discrimination in state-operated schools is barred by the Constitution and it is also axiomatic that a state may not induce, encourage or promote private per-

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165 Bd. of Educ. of Oklahoma City v. Dowell, 498 U.S. 237, 247–48 (1991).

166 Freeman v. Pitts, 503 U.S. 467, 491 (1992).

167 *Id.* at 491–92.

168 United States v. Fordice, 505 U.S. 717, 731–32 (1992). Applying this legal standard, the Court found that "there [we]re several surviving aspects of Mississippi's prior dual system which [we]re constitutionally suspect; for even though such policies [might] be race-neutral on their face, they substantially restrict[ed] a person's choice of which institution to enter, and they contribute[d] to the racial identifiability of the eight public universities. Mississippi [should] justify these policies or eliminate them." *Id.* at 733.

169 *See also* paras. H53, I436.

sons to accomplish what it is constitutionally forbidden to accomplish."[170] *Norwood* considered a Mississippi program that provided textbooks to students attending both public and private schools, without regard to whether any participating school had racially discriminatory policies. The Court emphasized that "the Constitution does not permit the State to aid discrimination, even when there is no precise causal relationship between state financial aid to a private school and the continued wellbeing of that school."[171] "[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.'"[172]

[K49] *Griffin* involved a situation where a county's school system literally closed down its schools, rather than desegregate, and, at the same time, it assumed "responsibility for furnishing free lunches, transportation, and grants-in-aid to the children" attending private segregated schools. The Court found that the county's school children were treated differently from those of other counties, since they should go to private schools or none at all. Moreover, the plan was aimed at "the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or county funds." The decree endorsed by the Court was an order enjoining the county officials from paying county tuition grants or giving tax exemptions and from processing applications for state tuition grants so long as the county's public schools remained closed. Relatedly, the Court noted that "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system" in the county like that operated in other counties in Virginia.[173]

[K50] In *Gilmore*, the plaintiffs alleged that a city was violating the Equal Protection Clause by permitting racially discriminatory private schools and other groups to use the public parks. The Court found that permitting *exclusive* use by school groups was unlawful, because it violated the city's constitutional obligation, spelled out in an outstanding school desegregation order, to take no action that would impede the integration of the public schools. Exclusive availabililty of the public parks significantly "enhanced the attractiveness of segregated private schools, formed in reaction against the federal court school order, by enabling them to offer complete athletic programs. The city's provision of stadiums and recreational fields resulted in capital savings for those schools and enabled them to divert their own funds to other educational programs. It also provided the opportunity for the schools to operate concessions that generated revenue. . . . [T]his assistance significantly tended to undermine the federal court order mandating the establishment and maintenance of a unitary school system in the city. It therefore

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[170] Norwood v. Harrison, 413 U.S. 455, 465 (1973). *See also* Cooper v. Aaron, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.").

[171] Norwood v. Harrison, 413 U.S. 455, 465–66 (1973).

[172] Gilmore v. City of Montgomery, 417 U.S. 556 (1974), *quoting* Norwood v. Harrison, 413 U.S. 455, 466 (1973).

[173] Griffin v. Sch. Bd., 377 U.S. 218, 230–33 (1964).

was wholly proper for the city to be enjoined from permitting exclusive access to public recreational facilities by segregated private schools and by groups affiliated with such schools."[174]

c. Public Parks and Other Recreational Facilities[175]

[K51] "Desegregation of [public] parks and other recreational facilities did not present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools at which attendance was compulsory, the adequacy of teachers and facilities crucial, and questions of geographic assignment often of major significance."[176] *Watson* thus held that delay in desegregating recreational facilities could not be upheld "except upon the most convincing and impressive demonstration by the local authorities that such delay [wa]s manifestly compelled by constitutionally cognizable circumstances warranting the exercise of an appropriate equitable discretion by a court."[177]

[K52] In *Palmer*, the city of Jackson, Mississippi, following a court decree to this effect, desegregated all of its public facilities save five swimming pools that had been operated by the city and that, following the decree, were closed by ordinance pursuant to a determination by the city council that closure was necessary to preserve peace and order, and that integrated pools could not be economically operated. "Accepting the finding that the pools were closed to avoid violence and economic loss, th[e] Court rejected the argument that the abandonment of this service was inconsistent with the outstanding desegregation decree, and that the otherwise seemingly permissible ends served by the ordinance could be impeached by demonstrating that racially invidious motivations had prompted the city council's action."[178]

d. Prisons

[K53] In *Lee v. Washington*, the practice of racial segregation of prisoners was justified by the state as necessary to maintain good order and discipline. The Court held, however, that the practice was constitutionally prohibited, although it was careful to point

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[174] Gilmore v. City of Montgomery, 417 U.S. 556, 569 (1974). The Court also held that, on the record of the case, it was not possible to determine whether the use of the city's recreational facilities by private school groups in common with others, and by private non-school organizations, involved the city so directly in the action of those users as to warrant court intervention on constitutional grounds. *Id.* at 570.

[175] *See also* para. K50.

[176] Watson v. Memphis, 373 U.S. 526, 532 (1963).

[177] *Id.* at 533. There, the Court rejected the city's contention that gradual desegregation on a facility by facility basis was necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil. *Id.* at 535.

[178] *See* Washington v. Davis, 426 U.S. 229, 242–43 (1976), *discussing* Palmer v. Thompson, 403 U.S. 217 (1971). "The holding was that the city was not overtly or covertly operating segregated pools, and was extending identical treatment to both whites and [blacks.] The opinion warned against grounding decision on legislative purpose or motivation. But the holding of the case was that the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. . . . [T]he decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences." *See* Washington v. Davis, 426 U.S. 229, 243 (1976).

out that the order of the district court, which it affirmed, made "allowance for the necessities of prison security and discipline."[179] In *Johnson v. California*, the Court made clear that strict scrutiny is the proper standard of review for an equal protection challenge to a state's policy of racially segregating prisoners. In so holding, the Court noted, *inter alia*, that "racial classifications 'threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility*.' . . . Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates 'may exacerbate the very patterns of [violence that it is] said to counteract.'"[180] "[C]ompliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Race discrimination is 'especially pernicious in the administration of justice.' . . . When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers."[181] In light of these considerations, the Court concluded that "the necessities of prison security and discipline . . . are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities."[182]

e. Housing

[K54] In *Hills v. Gautreaux*, the Federal Department of Housing and Urban Development (HUD) was found to have participated, along with a local housing agency, in establishing and maintaining a racially segregated public housing program. After the court of appeals ordered the adoption of a "comprehensive metropolitan area plan," the Court granted *certiorari* to consider the permissibility, in the light of *Milliken I*,[183] of inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation. The Court's opinion made clear that the authority of the HUD extended beyond the Chicago city limits, and that HUD's own administrative practice treated the Chicago metropolitan area as an undifferentiated whole. Because "[t]he relevant geographic area for the purposes of the respondents' housing options [wa]s the Chicago housing market, not the Chicago city limits," the Court concluded that a metropolitan area remedy was not impermissible as a matter of law.[184]

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[179] Lee v. Washington, 390 U.S. 333, 334 (1968) *(per curiam)*. Three members of the Court, in their concurring opinion, made explicit what was left to be gathered only by implication from the Court's opinion: "This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Id.* at 334. *See also* Cruz v. Beto, 405 U.S. 319, 321 (1972) ("racial segregation is unconstitutional within prisons, save for the necessities of prison security and discipline").

[180] Johnson v. California, 543 U.S. 499, 507 (2005), *quoting* Shaw v. Reno, 509 U.S. 630, 643, 648 (1993).

[181] *Id.* at 510–11.

[182] *Id.* at 512.

[183] *See* para. K44.

[184] Hills v. Gautreaux, 425 U.S. 284, 298–300, 306 (1976). The Court distinguished *Milliken I,* in part, because prior cases had established that racial segregation in schools is to be dealt with in terms of "an established geographic and administrative school system," and because "the

8. Repeal of Remedies and Restructuring of the Political Process[185]

[K55] In *Reitman*, California had repealed two laws relating to racial discrimination in the sale of housing by passing a constitutional amendment establishing the right of private persons to discriminate on racial grounds in real estate transactions. In finding a violation of the Equal Protection Clause of the Fourteenth Amendment, the Court accepted what it designated as the holding of the supreme court of California, namely that the constitutional amendment was an official authorization of racial discrimination that encouraged and significantly involved the state in the discriminatory acts of private parties.[186]

[K56] "[T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place; . . . the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[187] But "if the purpose of repealing [anti-discrimination] legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason."[188] If the mere repeal of race-related legislation were unconstitutional, the authority of states to deal with the problems of a heterogeneous population would be seriously limited. "States would be committed irrevocably to legislation that has proved unsuccessful in practice. And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation . . . discourag[ing] the States from providing greater protection to racial minorities. Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities, but which has produced just the opposite effects. Yet these would be the results of requiring a State to maintain legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place."[189]

State's educational structure vested substantial independent control over school affairs in the local school districts." In *Gautreaux,* by contrast, "a metropolitan area remedy involving HUD need not displace the rights and powers accorded suburban governmental entities under federal or state law." *Id.* at 298, n.13.

In *Gautreaux*, the Court did not obligate the district court to subject HUD to measures going beyond the geographical or political boundaries of its violation. Instead, it cautioned that its holding should not be interpreted as requiring a metropolitan area order. *Id.* at 306.

185 *See also* para. K128.

186 Reitman v. Mulkey, 387 U.S. 369, 376–81 (1967).

187 Crawford v. Bd. of Educ. of Los Angeles, 458 U.S. 527, 538–39 (1982).

188 *Id.* at 539, n.21.

189 *Id.* at 539–40. The California Constitution prohibited *de jure* as well as *de facto* segregation. *Crawford* upheld an amendment to the California Constitution, which provided that state courts would not order mandatory pupil assignment or transportation unless a federal court "would be permitted under federal decisional law" to do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution. First, the Court noted that the amendment did not embody a racial classification. It neither said nor implied that persons were to be treated differently on account of their race. It simply forbade state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation. "The benefit it [sought] to confer—neighborhood schooling—[wa]s made available regardless of race in the discretion of school boards. Indeed, even if [the amendment] ha[d] a racially discriminatory effect, in view of the demographic mix of the District, it [wa]s not clear

[K57] "Laws structuring political institutions or allocating political power according to 'neutral principles'—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they 'may make it more difficult for minorities to achieve favorable legislation.' . . . Because such laws make it more difficult for *every* group in the community to enact comparable laws, they 'provid[e] a just framework within which the diverse political groups in the American society may fairly compete.' . . . Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process. State action of this kind . . . 'places special burdens on racial minorities within the governmental process,' thereby 'making it more difficult for certain racial minorities [than for other members of the community] to achieve legislation that is in their interest.' . . . Such a structuring of the political process [i]s 'no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others."[190]

[K58] These principles received their clearest expression in *Hunter*. There the citizens of Akron had amended the city charter to require that any ordinance regulating real estate on the basis of race, color, religion, or national origin could not take effect without approval by a majority of those voting in a city election. The charter amendment was not a simple repeal of the existing ordinance forbidding housing discrimination, but it also required the approval of the electors before any future anti-discrimination ordinance could take effect. The Court held that the amendment created a classification based upon race, because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum, while other housing ordinances took effect without any such special election. The Court concluded that Akron had advanced no sufficient reasons to justify this racial classification, and, hence, that it was unconstitutional under the Fourteenth Amendment.[191]

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which race or races would be affected the most, or in what way." *Id.* at 537. Moreover, the amendment was less than a "repeal" of the California Equal Protection Clause, since, even after its enactment, the state Constitution still placed upon school boards a greater duty to desegregate than did the Fourteenth Amendment. Nor could it be said that the amendment "distort[ed] the political process for racial reasons, or that it allocate[d] governmental or judicial power on the basis of a discriminatory principle." *Id.* at 541. "A 'dual court system'—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas. Surely it was constitutional for the California Supreme Court to caution that, although, 'in some circumstances, busing will be an appropriate and useful element in a desegregation plan,' in other circumstances, 'its costs, both in financial and educational terms, will render its use inadvisable.' . . . It was equally constitutional for the people of the State to determine that the standard of the Fourteenth Amendment was more appropriate for California courts to apply in desegregation cases than the standard repealed by" the constitutional amendment. *Id.* at 542. Finally, even if it could be assumed that the amendment had a disproportionate adverse effect on racial minorities, its purposes—chief among them the educational benefits of neighborhood schooling—were legitimate, non-discriminatory objectives. *Id.* at 545.

190 Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470 (1982), *quoting* Hunter v. Erickson, 393 U.S. 385, 391, 393–95 (1969).

191 Hunter v. Erickson, 393 U.S. 385, 389–393 (1969). In *James v. Valtierra*, 402 U.S. 137 (1971), it was contended that a California referendum requirement violated the Fourteenth

[K59] In *Washington v. Seattle School District*, a statewide ballot initiative, passed at general election, terminated the use of mandatory busing for purposes of racial integration in the public schools of the state of Washington. The initiative prohibited school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home. It set out a number of broad exceptions to this requirement, however: a student could be assigned beyond his neighborhood school if he required special educational programs, or if the nearest or next nearest school was overcrowded or unsafe, or if it lacked necessary physical facilities. These exceptions permitted school boards to assign students away from their neighborhood schools for virtually all of the non-integrative purposes required by their educational policies. The Court held that the initiative should "fall because it d[id] not attempt to allocate governmental power on the basis of any general principle," but, instead, "it use[d] the racial nature of an issue to define the governmental decisionmaking structure, thus imposing substantial and unique burdens on racial minorities."[192] "Those favoring the elimination of *de facto* school segregation [should thereafter] seek relief from the state legislature, or from the statewide electorate."[193] The initiative "worked a major reordering of the State's educational decisionmaking process. . . . By placing power over desegregative busing at the state level, then, [the] [i]nitiative . . . plainly differentiate[d] between the treatment of problems involving racial matters and that afforded other problems in the same area."[194] The initiative "work[ed] something more than the 'mere repeal' of a desegregation law by the political entity that [had] created it. It burden[ed] all future attempts to integrate Washington schools by lodging decisionmaking authority over the question at a different and remote level of government."[195] This made "the enactment of racially beneficial legislation difficult, . . . [and] impose[d] direct and undeniable burdens on minority interests."[196]

Amendment, because it imposed a mandatory referendum in the case of an ordinance authorizing low-income housing, while referenda with respect to other types of ordinances had to be initiated by the action of private individuals. The Court responded: "a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." *Id.* at 142. *See, in extenso*, para. K204.

192 Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470 (1982).

193 *Id.* at 474.

194 *Id.* at 479–80.

195 *Id.* at 483.

196 Id. at 483–84. The Court rejected the state's argument that the statewide initiative prohibiting mandatory student assignment had no "racial overtones" simply because it did not mention the words "race" or "integration." The Court found it "beyond reasonable dispute . . . that the initiative was enacted because of, not merely in spite of, its adverse effects upon busing for integration." Moreover, the Court rejected the contention that "busing for integration . . . is not a peculiarly racial issue at all." While not discounting the value of an integrated education to non-minority students, the Court concluded that "desegregation of the public schools . . . , at bottom, inures primarily to the benefit of the minority, and is designed for that purpose," thereby bringing it within the *Hunter* doctrine. *Id.* at 471–72.

C. GENDER CLASSIFICATIONS

1. In General—Standard of Review

[K60] The Court's "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. . . . [The American] Nation has had a long and unfortunate history of sex discrimination. . . . Through a century plus three decades and more of that history, women did not count among voters composing 'We the People;' not until 1920 did women gain a constitutional right to the franchise. . . . And, for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination."[197] In 1971, for the first time, the Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. In *Reed*, the Court struck down an Idaho probate code provision that gave men a mandatory preference over women, in the same degree of relationship to the decedent, in the administration of the decedent's estate. The Court reasoned that, by providing dissimilar treatment for men and women who are thus similarly situated, the challenged provision violated the Equal Protection Clause.[198] "Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[199]

[K61] Without equating gender classifications, for all purposes, to classifications based on race or national origin,[200] the Court has held that party who seeks to defend a statute that classifies individuals on the basis of sex must carry the burden of showing an "exceedingly persuasive justification" for the classification. The burden of justification is demanding and it rests entirely on the party defending the classification. The defender of the classification meets this burden only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."[201]

[K62] "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation;"[202] "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[203] Further, "it must not rely on overbroad generaliza-

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197 *See* United States v. Virginia, 518 U.S. 515, 531 (1996), *citing* Goesaert v. Cleary, 335 U.S. 464, 467 (1948) (rejecting a challenge of a female tavern owner and her daughter to Michigan law denying bartender licenses to females—except for wives and daughters of male tavern owners; the Court would not "give ear" to the contention that "an unchivalrous desire of male bartenders to . . . monopolize the calling" prompted the legislation).

198 *See* Reed v. Reed, 404 U.S. 71, 77 (1971).

199 United States v. Virginia, 518 U.S. 515, 532 (1996)

200 The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin.

201 *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); United States v. Virginia, 518 U.S. 515, 533 (1996).

202 United States v. Virginia, 518 U.S. 515, 533 (1996).

203 Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

tions about the different talents, capacities, or preferences of males and females,"[204] even if such generalizations enjoy empirical support.[205] "'Inherent differences' between men and women, . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[206] Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered,"[207] and to "promot[e] equal employment opportunity;"[208] but they may not be used "to create or perpetuate the legal, social, and economic inferiority of women."[209]

[K63] Under the heightened scrutiny with which the Court has approached gender-based discrimination, a sufficiently tight fit between means and ends is required. Hence, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification.[210]

2. Particular Applications

a. Family Law [211]

i. Distinctions Between Unwed Mothers and Fathers

[K64] *Parental Rights. Stanley* addressed the constitutionality of an Illinois statute that conclusively presumed every father of a child born out of wedlock to be an unfit person to have custody of his children. The father in that case had lived with his children all their lives and had lived with their mother for 18 years. There was nothing in the record to indicate that Stanley had been a neglectful father who had not cared for his children. Under the statute, however, the nature of the actual relationship between parent and child was completely irrelevant. Once the mother died, the children were automatically made wards of the state. By contrast, the state assumed custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing on their fitness and proof of neglect. The Court found that denying such a hearing to Stanley and those like him, while granting it to other Illinois parents, was contrary to the Equal Protection Clause.[212]

[K65] *Caban* involved the conflicting claims of two natural parents who had lived together out of wedlock for several years and had maintained joint custody of their two children from the time of their birth until they were, respectively, two and four years

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[204] United States v. Virginia, 518 U.S. 515, 533 (1996).

[205] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 199 (1976); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139, n.11 (1994).

[206] United States v. Virginia, 518 U.S. 515, 533 (1996).

[207] Califano v. Webster, 430 U.S. 313, 320 (1977) *(per curiam).*

[208] *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987).

[209] United States v. Virginia, 518 U.S. 515, 533 (1996).

[210] *See, e.g.*, Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142, 151 (1980) (invalidating a sex-based classification where a sex-neutral approach would completely serve the needs of both classes: "the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need"); Orr v. Orr, 440 U.S. 268, 281 (1979) (finding "no reason, therefore, to use sex as a proxy for need" where the alimony statute already provided for individualized hearings that took financial circumstances into account).

[211] *See also* para. K93 *(alimony).*

[212] Stanley v. Illinois, 405 U.S. 645, 658 (1972).

old. The father challenged the validity of an order authorizing the mother's new husband to adopt the children. The Court held that it violated the Equal Protection Clause to grant the mother a veto over the adoption of the children—aged four and six at the time of the adoption proceedings—but not to grant a veto to their father, who had admitted paternity and had participated in their rearing. In so holding, the Court rejected the claim that the broad, gender-based distinction in question was required by any universal difference between maternal and paternal relations at every phase of a child's development. "Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. . . . [A]n unwed father may have a relationship with his children fully comparable to that of the mother."[213] "Even if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns, these difficulties need not persist past infancy."[214]

[K66] However, "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child."[215] "[W]here the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."[216] *Quilloin* upheld a Georgia statute that always required a mother's consent to the adoption of a child born out of wedlock, but required the father's consent only if he had legitimated the child, as applied to a putative father, who "ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child, . . . d[id] not complain of his exemption from these responsibilities and, indeed, d[id] not even . . . seek custody of his child."[217] *Lehr* involved a New York law that automatically provided mothers of "illegitimate" children with prior notice of an adoption proceeding and the right to veto an adoption, but it only extended those rights to unmarried fathers whose claim of paternity was supported by some formal public act, such as a court adjudication, the filing of a notice of intent to claim paternity, or written acknowledgment by the mother. The petitioner in that case, an unmarried putative father, need only have mailed a postcard to the state's "putative father registry" to enjoy the same rights as the child's undisputed mother, yet he argued that this gender-based requirement violated the Equal Protection Clause. The Court rejected that argument, noting that Lehr had "never established any custodial, personal, or financial relationship with [his daughter]."[218]

[K67] In *Parham*, the Court rejected a challenge to a Georgia law that denied fathers (but not mothers) of out-of-wedlock children the right to sue for their children's wrongful death, unless they had legitimated them. Four Justices took the view that the statute did not invidiously discriminate on the basis of sex, and therefore evaluated the statute under rational basis review. Justifying its application of the rational basis test, that four-Justice plurality concluded that the statutory classification did not discriminate against

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213 Caban v. Mohammed, 441 U.S. 380, 389 (1979).

214 *Id.* at 392.

215 Lehr v. Robertson, 463 U.S. 248, 266–267 (1983).

216 Caban v. Mohammed, 441 U.S. 380, 392 (1979).

217 Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

218 Lehr v. Robertson, 463 U.S. 248, 267 (1983).

fathers as a class, but instead it distinguished between fathers who had legitimated their children and those who had not. Further, the plurality held that the statutory classification was a rational means for dealing with the problem of proving paternity after the death of an illegitimate child, noting that "[i]f paternity has not been established before the commencement of a wrongful death action, a defendant may be faced with the possibility of multiple lawsuits by individuals all claiming to be the father of the deceased child."[219] Justice Powell, concurring in the judgment, believed that the statute should be reviewed under intermediate scrutiny, since it drew a gender-based distinction, and, applying that standard, he agreed with the plurality that the statute passed constitutional muster.[220] The four dissenters also thought that the statute embodied a gender-based discrimination. Nevertheless, they found that "any interest the State conceivably has in simplifying the determination of liability in wrongful death actions . . . are not sufficient to justify foreclosing suit by the many, many fathers like Parham, about whose parenthood there is very little doubt indeed."[221]

[K68] *Acquisition of Citizenship-Immigration. Tuan Anh Nguyen* addressed the constitutionality of statutory provisions governing the acquisition of citizenship at birth by children born out of wedlock and outside of the United States. The specific challenge was to the distinction drawn between the child of an alien father and a citizen mother, on the one hand, and the child of an alien mother and a citizen father, on the other. Subject to residence requirements for the citizen parent, the citizenship of the former was established at birth; the citizenship of the latter was not established unless and until either the father or his child took one of three affirmative steps to create or confirm their relationship before the child turned 18: legitimization, a declaration of paternity under oath by the father, or a court order of paternity.[222] The Court determined that, even under heightened review,[223] Congress' decision to impose different requirements for the child's acquisition of citizenship depending upon whether the citizen parent was the mother or the father did not violate the equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment. The Court found that "Congress' decision to impose requirements on unmarried fathers that differed from those on unmarried mothers [wa]s based on the significant difference between their respective relationships to the potential citizen at the time of birth. Specifically, the imposition of the requirement for a paternal relationship, but not a maternal one, [wa]s justified by

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[219] Parham v. Hughes, 441 U.S. 347, 357 (1979).

[220] *Id.* at 359–61.

[221] *Id.* at 364, 366. The dissent noted, *inter alia*, that even "[a]ssuming that there might be a few occasions where multiple recoveries are threatened, steps could be taken to settle liability in one proceeding." *Id.* at 366.

[222] The constitutionality of this distinction was argued for the first time in *Miller v. Albright*, 523 U.S. 420 (1998), but a majority of the Court did not resolve the issue. Four Justices, in two different opinions, rejected the challenge to the gender-based distinction, two finding the statute consistent with the Fifth Amendment, and two concluding that the court could not confer citizenship as a remedy even if the statute violated equal protection. Three Justices reached a contrary result and would have found the statue violative of equal protection. Finally, two Justices did not reach the issue as to the father, having determined that the child, the only petitioner in *Miller*, lacked standing to raise the equal protection rights of his father.

[223] Given that determination, the Court did not decide whether some lesser degree of scrutiny pertained, because the statute implicated Congress' immigration and naturalization power. *See* Tuan Anh Nguyen v. Immigration and Naturalization Serv., 533 U.S. 53, 61 (2001).

two important governmental objectives."[224] The first such interest was the importance of assuring that a biological parent-child relationship existed. As the Court pointed out, the mother's relation is verifiable from the birth itself and is documented by the birth certificate or hospital records and the witnesses to the birth. However, a father need not be present at the birth, and his presence is not incontrovertible proof of fatherhood. Because "[f]athers and mothers are not similarly situated with regard to proof of biological parenthood, . . . [t]he imposition of different rules for [each] . . . is neither surprising nor troublesome from a constitutional perspective."[225] The statutory provision of three options was designed to ensure acceptable documentation of paternity. Petitioners argued that the requirement that a father provide clear and convincing evidence of parentage was sufficient to achieve the end of establishing paternity, given the sophistication of modern DNA tests. However, the provision did not mandate DNA testing. Moreover, the Constitution "does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method. With respect to DNA testing, the expense, reliability, and availability of such testing in various parts of the world may have been of particular concern to Congress. . . . [Hence,] [t]he requirement . . . represent[ed] a reasonable conclusion by the legislature that the satisfaction of one of several alternatives [would] suffice to establish the blood link between father and child required as a predicate to the child's acquisition of citizenship."[226] The second governmental interest furthered by the provision at issue was "the determination to ensure that the child and citizen parent ha[d] some demonstrated opportunity to develop a relationship that consisted of real, everyday ties providing a connection between child and citizen parent and, in turn, the United States."[227] That interest's importance was too profound to be satisfied by a DNA test, because scientific proof of biological paternity did not, by itself, ensure father-child contact during the child's minority. "Congress [wa]s well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit th[e] country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders and to full participation in the political process."[228] And there was "nothing irrational or improper in recognizing that at the moment of birth—a critical event in the statutory scheme and tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood are established in a way not guaranteed to the unwed father."[229] Further, the means chosen by Congress substantially related to its interest in facilitating a parent-child relationship. Although Congress could have chosen to advance the interest of ensuring a meaningful relationship in every case, it had the power to enact instead "an easily administered scheme to promote the different but still substantial interest of ensuring an opportunity for that relationship to develop." Even if one conceived of Congress' real interest as the establishment of a meaningful relationship, "a policy seek[ing] to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in that bond's formation." Congress'

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[224] Tuan Anh Nguyen v. Immigration and Naturalization Serv., 533 U.S. 53, 62 (2001).

[225] *Id.* at 63.

[226] *Id.* at 63.

[227] *Id.* at 64–65.

[228] *Id.* at 67.

[229] *Id.* at 68.

means were in substantial furtherance of an important governmental objective, and the fit between the means and that end was "exceedingly persuasive."[230]

[K69] The Court has emphasized that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[231] *Fiallo* upheld a sex-based statutory classification under which an illegitimate child could not seek special preference immigration status by virtue of relationship with its citizen or resident father, nor could an alien father seek preference based on his illegitimate child's citizenship or residence. Noting that Congress' choice not to provide preferential immigration status by virtue of the relationship between an illegitimate child and his or her natural father was just one of many drawn by Congress pursuant to its determination to provide some—but not all—families with relief from various immigration restrictions that would otherwise hinder reunification of the family in the country, the Court said that these were policy questions entrusted exclusively to the political branches of the government. "Congress obviously ha[d] determined that preferential status [wa]s not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties, as well as a concern with the serious problems of proof that usually lurk in paternity determinations." The Court concluded that "[i]n any event, it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision."[232]

ii. Management of Joint Property of Spouses

[K70] In *Kirchberg*, the Court invalidated a statute that gave husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent. In so doing, the Court rejected the argument that the wife could have made a "declaration by authentic act" prohibiting her husband from executing a mortgage on her home without her consent, noting that the "absence of an insurmountable barrier will not redeem an otherwise unconstitutionally discriminatory law."[233]

iii. Child Support

[K71] *Stanton* invalidated a state statute that specified a greater age of majority for males than for females and thereby affected the period during which a divorced parent was responsible for supporting his children. The Court did not question the importance or validity of the state's interest in defining parents' obligation to support children during their minority. On analysis, however, it determined that the purported relationship between that objective and the gender-based classification was based upon traditional assumptions that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl." Once those traditional notions were abandoned, no basis for finding a substantial relationship between classification and objective remained.[234]

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230 *Id.* at 69–70.

231 Fiallo v. Bell, 430 U.S. 787, 792 (1977), *quoting* Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)

232 *Id.* at 797–99.

233 Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

234 Stanton v. Stanton, 421 U.S. 7, 14–15 (1975).

b. Pregnancy Classifications

[K72] In *Geduldig*, the Court faced the question whether a state's disability insurance system (funded entirely from contributions deducted from the wages of participating employees, at a rate of 1 percent of the employee's salary up to an annual maximum of $85) violated the Fourteenth Amendment by excluding benefits for normal pregnancy. A majority of the Court held that the system did not constitute discrimination on the basis of sex prohibited by the Equal Protection Clause. As the Court pointed out, the program did "not exclude anyone from benefit eligibility because of gender, but merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities. . . . The program divide[d] potential recipients into two groups—pregnant women and nonpregnant persons. While the first group [wa]s exclusively female, the second include[d] members of both sexes. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."[235] However, no semblance of such a showing had been made. "There [wa]s no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There [wa]s no risk from which men [we]re protected and women [we]re not. Likewise, there [wa]s no risk from which women [we]re protected and men [we]re not."[236]

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[235] Geduldig v. Aiello, 417 U.S. 484, 496, n.20 (1974).

[236] *Id.* at 496–97. *Cf. also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976) (upholding a similar plan against a challenge under Title VII of the Civil Rights Act of 1964).

The dissenters in *Geduldig* noted, *inter alia*, that "by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." *See* Geduldig v. Aiello, 417 U.S. 484, 501 (1974). In *General Electric Co. v. Gilbert*, 429 U.S. 125, 161, n.5 (1976), Justice Stevens observed in his dissenting opinion: "It is not accurate to describe the program as dividing 'potential recipients into two groups—pregnant women and nonpregnant persons.' . . . Insurance programs, company policies, and employment contracts all deal with future risks, rather than historic facts. The classification is between persons who face a risk of pregnancy and those who do not."

Congress, by enacting in 1978 the Pregnancy Discrimination Act, unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision. *See* Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n, 462 U.S. 669, 678 (1983).

In *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139–43 (1977), the Court held that a policy of denying employees returning from pregnancy leave their accumulated seniority acted both to deprive them "of employment opportunities" and to "adversely affect [their] status as an employee" because of their sex, in violation of Title VII of the Civil Rights Act of 1964. While the policy was facially neutral in that both male and female employees retained accumulated seniority while on leave for non-occupational disabilities other than pregnancy, seniority was divested if the employee took a leave for any other reason, including pregnancy. The Court

[K73] In *LaFleur*, the Court held that a school board's mandatory maternity leave rule, which required pregnant schoolteachers to take unpaid leave beginning five months before their expected due date and prohibited their return to work until three months after childbirth violated the Fourteenth Amendment. Noting that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause," the Court decided that the Constitution required a more individualized approach to the question of the teacher's physical capacity to continue her employment during pregnancy, "since the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter."[237] The three-month return provision, which created an irrebuttable presumption that the mother was not fit to resume work, was also invalidated, on similar grounds. "While it might be easier for the school boards to conclusively presume that all pregnant women [we]re unfit to teach past the fourth or fifth month of pregnancy, or during the three-month period following childbirth, administrative convenience alone [wa]s insufficient to make valid what otherwise [wa]s a violation of due process of law. The Fourteenth Amendment require[d] the school boards to employ alternative administrative means, which [would] not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals." The requirement of a physician's certificate or a medical examination could fully protect the school's interests in this regard.[238] Likewise, *Turner* found that a state statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before the expected date of childbirth until six weeks after childbirth was violative of the Due Process Clause of the Fourteenth Amendment, as incorporating a conclusive presumption that women were unable to work during the 18-week period because of pregnancy and childbirth.[239]

c. Welfare Benefits [240]

[K74] The Court has rejected the proposition that welfare benefits are a "privilege" not subject to the guarantee of equal protection. The Constitution is not indifferent to

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emphasized that the employer had not merely refused to extend to women a benefit that men could not and did not receive, but had "imposed on women a substantial burden that men [did not have to] suffer." While Title VII did not require that greater economic benefits be paid to one sex or the other because of their different roles, Title VII should not be read so as "to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Id.* at 142.

237 Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639, 645 (1974).

238 *Id.* at 647, n.14. At the same time, the Court emphasized that "[t]his is not to say that the only means for providing appropriate protection for the rights of pregnant teachers is an individualized determination in each case and in every circumstance. We are not dealing in these cases with maternity leave regulations requiring a termination of employment at some firm date during the last few weeks of pregnancy. We therefore have no occasion to decide whether such regulations might be justified by considerations not presented in these records—for example, widespread medical consensus about the 'disabling' effect of pregnancy on a teacher's job performance during these latter days, or evidence showing that such firm cutoffs were the only reasonable method of avoiding the possibility of labor beginning while some teacher was in the classroom, or proof that adequate substitutes could not be procured without at least some minimal lead time and certainty as to the dates upon which their employment was to begin." *Id.* at 647, n.13.

239 Turner v. Dep't of Employment Sec. of Utah, 423 U.S. 44 (1975) *(per curiam).*

240 *See also* para. K72 *(disability benefits for pregnant women)*; para. K73 *(unemployment benefits*

a statute that conditions the availability of welfare benefits (even "noncontributory") on the basis of gender.[241]

[K75] *Frontiero* involved federal statutes that provided the wife of a male serviceman with dependents' benefits (increased quarters allowance and medical and dental benefits) but not the husband of a servicewoman, unless she proved that she supplied more than one-half of her husband's support. The assumption was that "female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not. . . . [This classification was] premised on overbroad generalizations that could not be tolerated under the Constitution."[242] The Court held that, "by according such differential treatment to male and female members of the uniformed services, for the sole purpose of achieving administrative convenience," the statutory scheme violated the right to equal protection secured by the Fifth Amendment.[243]

[K76] At issue in *Weinberger v. Wiesenfeld*, was a provision in the Social Security Act that granted survivors' benefits based on the earnings of a deceased husband and father covered by the Act both to his widow and to the couple's minor children in her care, but that granted benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower. The assumption was that "male workers' earnings [we]re vital to the support of their families, while the earnings of female wage earners d[id] not significantly contribute to their families' support." In concluding that the provision violated the equal protection component of the Fifth Amendment, the Court stressed that, while "the notion that men [we]re more likely than women to be the primary supporters of their spouses and children [wa]s not entirely without empirical support, . . . such a gender-based generalization [could not] suffice to justify the denigration of the efforts of women who d[id] work and whose earnings contribute[d] significantly to their families' support." And since, as was apparent from the statutory scheme itself and from the relevant legislative history, the statute's purpose in providing benefits to young widows with children "was not to provide an income to women who were, because of economic discrimination, unable to provide for themselves" but "to provide children deprived of one parent with the opportunity for the personal attention of the other," it could not serve to justify the gender-based distinction at issue.[244]

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for pregnant women); para. K90 *(retirement benefits and remedial gender-discrimination)*; para. K175 *(protection of reasonable reliance on prior law, which has been found unconstitutional).*

[241] *See* Califano v. Westcott, 443 U.S. 76, 85 (1979).

[242] *See* Schlesinger v. Ballard, 419 U.S. 498, 507 (1975), *discussing* Frontiero v. Richardson, 411 U.S. 677 (1973).

[243] Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973).

[244] Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 645, 648–49 (1975). Similarly, in *Califano v. Goldfarb*, 430 U.S. 199 (1977), the Court invalidated a Social Security Act provision providing survivors' benefits to a widow, regardless of dependency, but providing the same benefits to a widower only if he had been receiving at least half of his support from his deceased wife. A four-Justice plurality pointed out that, under the challenged section, "female insureds received less protection for their spouses solely because of their sex" and that, as in *Wiesenfeld*, the provision disadvantaged women as compared to similarly situated men by providing the female wage earner with less protection for her family than it provided the family of the male wage earner, even though the family needs might be identical. Further, it appeared from the provision's phrasing and legislative history, as well as from the general scheme of the Old-Age, Survivors, and Disability Insurance benefits program, that "the differential treatment of nondependent widows and widowers result[ed] not . . . from a deliberate congressional intention to remedy

[K77] Likewise, in *Wengler*, the Court struck down a provision of the Missouri workers' compensation laws denying a widower benefits on his wife's work-related death, unless he either was mentally or physically incapacitated or proved dependence on his wife's earnings, but granting a widow death benefits without her having to show that she was incapacitated or to prove dependence on her husband's earnings. The Court found that the statute discriminated against both men and women. It "discriminate[d] against a woman covered by the Missouri workers' compensation system, since, in the case of her death, benefits [we]re payable to her spouse only if he [wa]s mentally or physically incapacitated or was to some extent dependent upon her," whereas a widow "would have been conclusively presumed to be dependent, and would have been paid the statutory amount for life or until she remarried. . . . The benefits, therefore, that the working woman [could] expect to be paid to her spouse in the case of her work-related death [we]re less than those payable to the spouse of the deceased male wage earner."[245] And the statute discriminated against a man who survived his wife's dying in a work-related accident, because, to receive benefits he, in contrast to a widow, should prove incapacity or dependency. The only justification offered by the state court or appellees for not treating males and females alike, whether viewed as wage earners or survivors of wage earners, was the assertion that most women were dependent on male wage earners, and that it was more efficient to presume dependency in the case of women than to engage in case-to-case determination, whereas individualized inquiries in the postulated few cases in which men might be dependent were not prohibitively costly. The Court rejected this justification, concluding that, although "[i]t may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny under the Equal Protection Clause, . . . the requisite showing ha[d] not been made [t]here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers."[246]

[K78] *Califano v. Westcott* invalidated a section of the Social Security Act, as amended in 1968, which provided benefits to families whose dependent children had been deprived of parental support because of the unemployment of the father, but did not provide such benefits when the mother became unemployed. Initially the provision was gender-neutral. The gender qualification was part of the general objective of the 1968 amendments to tighten standards for eligibility and reduce program costs. Congress was concerned that certain states were making assistance available to families where the

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the arguably greater needs of the former, but rather from an intention to aid the dependent spouses of deceased wage earners, coupled with a presumption that wives [we]re usually dependent. . . . The only conceivable justification for writing the presumption of wives' dependency into the statute [wa]s the [unverified] assumption . . . that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes." However, the plurality concluded, such an assumption does "not suffice to justify a gender-based discrimination in the distribution of employment-related benefits." *Id.* at 216–17. Justice Stevens, concurring, found that the relevant discrimination was "against surviving male spouses, rather than against deceased female wage earners," that such discrimination was "merely the accidental byproduct of a traditional way of thinking about females," and that something more than accident was necessary to justify, under the Fifth Amendment, the disparate treatment of persons who had as strong a claim to equal treatment as did similarly situated surviving spouses. *Id.* at 218, 223.

[245] Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 147 (1980).

[246] *Id.* at 152.

mother was out of work, but the father remained fully employed and able to support the family. "Apparently, Congress was not similarly concerned about states making benefits available where the father was out of work, but the mother remained fully employed. From all that appear[ed,] Congress, with an image of the 'traditional family' in mind, simply assumed that the father would be the family breadwinner, and that the mother's employment role, if any, would be secondary."[247] First, the Court rejected the contention that even if the statute was gender-based, it was not "gender-biased" and did not discriminate against women as a class, since the grant or denial of aid based on the father's unemployment necessarily affected, to an equal degree, one man, one woman, and one or more children. As the Court pointed out, "[f]or mothers who [we]re the primary providers for their families, and who [we]re unemployed, . . . the provision [wa]s obviously gender-biased, for it deprive[d] them and their families of benefits solely on the basis of their sex." Although the impact of the gender qualification was felt by family units, rather than individuals, "the statute discriminate[d] against one particular category of family—that in which the female spouse [wa]s a wage earner."[248] Second, the distinction was not substantially related to achievement of an important governmental objective. It did not serve the statutory goal of providing aid for needy children, for families where the mother was the principal wage earner and was unemployed were often in as much need of benefits as families where the father was unemployed. Nor was it substantially related to achieving the alleged objective of reducing the incentive for fathers to desert, or to pretend to desert, in order to make their families eligible for assistance. "There [wa]s no evidence, in the legislative history or elsewhere, that a father ha[d] less incentive to desert in a family where the mother [wa]s the breadwinner and bec[ame] unemployed, than in a family where the father [wa]s the breadwinner and bec[ame] unemployed. In either case, the family's need [would] be equally great, and the father [would] be equally subject to pressure to leave the home to make the family eligible for benefits. . . . Congress may not legislate 'one step at a time' when that step is drawn along the line of gender, and the consequence is to exclude one group of families altogether from badly needed subsistence benefits."[249]

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[247] Califano v. Westcott, 443 U.S. 76, 88 (1979).

[248] *Id.* at 84.

[249] *Id.* at 88–89. The district court, finding the gender-based classification, had determined that *extension of the benefits program to all families with needy children where either parent was unemployed*, rather than nullification of the program, was the proper remedial course. Moreover, it had declined to modify its order so as to permit the state of Massachusetts to pay benefits only to those families where needy children had been deprived of parental support by the unemployment of the family's "principal wage-earner." The Court found that the foregoing remedial order was proper. The question presented by the state's appeal concerned not the merits of extension versus nullification but rather the *form that extension should take.* The state agreed that either the mother's or the father's unemployment should be able to qualify a needy family for benefits, but proposed to award them only if the parent in question could show that he or she was both unemployed and the family's "principal wage-earner." Citing the legislative history of the program, the state argued that its proposed remedy comported with Congress' intent to aid families made needy by their breadwinner's unemployment. The Court assumed *arguendo* that, if Congress had known in 1968 that the gender-based distinction at issue violated the Constitution, it might well have adopted the "principal wage-earner" model. "But this d[id] not mean that the . . . program should be restructured along these lines by a federal court." First, the state's proposed remedy would have the effect of terminating benefits to many families then-currently receiving them. Second, the extension ordered by the district court possessed "the

d. Higher Education

[K79] In *Mississippi University for Women*, the Court held that the exclusion of men from a state-supported professional nursing school violated the Equal Protection Clause. In so holding, the Court rejected the argument that the single-sex admissions policy constituted educational affirmative action.[250] Similarly, in *United States v. Virginia*, the Court decided that the Constitution's equal protection guarantee precluded Virginia from reserving exclusively to men the unique educational opportunities the state military college afforded.[251]

e. Athletic Programs

[K80] In *O'Connor v. Board of Education*, the Court denied an application to vacate the court of appeals' stay pending appeal of the district court's preliminary injunction requiring respondent school officials to allow plaintiff applicant, a female junior high school student, to try out for the boys' basketball teams. Justice Stevens said that the question whether the discrimination was justified could not "depend entirely on whether the girls' program would offer [O'Connor] opportunities that [we]re equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. The answer must depend on whether it [wa]s permissible for the defendants to structure their athletic programs by using sex as one criterion for eligibility. If the classification is reasonable in substantially all of its applications, . . . the general rule [could not] be said to be unconstitutional simply because it [would] appea[r] arbitrary in an individual case." Justice Stevens concluded that there could be "little question about the validity of the classification in most of its normal applications. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events."[252]

f. Prohibition of Liquor Sales

[K81] *Craig v. Boren* held that an Oklahoma statutory scheme prohibiting the sale of "nonintoxicating" 3.2 percent beer to males under the age of 21 and to females under the age of 18 constituted a gender-based discrimination that denied to males 18–20

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virtue of simplicity: by ordering that 'father' be replaced by its gender-neutral equivalent, the court [had] avoided disruption of the . . . program, for benefits simply [would] be paid to families with an unemployed parent on the same terms that benefits ha[d] long been paid to families with an unemployed father. The 'principal wage-earner' solution, by contrast, would introduce a term novel in the [statutory scheme,] and would pose definitional and policy questions best suited to legislative or administrative elaboration." In addition, the Court was "ill-equipped both to estimate the relative costs of various types of coverage and to gauge the effect that different levels of expenditures would have upon the alleviation of human suffering. Under these circumstances, any fine-tuning of the benefits along 'principal wage-earner' lines should be properly left to the democratic branches of the Government." *Id.* at 92–93.

[250] Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). *See, in extenso*, para. K92.

[251] United States v. Virginia, 518 U.S. 515 (1996). *See, in extenso*, para. K86 and para. K92, n.289.

[252] O'Connor v. Bd. of Educ., 449 U.S. 1301, 1306–07 (1980).

years of age the equal protection of the laws. Oklahoma claimed that the gender-based distinction was substantially related to the enhancement of traffic safety. However, the statistics introduced by the state showed only that 0.18 percent of females and 2 percent of males in the 18–20-year-old age group had been arrested for driving while under the influence of liquor. "While such a disparity [wa]s not trivial in a statistical sense, it hardly [could] form the basis for employment of a gender line as a classifying device. Certainly if maleness [wa]s to serve a proxy for drinking and driving, a correlation of 2% [should] be considered an unduly tenuous 'fit.'"[253] Besides, none of the proposed surveys purported to measure the use and dangerousness of 3.2 percent beer, as opposed to alcohol generally, a detail that was of particular importance since, in light of its low alcohol level, Oklahoma apparently considered the 3.2 percent beverage to be "nonintoxicating." Hence, the evidentiary record of the case did not warrant the conclusion that sex represented an "accurate proxy for the regulation of drinking and driving."[254] Further, the Court unequivocally rejected the Twenty-first Amendment as a basis for sustaining state liquor regulations otherwise violative of the Equal Protection Clause.[255]

g. Statutory Rape

[K82] A state may prohibit a male from having sexual intercourse with a minor female. In *Michael M.* the Court upheld, against an equal protection challenge, the California "statutory rape" law, criminalizing "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." A four-Justice plurality found that the state had a strong interest in preventing illegitimate teenage pregnancies and their "significant social, medical, and economic consequences for both the mother and her child, and the State" itself.[256] The statute protected women from sexual intercourse and pregnancy at an age when the physical, emotional, and psychological consequences were particularly severe. And "[b]ecause virtually all of the significant harmful and identifiable consequences of teenage pregnancy fall on the female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct."[257] Relatedly, the plurality rejected the contention that the statute was impermissibly underinclusive and should, in order to pass judicial scrutiny, be broadened so as to hold the female as criminally liable as the male. The relevant inquiry was not whether the statute was drawn as precisely as it might have been, but whether the line chosen by the California legislature was within constitutional limitations. In any event, a gender-neutral statute would frustrate the state's interest in effective enforcement, since a female would be less likely to report violations of the statute if she herself would be subject to prosecution. "In an area already fraught with prosecutorial dificulties, [the Court] decline[d] to hold that the Equal Protection Clause require[d] a legislature to enact a statute so broad that it may well be incapable of enforcement."[258] Nor was the statute impermissibly overbroad because it made unlawful sexual intercourse with pre-

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[253] Craig v. Boren, 429 U.S. 190, 201–02 (1976).

[254] *Id.* at 204.

[255] *Id.* at 208–09.

[256] Michael M. v. Superior Court, 450 U.S. 464, 470 (1981) (opinion of Rehnquist, J., joined by Burger, C.J., Stewart, and Powell, JJ.).

[257] *Id.* at 473.

[258] *Id.* at 474.

pubescent females incapable of becoming pregnant. "Quite apart from the fact that the statute could well be justified on the grounds that very young females [we]re particularly susceptible to physical injury from sexual intercourse," the Constitution did not require the California legislature to limit the scope of the statute to older teenagers and exclude young girls.[259] Finally the statute was not unconstitutional as applied to petitioner who, like the girl involved, was under 18 at the time of sexual intercourse, on the asserted ground that the statute presumed in such circumstances that the male was the culpable aggressor. The statute did not rest on such an assumption, but instead was an attempt "to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man [wa]s irrelevant, since young men [we]re as capable as older men of inflicting the harm sought to be prevented."[260]

h. Employment as a Prison Guard

[K83] *Dothard* sustained a state regulation establishing gender criteria for assigning prison guards to maximum security institutions for "contact positions," i.e., positions requiring continual close physical proximity to inmates of the institution. The Court first took note of the actual conditions of the prison environment: "[i]n a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians." Further, the Court stressed that more was at stake than a risk to individual female employees. "The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel." Under those circumstances, the Court concluded that "[t]he employee's very womanhood would directly undermine her capacity to provide the security that is the essence" of a prison guard's responsibility.[261] Nevertheless, at the same time, the Court refused to allow employers to use sex as a proxy for strength.[262]

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[259] *Id.* at 475.

[260] *Id.* at 475. Justice Blackmun concurred in the judgment, finding that the law was a sufficiently reasoned and constitutional effort to control at its inception the problem of teenage pregnancies and to protect all minors from the problems and risks attendant upon adolescent sexual activity. *Id.* at 482–83. Justice Brennan, in dissent, noted that (1) "the experience of other jurisdictions, and California itself, belie[d] the plurality's conclusion that a gender-neutral statutory rape law 'may well be incapable of enforcement;'" (2) "even assuming that a gender-neutral statute would be more difficult to enforce, the State ha[d] still not shown that those enforcement problems would make such a statute less effective than a gender-based statute in deterring minor females from engaging in sexual intercourse. Common sense, however, suggests that a gender-neutral statutory rape law is potentially a greater deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions, and thus arguably has a deterrent effect on twice as many potential violators." *Id.* at 492–94.

[261] Dothard v. Rawlinson, 433 U.S. 321, 335–36 (1977). Consequently, the Court held that the regulation in question fell within the narrow ambit of the "*bona fide* occupational qualification" exception for employment discrimination on the basis of sex, under Title VII of the Civil Rights Act of 1964.

[262] *Id.* at 331–32. *See, in extenso*, para. K95, n.299.

i. In the Military Context

[K84] In *Schlesinger*, the Court upheld the constitutionality of a federal statute, which provided that male naval officers who were not promoted within a certain length of time were subject to mandatory discharge, while female naval officers who were not promoted within the same length of time could continue as officers. Because of restrictions on women officers' participation in combat and in most sea duty, their opportunities to compile records entitling them to promotion were more limited than were those of their male counterparts. Thus, the different treatment reflected "not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy [we]re *not* similarly situated with respect to opportunities for professional service."[263]

[K85] The constitutional power of Congress to raise and support armies (Article I, Section 8, of the Constitution) is broad. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."[264] Hence, courts owe deference to legislative and executive judgments in the area of military affairs.[265] In 1981, the Court held that the Military Selective Service Act did not violate the Fifth Amendment in authorizing the President to require the registration of males and not females. The purpose of registration was to prepare for a draft of combat troops. Women as a group, however, unlike men as a group, were excluded from combat service by statute or military policy, and, therefore, men and women were "not similarly situated for purposes of a draft or registration for a draft." Moreover, Congress had reasonably concluded that "whatever the need for women for noncombat roles during mobilization, . . . it could be met by volunteers," and that "staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility."[266]

[K86] In 1996, the Court held that Virginia violated the Equal Protection Clause by maintaining the Virginia Military Institute's (VMI's) male-only admission policy, and that establishing the Virginia Women's Institute for Leadership (VWIL) program did not remedy that violation. First, the Court rejected the state's argument that VMI's adversative method of training provided educational benefits that could not be made available, unmodified, to women, and that alterations to accommodate women would necessarily be so drastic as to destroy VMI's program. It was uncontested that women's admission to VMI would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. However, "neither the goal of producing citizen soldiers, VMI's *raison d' être*, nor VMI's implementing methodology [wa]s inherently unsuitable to women."[267] "The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, [wa]s a judgment hardly proved," and it reflected generalizations about "typically female 'tendencies.'"[268] "Women's successful entry into the federal military academies, and their

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263 Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).
264 Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
265 *See* Rostker v. Goldberg, 453 U.S. 57, 66 (1981).
266 *Id.* at 78, 81–82.
267 United States v. Virginia, 518 U.S. 515, 533, 541 (1996).
268 *Id.* at 541–42.

participation in the Nation's military forces, indicate[d] that Virginia's fears for VMI's future [might] not be solidly grounded." In any event, the state's justification for excluding all women from "citizen soldier" training for which some were qualified, fell far short of establishing the "exceedingly persuasive justification," that must be the base for any gender-defined classification.[269] Further, the remedy proffered by Virginia—maintain VMI as a male-only college and create VWIL as a program for women—did not cure the constitutional violation, for it left untouched VMI's exclusionary policy, and proposed for women only "a separate program, different in kind from VMI and [substantially] unequal in tangible and intangible facilities."[270] The Court concluded that "[w]omen seeking and fit for a VMI-quality education cannot be offered anything less, under the State's obligation to afford them genuinely equal protection."[271]

j. Jury Selection

[K87] In *Taylor v. Louisiana*, the Court held that systematic exclusion of women during the jury selection process, resulting in jury pools not "reasonably representative" of the community, denies a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross-section of the community.[272] Under the system invalidated in *Taylor*, women were exempted from mandatory jury service and could not serve on a jury unless they filed a written declaration of their willingness to do so. As a result, although 53 percent of the persons eligible for jury service were women, less than 1 percent of the 1,800 persons whose names were drawn from the jury wheel during the year in which Taylor's jury was chosen were female. Similarly, in *Duren*, the Court invalidated Missouri's constitutional and statutory provisions allowing women to claim automatic exemption from jury service, since they resulted in underrepresentation (less than 15 percent) of women at the venire stage and were justified only by the stereotype that most women would be unable to serve because of their domestic responsibilities.[273]

[K88] *Taylor* and *Duren* relied on Sixth Amendment principles, but the opinions' approach is consistent with the heightened equal protection scrutiny afforded gender-based classifications.[274] Sex discrimination in jury selection "causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice which motivated the discriminatory selection of the jury will infect the entire proceedings. . . . The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in the judicial system that state-sanctioned discrimination in the courtroom engenders."[275] And "individual jurors themselves have a right to non-discriminatory jury selection procedures. . . . Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by law, an assertion of their infe-

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269 *Id.* at 544–45.
270 *Id.* at 547.
271 *Id.* at 557.
272 Taylor v. Louisiana, 419 U.S. 522, 531, 538 (1975).
273 Duren v. Missouri, 439 U.S. 357, 363–79 (1979).
274 *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135 (1994).
275 *Id.* at 140.

riority.' . . . It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation. The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree."[276] Under these considerations, the Court held in *J.E.B.*—a case involving an all-female jury in a paternity and child support trial, where the state had used nine of its ten peremptory challenges to remove male jurors—that "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man."[277] Nevertheless, the fact that "litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. Neither does it conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury. Parties still may remove jurors whom they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review. . . . Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext. . . . For example, challenging all persons who have had military experience would disproportionately affect men at this time, while challenging all persons employed as nurses would disproportionately affect women. Without a showing of pretext, however, these challenges may well not be unconstitutional, since they are not gender- or race-based."[278] "As with race-based *Batson* claims, a party alleging gender discrimination must make a *prima facie* showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. . . . When an explanation is required, it need not rise to the level of a 'for cause' challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual."[279]

3. Benign or Compensatory Gender Discrimination[280]

[K89] "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. . . . However, [the Court has] consistently emphasized that 'the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.'"[281] "[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification have actually suffered a disadvantage related to the classification."[282] Further, "even statutes purportedly

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[276] *Id.* at 140–42.

[277] *Id.* at 146.

[278] *Id.* at 143 and n.16.

[279] *Id.* at 144–45.

[280] *See also* para. K76.

[281] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982), *quoting* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

[282] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982). *See also* Orr v. Orr,

designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where . . . the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies, and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to redound—if only indirectly—to the benefit of those without need for special solicitude."[283]

[K90] "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as an important governmental objective."[284] In *Kahn v. Shevin*, the Court upheld a Florida annual $500 real estate tax exemption for all widows in the face of an equal protection challenge. The Court believed that statistics established a lower median income for women than men, a discrepancy that justified "a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposed a disproportionately heavy burden."[285] *Califano v. Webster* involved a challenge to a statutory classification that allowed women to eliminate more low-earning years than men for purposes of computing Social Security retirement benefits. Although the effect of the classification was to allow women higher monthly benefits than were available to men with the same earning history, the Court upheld the statutory scheme, noting that it took into account that women "as such ha[d] been unfairly hindered from earning as much as men," and "work[ed] directly to remedy" the resulting economic disparity.[286]

[K91] A similar pattern of discrimination against women influenced the decision in *Schlesinger*. There, the Court considered a federal statute that granted female naval officers a 13-year tenure of commissioned service before mandatory discharge, but accorded male officers only a nine-year tenure. The Court "recognized that, because women were barred from combat duty, they had had fewer opportunities for promotion than had their male counterparts. By allowing women an additional four years to reach a particular rank before subjecting them to mandatory discharge, the statute directly compensated for other statutory barriers to advancement."[287]

[K92] In *Mississippi University for Women*, the Court held that the university's policy of denying otherwise qualified males the right to enroll in its school of nursing was not consistent with the Equal Protection Clause. The state's primary justification for maintaining this policy was that it compensated for discrimination against women. However,

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440 U.S. 268, 281 (1979) (the Court approaches "the 'compensation' rationale by asking whether women have, in fact, been significantly discriminated against in the sphere to which the statute applies a sex-based classification").

283 Orr v. Orr, 440 U.S. 268, 283 (1979).

284 Califano v. Webster, 430 U.S. 313, 317 (1977) *(per curiam)*.

285 Kahn v. Shevin, 416 U.S. 351, 355 (1974).

286 Califano v. Webster, 430 U.S. 313, 318 (1977) *(per curiam)*. The Court "did not require proof that each woman so benefited had suffered discrimination; it was sufficient that even under the former congressional scheme 'women *on the average* received lower retirement benefits than men.'" *See* United States v. Virginia, 518 U.S. 515, 573 (1996) (opinion of Justice Scalia), *quoting* Califano v. Webster, 430 U.S. 313, 318, n.5 (1977) (emphasis added).

287 See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728–29 (1982), *discussing* Schlesinger v. Ballard, 419 U.S. 498 (1975).

Mississippi made "no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door, or that women [then] currently [we]re deprived of such opportunities." Rather than compensating for discriminatory barriers faced by women, MUW's policy "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job."[288] Thus, the Court concluded that the state had failed to establish that the alleged objective was the actual purpose underlying the discriminatory classification. Moreover, the state had not shown that the gender-based classification was substantially and directly related to its proposed compensatory objective.[289]

[K93] *Orr* struck down Alabama statutes, which provided that husbands, but not wives, might be required to pay alimony upon divorce. Though it could be argued that the Alabama statutory scheme was designed "to provide help for needy spouses, using sex as a proxy for need," and to compensate women "for past discrimination during marriage, which assertedly ha[d] left them unprepared to fend for themselves in the working world following divorce," these considerations would not justify that scheme, because, under the Alabama statutes, "individualized hearings at which the parties' relative financial circumstances [we]re considered already occur[red.] . . . In such circumstances, not even an administrative convenience rationale exist[ed] to justify operating by generalization or proxy."[290] "Moreover, use of a gender classification actually produce[d] perverse results in this case. As compared to a gender-neutral law placing alimony obligations on the spouse able to pay, the . . . Alabama statutes [gave] an advantage only to the financially secure wife whose husband [wa]s in need. . . . Thus, the wives who benefit[ed] from the disparate treatment [we]re those who were . . . nondependent on their husbands."[291]

4. De Jure/De Facto *Gender Discrimination*[292]

[K94] "[T]he Fourteenth Amendment guarantees equal laws, not equal results."[293] "When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is . . . appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. . . . In this second inquiry, impact provides an 'important starting point,'

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288 Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982).

289 *Id.* at 730. Pursuing a similar inquiry, the Court rejected in *United States v. Virginia*, 518 U.S. 515, 535–40 (1996), a case involving the categorical exclusion of women from a military college (VMI), the state's contention that single-sex education yielded important educational benefits, and that provision of an option for such education fostered diversity in educational approaches. Virginia did not show that the college had been established, or maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the state. A purpose genuinely to advance an array of educational options was not served by VMI's historic and constant plan to afford a unique educational benefit only to males.

290 Orr v. Orr, 440 U.S. 268, 280–81 (1979).

291 *Id.* at 282.

292 *See also* paras. K87–K88 *(jury selection)*; para. K72 *(pregnancy classifications).*

293 Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).

. . . but purposeful discrimination is 'the condition that offends the Constitution.'"[294] "'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 [a sex group.]"[295] "This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are inevitable, . . . a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry an inference is a working tool, not a synonym for proof."[296] "Proof of discriminatory intent must necessarily usually rely on objective factors. . . . The inquiry is practical. What a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from 'the give and take of the situation.'"[297] "Sometimes a clear pattern, unexplainable on grounds other than gender, emerges from the effect of the state action even when the governing legislation appears neutral on its face."[298]

[K95] *Feeney* sustained against an Equal Protection Clause challenge a Massachusetts law giving state employment preference to military veterans, a class that, in Massachusetts, was over 98 percent male. The Massachusetts statute was not a pretext for gender discrimination. Apart from the facts that the definition of "veterans" in the statute had always been neutral as to gender, and that Massachusetts had consistently defined veteran status in a way inclusive of women who had served in the military, this was not a law that could rationally be explained as a gender-based classification. "[S]ignificant numbers of nonveterans were men, and all nonveterans—male as well as female—[we]re placed at a disadvantage." The distinction made by the Massachusetts statute was quite simply between veterans and non-veterans, not between men and women. Nothing in the record demonstrated that the preference for veterans was originally devised or subsequently re-enacted, because it would accomplish the collateral goal of keeping women in a stereotypic and pre-defined place in the Massachusetts civil service. Although the substantial edge granted to veterans by the Massachusetts statute might reflect unwise policy, Feeney had simply failed to demonstrate that the law in any way reflected a purpose to discriminate on the basis of sex.[299]

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294 *Id.* at 274.

295 *Id.* at 279.

296 *Id.* at 279, n.25.

297 *Id.* at 279, n.24.

298 Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

299 Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 275, 281 (1979). *Dothard v. Rawlinson*, 433 U.S. 321 (1977), involved an Alabama statute pursuant to which one who sought state employment as a *prison guard* should cover the minimum height and weight requirements of five feet, two inches, and 120 pounds. The five feet, two inches requirement would operate to exclude 33.29 percent of the women in the United States between the ages of 18–79, while excluding only 1.28 percent of men between the same ages. The 120-pound weight restriction would exclude 22.29 percent of the women and 2.35 percent of the men in this age group. When the height and weight restrictions were combined, Alabama's statutory standards would exclude 41.13 percent of the female population, while excluding less than 1 percent of the male population. Besides, a statistical showing of disproportionate impact based on analysis of the characteristics of actual applicants was not necessary, since qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged

D. CLASSIFICATIONS BASED ON ILLEGITIMACY[300]

[K96] "[T]he legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and bears no relation to the individual's ability to participate in and contribute to society."[301] The Court recognized in *Weber* that visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons "is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept . . . that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."[302] Nevertheless, the Court has rejected the proposition that classifications based on illegitimacy are "suspect," so that any justifications must survive "strict scrutiny." Considering that discrimination against illegitimates "has never approached the severity or pervasiveness of the historic legal and political discrimination against women and [blacks,] . . . perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do,"[303] the Court has adopted an intermediate standard of scrutiny in this context: classifications based on illegitimacy are constitutionally "invalid if they are not substantially related to permissible state interests."[304]

[K97] Thus, *Levy* held that a state may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right, noting that "[l]egitimacy or illegitimacy of birth ha[d] no relation to the nature of the wrong allegedly inflicted on" the parent.[305] In *Weber*, the Court held that, under the Equal Protection Clause, a state may not exclude unacknowledged ille-

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as being discriminatory. For these reasons, the Court accepted the district court's holding that the statutory height and weight standards had a discriminatory impact on women applicants. *Id.* at 329–31. The state argued that the height and weight requirements had a relationship to strength, a sufficient but unspecified amount of which was essential to effective job performance as a prison guard. Nevertheless, it had produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance. Indeed, it had failed to offer evidence of any kind in specific justification of the statutory standards. The Court noted that "if the job-related quality [identified by the State] is *bona fide*, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly." Such a test, fairly administered, would "measure the person for the job, and not the person in the abstract." Hence, the Court found that Title VII of the Civil Rights Act of 1964—which required the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operated invidiously to discriminate on the basis of sex—prohibited application of the statutory height and weight requirements to women. *Id.* at 332.

300 *See also* paras. K67–K69, K202.

301 Mathews v. Lucas, 427 U.S. 495, 505 (1976).

302 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

303 Mathews v. Lucas, 427 U.S. 495, 506 (1976).

304 Lalli v. Lalli, 439 U.S. 259, 265 (1978) (plurality opinion), *quoted in* Pickett v. Brown, 462 U.S. 1, 8 (1983). *Cf.* Mathews v. Lucas, 427 U.S. 495, 505–06 (1976); Trimble v. Gordon, 430 U.S. 762, 767 (1977); Clark v. Jeter, 486 U.S. 456, 465 (1988).

305 Levy v. Louisiana, 391 U.S. 68, 70–72 (1968). Similarly, a wrongful death statute, barring recovery for damages to the parent of an illegitimate child while allowing such recovery to the parent of a legitimate child, violates the Equal Protection Clause, there being no rational basis for the distinction. *See* Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968).

gitimate children from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent.[306] Under these decisions, "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."[307] *Gomez v. Perez* therefore held 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."[308] And *Cahill* found that a state statute limiting benefits of the "Assistance to Families of the Working Poor" program to those households in which the parents were ceremonially married and had at least one minor child of both, the natural child of one and adopted by the other, or a child adopted by both, denied equal protection to illegitimate children, for "the benefits extended under the program [we]re as indispensable to the health and wellbeing of illegitimate children as to those who [we]re legitimate."[309]

[K98] *Jimenez* struck down a statute granting social security benefits to a disabled worker's legitimate children born after the onset of disability but not to after-born illegitimate children, except under certain limited circumstances (those illegitimate solely on account of a non-obvious defect in their parents' marriage or those who could inherit from the wage-earner parent under state law). Finding a legislative purpose to aid children with needs demonstrated by a dependency relationship to a disabled worker, the Court held that equal protection was offended by the statute's denial to a sub-class of illegitimates of any opportunity to establish their dependency.[310]

[K99] In *Mathews v. Lucas*, the Court sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits. One of the statutory conditions of eligibility was dependency on the deceased wage earner. A child was considered dependent for this purpose if the insured father was living with or contributing to the child's support at the time of death. Certain children, however, were relieved of the burden of such individualized proof of dependency. Unless adopted by some other individual, a child who was legitimate, or a child who would be entitled to inherit personal property from the insured parent's estate under the applicable state intestacy law, was considered dependent at the time of the parent's death. Even lacking this relationship under state law, a child, unless adopted by some other individual, was entitled to a presumption of dependency if the decedent, before death, (1) had gone through a marriage ceremony with the other parent, resulting in a purported marriage between them that, but for a non-obvious legal defect, would have been valid, or (2) in writing had acknowledged the child to be his, or (3) had been decreed by a court to be the child's father, or (4) had been ordered by a court to support the child because the child was his. The remaining illegitimate children were required to prove actual dependency. The Court upheld the statutory classifications, finding them "reasonably related

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306 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 167–76 (1972). Without questioning Louisiana's interest in protecting legitimate family relationships, the Court rejected the argument that "persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation." *Id.* at 173.

307 Gomez v. Perez, 409 U.S. 535, 538 (1973) *(per curiam)*.

308 *Id.* at 538.

309 New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973) *(per curiam)*.

310 Jimenez v. Weinberger, 417 U.S. 628, 636–37 (1974).

to the likelihood of dependency at death."[311] "Congress' purpose in adopting the statutory presumptions of dependency [wa]s obviously to serve administrative convenience. While Congress was unwilling to assume that every child of a deceased insured was dependent at the time of death, by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or existence of a support order or paternity decree, which could be relied upon to indicate the likelihood of continued actual dependency, Congress was able to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency [wa]s objectively probable. Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny."[312] Under the intermediate standard of review applicable in that case, "the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect[ed] [did not have to] be 'scientifically substantiated.' . . . [Nor was Congress] required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately spent, ignoring the relative amounts devoted to administrative rather than welfare uses. . . . [T]he burden remain[ed] upon the appellees to demonstrate the insubstantiality of that relation."[313] Applying these principles, the Court held that the challenged classifications were justified as "reasonable empirical judgments that [we]re consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death."[314]

[K100] The Court has developed a particular framework for evaluating equal protection challenges to statutes of limitations that apply to suits to establish paternity and thereby limit the ability of illegitimate children to obtain support. "First, the period for obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims."[315] *Mills* held that Texas' one-year statute of limitations failed both steps of the analysis. The Court "explained that paternity suits typically will be brought by the child's mother, who might not act swiftly amidst the emotional and financial complications of the child's first year. And it is unlikely that the lapse of a mere 12 months will result in the loss of evidence or appreciably increase the likelihood of fraudulent claims."[316]

[K101] In *Pickett*, the Court unanimously struck down Tennessee's two-year statute of limitations for paternity and child support actions brought on behalf of certain illegitimate children. Adhering to the analysis developed in *Mills*, the Court first considered whether two years afforded a reasonable opportunity to bring such suits. The Tennessee statute was relatively more generous than the Texas statute considered in *Mills*, because

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311 Mathews v. Lucas, 427 U.S. 495, 509 (1976).

312 *Id.* at 509.

313 *Id.* at 510.

314 *Id.* at 510.

315 Mills v. Habluetzel, 456 U.S. 91, 99–100 (1982).

316 *See* Clark v. Jeter, 486 U.S. 456, 462 (1988), *discussing* Mills v. Habluetzel, 456 U.S. 91, 100–01 (1982).

it did not limit actions against a father who had acknowledged his paternity in writing or by furnishing support; nor did it apply if the child was likely to become a public charge. Nevertheless, the Court concluded that the two-year period was too short. The mother's "financial difficulties caused by the child's birth, . . . [the] loss of income attributable to the need to care for the child, . . . 'continuing affection for the child's father, a desire to avoid family and community disapproval, or the emotional strain and confusion that often attend the birth of an illegitimate child,' . . . might inhibit a mother from filing a paternity suit within two years after the child's birth."[317] Proceeding to the second step of the analysis, the Court decided that the two-year statute of limitations was not substantially related to Tennessee's asserted interest in preventing stale and fraudulent claims. The period during which suit could be brought was only a year longer than the period considered in *Mills*, and this incremental difference would not create substantially greater proof and fraud problems. Furthermore, Tennessee tolled most other actions during a child's minority, and even permitted a support action to be brought on behalf of a child up to 18 years of age if the child was or was likely to become a public charge. Finally, scientific advances in blood testing had alleviated some problems of proof in paternity actions. For these reasons, the Tennessee statute failed to survive heightened scrutiny under the Equal Protection Clause.[318]

[K102] In light of this authority, *Clark v. Jeter* concluded that Pennsylvania's six-year statute of limitations violated the Equal Protection Clause. The Court first noted that even six years do "not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child. 'The unwillingness of the mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father or from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval, may continue years after the child is born. The problem may be exacerbated if, as often happens, the mother herself is a minor.' . . . Not all of these difficulties are likely to abate in six years. A mother might realize only belatedly a loss of income attributable to the need to care for the child. . . . Furthermore, financial difficulties are likely to increase as the child matures and incurs expenses for clothing, school, and medical care."[319] Second, the six-year period was not substantially related to an interest in avoiding the litigation of stale or fraudulent claims. In a number of circumstances, Pennsylvania permitted the issue of paternity to be litigated more than six years after the birth of an illegitimate child. In addition, Congress had "recognized that increasingly sophisticated tests for genetic markers permit[ted] the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child."[320]

[K103] *Trimble* addressed the constitutionality of an Illinois statute providing that a child born out of wedlock could inherit from his intestate father only if the father had "acknowledged" the child and the child had been legitimated by the inter-marriage of the parents. The appellant in Trimble was a child born out of wedlock whose father had neither acknowledged her nor married her mother. He had, however, been found to

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317 Pickett v. Brown, 462 U.S. 1, 12–13 (1983), *quoting* Mills v. Habluetzel, 456 U.S. 91, 100 (1982).

318 Pickett v. Brown, 462 U.S. 1, 13–18 (1983).

319 Clark v. Jeter, 486 U.S. 456, 463–64 (1988), *quoting* Mills v. Habluetzel, 456 U.S. 91, 105, n.4 (1982) (O'Connor, J., concurring).

320 Clark v. Jeter, 486 U.S. 456, 464–65 (1988).

be her father in a judicial decree ordering him to contribute to her support. When the father died intestate, the child was excluded as a distributee, because the statutory requirements for inheritance had not been met. The Court concluded that the Illinois statute discriminated against illegitimate children in a manner prohibited by the Equal Protection Clause. The state argued that the statute furthered its interest in safeguarding "the orderly disposition of property at death." The Court recognized that devising an appropriate legal framework in the furtherance of that interest is "a matter particularly within the competence of the individual States."[321] "An important aspect of that framework is a response to the often difficult problem of proving the paternity of illegitimate children and the related danger of spurious claims against intestate estates."[322] These difficulties, the Court said, "might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."[323] The Illinois statute, however, was constitutionally flawed, because it excluded "at least some significant categories of illegitimate children of intestate men [whose] inheritance rights [could] be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[324] As the Court pointed out, difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate. Since, in that case, the deceased had been found to be the father of appellant in a state court paternity action prior to his death, that adjudication should be equally sufficient to establish appellant's right to claim a child's share of her father's estate, "for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances."[325]

[K104] "[S]tatutory provisions that have an evident and substantial relation to the State's interest in providing for the orderly and just distribution of a decedent's property at death" are to be sustained.[326] "After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the probate process."[327]

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[321] Trimble v. Gordon, 430 U.S. 762, 771 (1977).

[322] Lalli v. Lalli, 439 U.S. 259, 265 (1978).

[323] Trimble v. Gordon, 430 U.S. 762, 770 (1977).

[324] *Id.* at 771.

[325] *Id.* at 772.

[326] Reed v. Campbell, 476 U.S. 852, 855 (1986), *citing* Lalli v. Lalli, 439 U.S. 259 (1978). Considering the problem of proving the paternity of illegitimate children and the related danger of spurious claims against intestate estates, *Lalli* upheld the requirement imposed by state law for an illegitimate child to inherit from its natural father that the paternity of the father be declared in a judicial proceeding sometime before his death. The dissent noted, *inter alia*, that "the state interest in the accurate and efficient determination of paternity can be adequately served by requiring the illegitimate child to offer into evidence a formal acknowledgment of paternity" or by requiring "illegitimates to prove paternity by an elevated standard of proof, e.g., clear and convincing evidence, or even beyond a reasonable doubt." *Id.* at 277, 279.

[327] Reed v. Campbell, 476 U.S. 852, 855–56 (1986).

E. ALIENAGE CLASSIFICATIONS

1. Federal Regulation

[K105] Federal authority to regulate the status of aliens derives from various sources, including the federal government's power "[t]o establish [a] uniform Rule of Naturalization" (U.S. Constitution, Article I, Section 8, Clause 4), its power "[t]o regulate Commerce with foreign Nations" (Article I, Section 8, Clause 3), and its broad authority over foreign affairs.[328] "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization."[329] As the Court has pointed out, it is "a routine and normally legitimate part of the business of the Federal Government to classify on the basis of alien status" and "to take into account the character of the relationship between the alien and the United States."[330]

[K106] In *Mathews v. Diaz*, the Court applied relaxed scrutiny in upholding the validity of a federal statute that conditioned an alien's eligibility for participation in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence, but it imposed no similar burden on citizens. The Court reasoned:

> The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country. . . .
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> In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that, as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence. . . .
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> Since it is obvious that Congress has no constitutional duty to provide *all aliens* with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others. In this case, the appellees have challenged two requirements—first, that the alien be admitted

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328 *See* Toll v. Moreno, 458 U.S. 1, 10 (1982).

329 Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419 (1948).

330 Plyler v. Doe, 457 U.S. 202, 225 (1982), *quoting* Mathews v. Diaz, 426 U.S. 67, 80, 85 (1976).

as a permanent resident, and, second, that his residence be of a duration of at least five years. But if these requirements were eliminated, surely Congress would at least require that the alien's entry be lawful; even then, unless mere transients are to be held constitutionally entitled to benefits, some durational requirement would certainly be appropriate. In short, it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence. . . .

[T]hose who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not.[331]

2. State Legislation

a. The Supremacy Clause[332]

[K107] The Court has long recognized the preeminent role of the federal government with respect to the regulation of aliens within the borders of the United States.[333] Not surprisingly, therefore, its cases have also been at pains to note the substantial limitations upon the authority of the states in making classifications based upon alienage. In *Takahashi*, the Court considered a California statute that precluded aliens who were "ineligible for citizenship under federal law" from obtaining commercial fishing licenses, even though they "met all other state requirements" and were lawful inhabitants of the state. In seeking to defend the statute, the state argued that it had "simply followed the Federal Government's lead" in classifying certain persons as ineligible for citizenship. The Court rejected the argument, stressing the delicate nature of the federal-state relationship in regulating aliens: "[the states] can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration."[334]

[K108] The decision in *Graham v. Richardson*, followed directly from *Takahashi*. *Graham* held that a state may not withhold welfare benefits from resident aliens "merely because of their alienage." Such discrimination, the Court concluded, would not only violate

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[331] Mathews v. Diaz, 426 U.S. 67, 78–83 (1976). In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101, 105 (1976), the Court held unlawful a Civil Service Commission regulation prohibiting the hiring of aliens on the ground that the Commission lacked the requisite authority. However, the Court accepted the position that "overriding national interests may provide a justification for a *citizenship requirement in the federal service*." *Id.* at 101 (emphasis added). Moreover, the Court was willing to "assume . . . that, if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes." *Id.* at 105.

[332] In those areas where the Constitution grants the federal government the power to act, the Supremacy Clause (U.S. Const., art. VI, cl. 2) dictates that federal enactments will prevail over competing state exercises of power. *See, e.g.*, United States v. Gillock, 445 U.S. 360, 370 (1980).

[333] *See, e.g.*, Truax v. Raich, 239 U.S. 33, 42 (1915).

[334] Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 418–19 (1948).

the Equal Protection Clause but would also encroach upon federal authority over lawfully admitted aliens. In support of the latter conclusion, the Court noted that Congress had "not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States," but rather had chosen to afford "lawfully admitted resident aliens . . . the full and equal benefit of all state laws for the security of persons and property." The states had thus imposed an "auxiliary burde[n] upon the entrance or residence of aliens" that was never contemplated by Congress.[335]

[K109] "Read together, *Takahashi* and *Graham* stand for the broad principle that 'state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.'"[336] Accordingly, *Toll* held that a state university's policy of categorically denying domiciled non-immigrant aliens holding G-4 visas (visas issued to non-immigrant aliens who were officers or employees of certain international organizations and to members of their immediate families) in-state status, under which preferential treatment was given to domiciled citizen and immigrant alien students for purposes of tuition and fees, was invalid under the Supremacy Clause, for, in light of Congress' explicit decision in the Immigration and Nationality Act of 1952 not to bar G-4 aliens from acquiring domicile in the United States, the state's decision to deny "in-state" status to G-4 aliens, solely on account of such aliens' immigration status, amounted to an ancillary burden not contemplated by Congress in admitting these aliens to the United States, and it frustrated the federal policies embodied in the special tax exemptions afforded G-4 aliens by various treaties, international agreements, and it federal statutes.[337] Conversely, *De Canas* held that a California statute, making it unlawful in some circumstances to employ illegal aliens, was not invalid under the Supremacy Clause, because Congress intended that the states be allowed, "to the extent consistent with federal law, [to] regulate the employment of illegal aliens."[338]

b. The Equal Protection Clause

i. Generally—Standard of Review

[K110] The decisions of the Court regarding the permissibility of state classifications involving aliens have not formed an unwavering line over the years. In *Yick Wo*, the Court held both that resident aliens fall within the protection of the Equal Protection Clause of the Fourteenth Amendment, and that the state could not deny to aliens the right to carry on a "harmless and useful occupation" available to citizens.[339] "Although *Yick Wo* proclaimed that hostility toward aliens was not a permissible ground for a discriminatory classification, it dealt only with a situation in which government had actively intervened in the sphere of private employment. In a series of later cases, it became clear that *Yick Wo* did not mean that the State had to be strictly neutral as between aliens and

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335 Graham v. Richardson, 403 U.S. 365, 377–79 (1971).

336 Toll v. Moreno, 458 U.S. 1, 12–13 (1982), *quoting* De Canas v. Bica, 424 U.S. 351, 358, n.6 (1976). However, "when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of this principle is likely to be a matter of some dispute. *See* Toll, *supra*, at 13.

337 Toll v. Moreno, 458 U.S. 1, 13–17 (1982).

338 De Canas v. Bica, 424 U.S. 351, 361 (1976).

339 Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

citizens: the Court continued to uphold the right of the State to withhold from aliens public benefits and public resources."[340] "This distinction between government distribution of public resources and intervention in the private market was clearly established as the principle by which state regulations of aliens were to be evaluated in *Truax*, . . . which struck down a state statute requiring all employers of more than five workers to employ 'not less than eighty per cent qualified electors or native born citizens of the United States.'"[341] There the Court permitted states to exclude aliens from various activities when the restriction pertained to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State."[342]

[K111] This public/private distinction, the "special public interest" doctrine, was challenged in *Takahashi*, which held that California could not bar lawfully resident aliens from obtaining commercial fishing licenses: "[t]o whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so."[343] As the principle governing analysis of state classifications of aliens, who are lawful residents, the distinction was further eroded in *Graham v. Richardson*, which read *Takahashi* as "cast[ing] doubt on the continuing validity of the special public interest doctrine in all contexts,"[344] and held that a state could not distinguish between lawfully resident aliens and citizens in the distribution of welfare benefits.

[K112] Noting that "[a]liens as a class are a prime example of a 'discrete and insular' minority," *Graham* announced that classifications by a state that are based on alienage are "inherently suspect [under the Equal Protection Clause,] and subject to close judicial scrutiny."[345] In order to withstand strict scrutiny, alienage classifications by a state "must advance a compelling state interest by the least restrictive means available."[346]

ii. Economic Benefits

[K113] *Graham* invalidated an Arizona statute that imposed a durational residency requirement for welfare benefits on aliens but not on citizens. In so doing, the Court noted that "the justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens, like citizens, pay taxes, and may be called into the armed forces. . . . [A]liens may live within a state for many years, work in the state and contribute to the economic growth of the state."[347]

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[340] Cabell v. Chavez-Salido, 454 U.S. 432, 436–37 (1982), *citing* Terrace v. Thompson, 263 U.S. 197 (1923) (ownership of land); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (harvesting wildlife); Heim v. McCall, 239 U.S. 175 (1915) (employment on public works projects).

[341] See Cabell v. Chavez-Salido, 454 U.S. 432, 437 (1982), *discussing* Truax v. Raich, 239 U.S. 33 (1915).

[342] Truax v. Raich, 239 U.S. 33, 39 (1915).

[343] Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 421 (1948).

[344] Graham v. Richardson, 403 U.S. 365, 374 (1971).

[345] *Id.* at 372.

[346] Bernal v. Fainter, 467 U.S. 216, 219 (1984). *Cf.* Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 605 (1976) ("the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn").

[347] Graham v. Richardson, 403 U.S. 365, 374 (1971).

[K114] Similarly, in *Nyquist*, the Court held that a New York statutory provision barring certain resident aliens from state financial assistance for higher education violated the Equal Protection Clause of the Fourteenth Amendment. The statute was subject to strict scrutiny, since it was directed at aliens, and only aliens were harmed by it, even though its bar against them was not absolute, in that an alien who had applied for citizenship or one not qualified to apply who had filed a statement of intent to become a citizen might participate in the assistance programs. Further, the Court found that the purpose of creating "an incentive for aliens to become naturalized . . . is not a permissible one for a State," since "[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."[348] Moreover, the asserted justification that the financial assistance program was confined to actual or potential voters, thus enhancing the educational level of the electorate, could not be deemed adequate to support the statute's ban. "If the encouragement of naturalization through these programs were seen as adequate, then every discrimination against aliens could be similarly justified. The exception would swallow the rule." And the claimed interest in educating the electorate would not be frustrated by including resident aliens in the assistance program.[349]

iii. Occupational Activity—The "Public Function" Exception

[K115] Applying strict scrutiny, the Court has invalidated an array of state statutes that denied aliens the right to pursue various occupations. In *Examining Board v. Flores de Otero*, the Court voided a Puerto Rico statute that excluded aliens from the practice of civil engineering. Puerto Rico offered three justifications for its ban. The first was to prevent the "uncontrolled" influx of Spanish-speaking aliens into the field in Puerto Rico. In rejecting the contention, the Court emphasized that "[o]nce an alien is lawfully admitted, a State may not justify the restriction of the alien's liberty on the ground that it wishes to control the impact or effect of federal immigration laws." The second was to raise the prevailing low standard of living. Although this justification "ha[d] elements of substance and legitimacy, the means drawn to achieve the end were neither necessary nor precise. To uphold the statute on the basis of broad economic justification of this kind would permit any State to bar the employment of aliens in any or all lawful occupations."[350] Finally, the asserted purpose to assure responsibility for negligent workmanship swept too broadly. "United States citizenship [wa]s not a guarantee that a civil engineer would continue to reside in Puerto Rico, or even in the United States, and it [bore] no particular or rational relationship to skill, competence, or financial responsibility. . . . Puerto Rico ha[d] available to it other ample tools to achieve the goal of an engineer's financial responsibility without indiscriminately prohibiting the private practice of civil engineering by a class of otherwise qualified professionals."[351]

[K116] *In re Griffiths* nullified a state law excluding aliens from eligibility for membership in the state Bar. First, the state did not meet its burden of showing the classification to have been necessary to vindicate the state's undoubted interest in maintaining

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[348] Nyquist v. Mauclet, 432 U.S. 1, 9–10 (1977).

[349] *Id.* at 11. Since the Court held that the challenged statute violated the Fourteenth Amendment's equal protection guarantee, it did not reach appellees' claim that it also intruded upon Congress' comprehensive authority over immigration and naturalization. *Id.* at 12.

[350] Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 605–06 (1976).

[351] *Id.* at 606.

high professional standards. Moreover, the Court pointed out that "the powers to sign writs and subpoenas, take recognizances, and administer oaths hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens."[352] "Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. . . . Yet they are not officials of government."[353]

[K117] In this context, the Court has developed a narrow exception to the rule that discrimination based on alienage triggers strict scrutiny. This exception has been labeled the "political function" exception, and it applies to laws that exclude aliens from positions "intimately related to the process of democratic self-government."[354] "The rationale behind the political function exception is that, within broad boundaries, a State may establish its own form of government and limit the right to govern to those who are full-fledged members of the political community. Some public positions are so closely bound up with the formulation and implementation of self-government that the State is permitted to exclude from those positions persons outside the political community, hence persons who have not become part of the process of democratic self-determination."[355] To determine whether a restriction based on alienage fits within the narrow political function exception, *Cabell* devised a two-part test. "First, the specificity of the classification will be examined: a classification that is substantially over-inclusive or under-inclusive tends to undercut the governmental claim that the classification serves legitimate political ends. . . . Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to 'persons holding state elective or important non-elective executive, legislative, and judicial positions,' those officers 'who participate directly in the formulation, execution, or review of broad public policy,' and hence 'perform functions that go to the heart of representative government.'"[356]

[K118] Hence, *Foley* held that a state may require police to be citizens, because, in performing a "fundamental obligation of government," police are "clothed with authority to exercise an almost infinite variety of discretionary powers . . . often in the most sensitive areas of daily life."[357] Under *Ambach*, "a State may bar aliens who have not declared their intent to become citizens from teaching in the public schools because teachers, like police, possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation. They have direct, day-to-day contact with students, exercise unsupervised discretion over them, act as role models, and influence their students about the government and the political process."[358] *Cabell* held that "a State may bar aliens from positions as probation officers because they, like police and teachers, routinely exercise discretionary power, involving a basic governmental function, that places them in a position of direct authority over other individuals."[359]

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[352] *In re* Griffiths, 413 U.S. 717, 724 (1973).

[353] *Id.* at 729.

[354] Bernal v. Fainter, 467 U.S. 216, 220 (1984).

[355] *Id.* at 221.

[356] Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982), *quoting* Sugarman v. Dougall, 413 U.S. 634, 646 (1973).

[357] Foley v. Connelie, 435 U.S. 291, 297 (1978).

[358] *See* Bernal v. Fainter, 467 U.S. 216, 220 (1984), *discussing* Ambach v. Norwick, 441 U.S. 68, 75–79 (1979).

[359] *See* Bernal v. Fainter, 467 U.S. 216, 220 (1984), *discussing* Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

[K119] By contrast, *Bernal* held that Texas could not require that a notary public be a U.S. citizen. Under state law, a notary public had the power to authenticate written instruments, administer oaths, and take out-of-court depositions. The Court found that, although there was "a critical need for a notary's duties to be carried out correctly and with integrity," those duties were "essentially clerical and ministerial."[360] Texas notaries were not invested with "policymaking responsibility or broad discretion in the execution of public policy . . . requir[ing] the routine exercise of authority over individuals."[361] Further, Texas maintained that the challenged statute served its "legitimate concern that notaries be reasonably familiar with state law and institutions," and "that notaries may be called upon years later to testify to acts they have performed." However, both of these asserted justifications utterly failed to meet the stringent requirements of strict scrutiny. "[I]f the State's concern with ensuring a notary's familiarity with state law were truly 'compelling,' one would expect the State to give some sort of test actually measuring a person's familiarity with the law. The State, however, administer[ed] no such test." The second justification was similarly inadequate, because the state had "failed to advance a factual showing that the unavailability of notaries' testimony presented a real, as opposed to a merely speculative, problem to the State. Without a factual underpinning, the State's asserted interest lack[ed] the weight required of interests properly denominated as compelling."[362]

[K120] *Sugarman* struck down a state statute barring aliens from employment in permanent positions in the competitive class of the state civil service. The challenged statute was "neither narrowly confined nor precise in its application. Its imposed ineligibility [might] apply to the 'sanitation man,' . . . to the typist, and to the office worker, as well as to the person who directly participate[d] in the formulation and execution of important state policy. The citizenship restriction [swept] indiscriminately." Besides, the state legislation relating generally to persons holding elective and high appointive offices, contained no citizenship restrictions.[363] The state asserted that when aliens left their positions, the state had the expense of hiring and training replacements. The Court rejected the argument, noting that, "[e]ven if [it] could accept the premise underlying this argument—that aliens [we]re more likely to leave their work than citizens—and assuming that this rationale could be logically confined to the competitive civil service, . . . 'the justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens,' . . . [in view of] the general identity of an alien's obligations with those of a citizen."[364]

iv. Illegal Aliens

[K121] In *De Canas*, the Court recognized that "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal."[365] *Plyler v. Doe* held that states cannot deny to illegal aliens the free public education they provide to citizens and legally documented

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360 Bernal v. Fainter, 467 U.S. 216, 225 (1984).

361 *Id.* at 226.

362 *Id.* at 227–28.

363 Sugarman v. Dougall, 413 U.S. 634, 643 (1973).

364 *Id.* at 646, *quoting* Graham v. Richardson, 403 U.S. 365, 376 (1971).

365 *See* Plyler v. Doe, 457 U.S. 202, 225 (1982), *discussing* De Canas v. Bica, 424 U.S. 351 (1976). In the latter case, the state's program reflected Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country. *Id.* at 361.

aliens. There, the Court reiterated that education is not a fundamental right, and it stressed that undocumented aliens are not a "suspect class." Nevertheless, appearing to apply a heightened level of equal protection scrutiny,[366] it concluded that the justifications for the discrimination offered by the state were wholly insubstantial in light of the costs involved to these children, the state, and the nation. Quoting from earlier opinions, the Court emphasized that public education is not

> merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining [the] basic institutions [of the nation] and the lasting impact of its deprivation on the life of the child mark the distinction. . . . "[T]he public schools [are] a most vital civic institution for the preservation of a democratic system of government," . . . and . . . the primary vehicle for transmitting "the values on which [the American] society rests." . . . In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of . . . all.
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> In addition, . . . denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. . . . [B]y depriving the children of any disfavored group of an education, [a state] foreclose[s] the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." . . . The inability to read and write handicaps the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological wellbeing of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. . . .
>
> [A state statute denying children of illegal aliens the free public education made available to other residents] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. . . .
>
> [Indeed, these children] can affect neither their parents conduct nor their own status, . . . [and] legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.[367]

Under these considerations, the Court held that such a statutory classification "can hardly be considered rational unless it furthers some substantial goal of the State."[368] But no such showing had been made in that case. "[T]he undocumented status of these children *vel non* [did not] establis[h] a sufficient rational basis for denying them benefits that a State might choose to afford other residents. . . . Faced with an equal protection challenge respecting the treatment of aliens, . . . the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's

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366 *See* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 459 (1988).

367 Plyler v. Doe, 457 U.S. 202, 221–23, 220 (1982).

368 *Id.* at 224.

prerogatives to afford differential treatment to a particular class of aliens. But [the Court was] unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education."[369] And "[i]n light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported, until after deportation proceedings have been completed."[370] Further, "[w]hile a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population, [the challenged distinction] hardly offer[ed] an effective method of dealing with an urgent demographic or economic problem. There [wa]s no evidence in the record suggesting that illegal entrants impose[d] any significant burden on the State's economy. To the contrary, the available evidence suggest[ed] that illegal aliens underutilize[d] public services, while contributing their labor to the local economy and tax money to the state fisc. . . . Thus, even making the doubtful assumption that the net impact of illegal aliens on the economy of the State [wa]s negative, . . . it [wa]s clear that charging tuition to undocumented children constitute[d] a ludicrously ineffectual attempt to stem the tide of illegal immigration, at least when compared with the alternative of prohibiting the employment of illegal aliens."[371] Moreover, the record in no way supported the claim that exclusion of undocumented children was likely to improve the overall quality of education in the state. The state had failed to offer any "credible supporting evidence that a proportionately small diminution of the funds spent on each child, which might result from devoting some state funds to the education of the excluded group, would have a grave impact on the quality of education." And "even if improvement in the quality of education were a likely result of barring some *number* of children from the schools of the State, the State [should] support its selection of *this* group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children [we]re basically indistinguishable from legally resident alien children."[372] Finally, the Court rejected the argument that "undocumented children [we]re appropriately singled out because their unlawful presence within the United States render[ed] them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. Even assuming that such an interest [wa]s legitimate, it [wa]s an interest most difficult to quantify. The State ha[d] no assurance that any child, citizen or not, [would] employ the education provided by the State within the confines of the State's borders. In any event, the record [wa]s clear that many of the undocumented children disabled by the classification at issue [would] remain in the country indefinitely, and that some [would] become lawful residents or citizens of the United States. It [wa]s difficult to understand precisely what the State hope[d] to achieve by promoting the creation and perpetuation of a subclass of illiterates within [the country's] boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."[373]

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369 *Id.* at 224–25.

370 *Id.* at 226.

371 *Id.* at 228–29.

372 *Id.* at 229.

373 *Id.* at 229–30.

F. AGE CLASSIFICATIONS[374]

[K122] "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'"[375]

> Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a "history of purposeful unequal treatment." . . . Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. . . . Accordingly, . . . age is not a suspect classification under the Equal Protection Clause.
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> States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. . . . Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant. . . . Finally, because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that "the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[376]

[K123] "[G]overnmental employment is not a fundamental right and those who are mandatorily retired are not a suspect class."[377] *Murgia* upheld, against an equal protection challenge, a Massachusetts statute requiring uniformed state police officers to retire at age 50. The state justified the provision on the ground that the age classification assured the state of the physical preparedness of its uniformed police. Although Officer Murgia himself was in excellent physical health and could still perform the duties of a state police officer, the Court found that the statute clearly met the requirements of the Equal Protection Clause. "That the State [had chosen] not to determine fitness more precisely through individualized testing after age 50 [wa]s not to say that the objective of assuring physical fitness [wa]s not rationally furthered by a maximum age limitation."[378]

[K124] In *Bradley*, the Court rejected an equal protection challenge to a federal statute requiring Foreign Service officers to retire at age 60, though no mandatory retirement age was established for Civil Service employees, including those who served abroad. The Court held that the early retirement provision was justified in view of its function of "stimulating the highest performance in the ranks of the Foreign Service by assuring

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374 *See also* para. K81 *(prohibition of liquor sales)*; para. K82 *(statutory rape)*; para. K179 *(ordinance restricting admission to certain dancehalls to persons between the ages of 14 and 18)*.

375 Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83 (2000), *quoting* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

376 Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83–84 (2000), *quoting* Vance v. Bradley, 440 U.S. 93, 111 (1979).

377 Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 260 (1983) (opinion of Burger, C.J.).

378 Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 316 (1976) *(per curiam)*.

that opportunities for promotion would be available despite limits on the number of personnel classes and on the number of positions in the Service." Moreover, the provision was justified by Congress' perception of a need "to assure the high quality of those occupying positions critical to the conduct of [the country's] foreign relations," and to "minimize[e] the risk of less than superior performance by reason of poor health or loss of vitality."[379] Another reason for not equating the situation with respect to Civil Service employees serving overseas with that of the Foreign Service was that about 60 percent of the relatively small group in the latter category served in overseas posts at any one time, whereas only about 5 percent of Civil Service employees were in overseas service at any one time, and such service was mainly on a voluntary basis. And even if the classification at issue was to some extent both underinclusive and overinclusive, "perfection [wa]s by no means required" to satisfy equal protection standards. "If increasing age [brought] with it increasing susceptibility to physical difficulties, . . . the fact that individual Foreign Service employees [might] be able to perform past age 60 d[id] not invalidate [the provision.] Because Congress desired to maintain the competence of the Foreign Service, the mandatory retirement age of 60 rationally further[ed] its legitimate objective, and it ma[de] no difference that some Foreign Service personnel [might] not be subject to the rigors of overseas service or that some Civil Service employees serve[d] in various hardship positions in foreign lands."[380] The Court accepted such imperfection, because it was, "in turn, rationally related to the secondary objective of legislative convenience. The Foreign Service retirement system and the Civil Service retirement system [we]re packages of benefits, requirements, and restrictions serving many different purposes. . . . Congress was entitled to conclude that certain groups of employees share[d] more characteristics with Foreign Service officers than with Civil Service personnel, even though not serving for as long in as important overseas posts, and that other employees share[d] more characteristics with Civil Service personnel than with Foreign Service officers, even though serving some time in some overseas positions. Congress chose not to examine exactly which individual employees [we]re likely to serve long enough in important enough positions in demanding enough locales to warrant mandatory early retirement. Rather than abandoning its primary end completely, or unnecessarily including all federal employees within the means, it drew a line around those groups of employees it thought most generally pertinent to its objective. Whether . . . Congress was unwise in not choosing a means more precisely related to its primary purpose [wa]s irrelevant."[381] Finally, the Court noted that appellees had failed to demonstrate that Congress had "no reasonable basis for believing that conditions overseas generally [we]re more demanding than conditions in the United States and that, at age 60 or before, many persons begin something of a decline in mental and physical reliability."[382]

[K125] *Gregory* upheld a provision of the Missouri Constitution that required judges to retire at age 70. The Court stressed that the people of Missouri had a "legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. . . . The people [might] there-

379 Vance v. Bradley, 440 U.S. 93, 101, 103–04 (1979).
380 *Id.* at 108–09.
381 *Id.* at 109.
382 *Id.* at 111.

fore wish to replace some older judges. . . . Voluntary retirement [would] not always be sufficient. Nor [might] impeachment—with its public humiliation and elaborate procedural machinery—serve acceptably the goal of a fully functioning judiciary."[383] "The election process [might] also be inadequate. . . . Most voters never observe[d] judges in action nor read their opinions. . . . State judges serve[d] longer terms than other officials, making them—deliberately—less dependent on the people's will. . . . The people of Missouri rationally could conclude that retention elections—in which state judges run unopposed at relatively long intervals—[would] not serve as an adequate check on judges whose performance [wa]s deficient. Mandatory retirement [wa]s a reasonable response to this dilemma."[384] That other state officials were not subject to mandatory retirement was rationally explained by the facts that their performance was subject to greater public scrutiny, that they were subject to more standard elections, that deterioration in their performance was more readily discernible, and that they were more easily removed than judges. Moreover, although the Missouri provision was based on a generalization about the effect of old age on the ability of individuals to serve as judges, and although it was probably not true that most judges suffered significant deterioration in performance at age 70, nevertheless, because Missouri's age classification was subject only to rational basis review, the Court held that the state's reliance on such imperfect generalizations was entirely proper under the Equal Protection Clause.[385]

G. CLASSIFICATIONS BASED ON MENTAL RETARDATION[386]

[K126] *Cleburne* considered an equal protection challenge to a city ordinance requiring a special use permit for the operation of a group home for the mentally retarded. The court of appeals had held that mental retardation qualified as a "quasi-suspect" classification under the Equal Protection Clause. The Court did not accept this proposition, and it concluded instead that legislation "singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others"[387] and incurs only the minimum "rational basis" review applicable to general social and economic legislation. As the Court explained,

> if the large and amorphous class of the mentally retarded were deemed quasi-suspect, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. . . .
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> Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one

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383 Gregory v. Ashcroft, 501 U.S. 452, 472 (1991).

384 *Id.* at 472.

385 *Id.* at 473.

386 *See also* para. D47 *(applicable burden of proof in mental retardation commitment proceedings lower than the standard of proof for the institutionalization of the mentally ill).*

387 Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 444 (1985).

> that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate. . . .
>
> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.[388]

[K127] Further, the Court found that the city's purported justifications for the ordinance at issue made no sense in light of how the city treated other groups similarly situated in relevant respects. Although the group home for the mentally retarded was required to obtain a special use permit, apartment houses, other multiple-family dwellings, retirement homes, nursing homes, sanitariums, hospitals, boarding houses, fraternity and sorority houses, and dormitories were not subject to the ordinance. The mentally retarded, as a group, were different from those who occupied other facilities permitted in the zoning area in question without a special permit, but such difference was "largely irrelevant unless the [proposed group home] would threaten the city's legitimate interests in a way that [the] permitted uses . . . would not."[389] The record did not reveal any rational basis for believing that the proposed group home would pose any special threat to the city's legitimate interests. The city council's insistence on the permit rested on several factors. First, the council was concerned with the negative attitude of the majority of property owners located within 200 feet of the proposed facility, as well as with the fears of elderly residents of the neighborhood. However, "mere negative attitudes, or fear, unsubstantiated by factors . . . properly cognizable in a zoning proceeding, [we]re not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. . . . 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'"[390] Second, the council was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the home. But the school itself was attended by about 30 mentally retarded students, and "denying a permit based on such vague, undifferentiated fears [wa]s again permitting some portion of the community to validate what would otherwise be an equal protection violation."[391] Moreover, the council had doubts about the legal responsibility for actions that the mentally retarded might take. Nevertheless, since there was no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it was difficult to believe that the groups of

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388 *Id.* at 445–46. "[T]he result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled so long as their actions towards such individuals are rational. They could quite hard-headedly hold to job qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law, and not through the Equal Protection Clause." *See* Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356, 367–68 (2001).

389 Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

390 *Id.* at 448, *quoting* Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

391 *Id.* at 449.

mildly or moderately mentally retarded individuals who would live there "would present any different or special hazard."[392] Fourth, the council was concerned with the size of the home and the number of people that would occupy it. But there would be no restrictions on the number of people who could occupy the home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. "The question [wa]s whether it [wa]s rational to treat the mentally retarded differently. It [wa]s true that they suffer[ed] disability not shared by others, but why this difference warrant[ed] a density regulation that others [did not have to] observe [wa]s not at all apparent. [The] record of the case d[id] not clarify how, in this connection, the characteristics of the intended occupants of the proposed home rationally justif[ied] denying to those occupants what would be permitted to groups occupying the same site for different purposes."[393] The Court concluded that the insubstantiality of each of the city's asserted justifications for the ordinance at issue suggested that the ordinance in fact rested on "an irrational prejudice against the mentally retarded, including those who would occupy the [proposed] facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law."[394]

H. CLASSIFICATIONS BASED ON SEXUAL ORIENTATION

[K128] *Romer* struck down a Colorado constitutional amendment prohibiting special protection for homosexuals. The state's principal argument in defense of the amendment was that it put gays and lesbians in the same position as all other persons. So, the state said, the measure merely denied homosexuals special rights. However, the Court found that this reading of the amendment's language was implausible. The extent of the change in legal status effected by the amendment was evident from the authoritative construction of Colorado's supreme court—which established that the amendment's immediate effect was to repeal all existing statutes, regulations, ordinances, and policies of state and local entities barring discrimination based on sexual orientation, and that its ultimate effect was to prohibit any governmental entity from adopting similar, or more protective, measures in the future absent state constitutional amendment—and from a review of the terms, structure, and operation of the ordinances that would be repealed and prohibited by the amendment. "In any event, even if . . . homosexuals could find some safe harbor in laws of general application, . . . the amendment impose[d] a special disability upon those persons alone. Homosexuals [we]re forbidden the safeguards that others enjoy[ed] or [might] seek without constraint. They [could] obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the state's view, by trying to pass helpful laws of general applicability. This [wa]s so no matter how local or discrete the harm, no matter how public and widespread the injury. [There was] nothing special in the protections [the amendment] withh[eld]. These [we]re protections taken for granted by most people either because they already ha[d] them or d[id] not need them; these [we]re protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[395] Further, the challenged classification could not pass constitutional master. If a law neither bur-

[392] *Id.* at 449.
[393] *Id.* at 449–50.
[394] *Id.* at 450.
[395] Romer v. Evans, 517 U.S. 620, 631 (1996).

dens a fundamental right nor targets a suspect class, the legislative classification is upheld so long as it bears a rational relation to some independent and legitimate end. The amendment failed even this conventional inquiry. "First, the amendment ha[d] the peculiar property of imposing a broad and undifferentiated disability on a single named group."[396] "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[397] Second, the amendment "raise[d] the inevitable inference that the disadvantage imposed [wa]s born of animosity toward the class of persons affected."[398] The primary rationale the state offered for the amendment was respect for other citizens' freedom of association and, in particular, the liberties of landlords or employers who had personal or religious objections to homosexuality. Colorado also cited its interest in conserving resources to fight discrimination against other groups. Nevertheless, "the breadth of the [a]mendment [wa]s so far removed from these particular justifications that [the Court found] it impossible to credit them. [The Court could not] say that [the amendment] [wa]s directed to any identifiable legitimate purpose or discrete objective. It [wa]s a status-based enactment divorced from any factual context from which [it] could be discerned a relationship to legitimate state interests; it [wa]s a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."[399]

I. ELECTORAL FRANCHISE

1. The Right to Vote

a. In General—Standard of Review

[K129] The Constitution "does not confer the right of suffrage upon any one,"[400] and "the right to vote, *per se*, is not a constitutionally protected right."[401] However, when a state has provided that its representatives be elected, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."[402] Likewise, although "[t]he individual citizen has no federal constitutional

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396 *Id.* at 632.

397 *Id.* at 633.

398 *Id.* at 634.

399 *Id.* at 635.

400 Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982), *quoting* Minor v. Happersett, 21 Wall. 162, 178 (1875).

401 Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982), *quoting* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35, n.78 (1973).

402 Dunn v. Blumstein, 405 U.S. 330, 336 (1972). The Court has rejected claims that the Constitution compels a fixed method of choosing state or local officers or representatives. In *Sailors v. Board of Education*, 387 U.S. 105, 107–11 (1967), the Court found no constitutional reason why non-legislative state or local officials may not be chosen otherwise than by elections. Consequently, the Court upheld a statute authorizing appointment, rather than election, of the members of a county school board, the functions of which were essentially administrative. At the same time, it expressly left open the question "whether a State may constitute a local legislative body through the appointive, rather than the elective, process." *Id.* at 109–10. In *Fortson v. Morris*, 385 U.S. 231, 234 (1966), the Court said that "[t]here is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the

right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College" (U.S. Constitution, Article II, Section 1), "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental," and the equal protection guarantee is applicable.[403]

[K130] "With respect to suffrage, [the Court has] explained the need for close scrutiny as arising from the significance of the franchise as the guardian of all other rights."[404] *Hill v. Stone* held that, "as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest."[405] In *Burdick*, the Court made clear that when voting rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' . . . But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."[406]

[K131] "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[407]

b. Voter Residency and Registration Requirements [408]

[K132] The Court has "recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders. . . . *Bona fide* residence alone, however, does not automatically confer the right to vote on all matters, for at least in the context of special interest elections the State may constitutionally disfranchise residents who lack the required special interest in the subject matter of the election."[409]

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method a State must use to select its Governor." The Court thus sustained a Georgia constitutional provision empowering the state legislature to elect a governor from the two candidates receiving the highest number of votes cast in the general election, in the event neither received a majority.

403 Bush v. Gore, 531 U.S. 98, 104 (2000) *(per curiam)*.

404 *See* Plyler v. Doe, 457 U.S. 202, 217, n.15 (1982), *citing* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 562 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

405 Hill v. Stone, 421 U.S. 289, 297 (1975).

406 Burdick v. Takushi, 504 U.S. 428, 434 (1992). Applying this test, the *Burdick* Court sustained as reasonable Hawaii's prohibition on write-in voting, holding that it imposed "only a limited burden" upon the constitutional rights of voters. *Id.* at 439.

407 Bush v. Gore, 531 U.S. 98, 104–05 (2000) *(per curiam)*.

408 In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court upheld an Act of Congress that forbade states from disqualifying voters in presidential elections for failure to meet state residency requirements.

409 Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 68–69 (1978).

[K133] *Carrington* involved a provision of the Texas Constitution that prohibited any member of the armed forces, who entered the service as a resident of another state and then moved his home to Texas during the course of his military duty, from ever satisfying the residence requirement for voting in Texas elections, so long as he remained a member of the armed forces. First, the state argued that it had a legitimate interest in immunizing its elections from the concentrated balloting of military personnel, whose collective voice might overwhelm a small local civilian community. In rejecting this contention, the Court stressed that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. . . . [If servicemen were] in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, ha[d] a right to an equal opportunity for political representation."[410] Secondly, the state said it had a valid interest in protecting the franchise from infiltration by transients, and it could reasonably assume that those servicemen who fell within the constitutional exclusion would be within the state for only a short period of time. The Court rejected this "conclusive presumption" approach, pointing out that Texas could not conclusively presume that members of a particular profession were transient inhabitants but should instead apply "more precise tests to determine the *bona fides* of an individual claiming to have actually made his home in the State long enough to vote," just as it applied those tests to all others seeking to vote in the state. Thus, Texas could not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state.[411]

[K134] In *Evans v. Cornman*, the permanent board of registry of Montgomery County, Maryland, ruled that persons living on the grounds of the National Institutes of Health (NIH), a federal enclave located within the geographical boundaries of the state, did not meet the residency requirement of the Maryland Constitution. Accordingly, NIH residents were denied the right to vote in Maryland elections. The Court rejected the notion that persons living on NIH grounds were not residents of Maryland: "Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as state residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the NIH grounds ceased to be a part of Maryland when the enclave was created. However, that 'fiction of a state within a state' was specifically rejected by this Court in *Howard v. Commissioners of Louisville*, 344 U.S. 624, 627 (1953)."[412] Thus, because inhabitants of the NIH enclave were residents of Maryland and were "just as interested in and connected with electoral decisions as they were prior to [the time that the area had come] under federal jurisdiction, and as their neighbors who live[d] off the enclave," the state could not deny them the equal right to vote in Maryland elections.[413]

[K135] In relation to durational residency requirements for exercising the right to vote, the Court also has invoked the freedom to travel. *Dunn v. Blumstein* examined the constitutionality of a Tennessee law, which provided that registration books closed 30 days before an election but required residence in the state for one year and in the county for three months as prerequisites for registration to vote. After noting that a durational residence requirement for voting "penalize[s] . . . only those persons who

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410 Carrington v. Rash, 380 U.S. 89, 94 (1965).

411 *Id.* at 95–96.

412 Evans v. Cornman, 398 U.S. 419, 421–22 (1970).

413 *Id.* at 426.

have exercised their constitutional right of interstate migration . . . [and] may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest,"[414] the Court struck down the statute, because the state of Tennessee failed to meet this heavy burden. Tennessee claimed that its durational residence requirements were necessary to serve two basic purposes. First, it insured purity of ballot, protection against fraud through "dual voting" and "colonization" (voting by non-residents). The Court acknowledged that the prevention of such fraud was surely a legitimate and compelling government goal; yet it found impossible to view durational residence requirements as necessary to achieve that state interest. On the one hand, the measure at issue was overbroad, since it "bar[red] newly arrived residents from the franchise along with nonresidents." On the other hand, "as long as the State relie[d] on the oath-swearing system to establish qualifications, a durational residence requirement add[ed] nothing to a simple residence requirement in the effort to stop fraud," for "[t]he nonresident intent on committing election fraud [would] as quickly and effectively swear that he ha[d] been a resident for the requisite period of time as he would swear that he [wa]s simply a resident."[415] Besides, "[t]o prevent dual voting, state voting officials simply ha[d] to cross-check lists of new registrants with their former jurisdictions. . . . Objective information tendered as relevant to the question of *bona fide* residence under Tennessee law—places of dwelling, occupation, car registration, driver's license, property owned, etc.—[wa]s easy to double-check, especially in light of modern communications."[416] And Tennessee "ha[d] at its disposal a variety of criminal laws more than adequate to detect and deter whatever fraud [might] be feared." Subsequently, the Court concluded that "the waiting period [wa]s not the least restrictive means necessary for preventing fraud."[417] The second argument advanced by the state referred to the interest to knowledgeable voters: the restriction aimed to afford some surety that the voter had, in fact, become a member of the community, and that, as such, he had a common interest in all matters pertaining to its government and was, therefore, more likely to exercise his right more intelligently. The Court rejected this position as well. "[W]ithout deciding as a general matter the extent to which a State can bar less knowledgeable or intelligent citizens from the franchise," it concluded that "durational residence requirements cannot be justified on this basis."[418] "The classifications created by durational residence requirements obviously permit any long-time resident to vote regardless of his knowledge of the issues—and obviously many long-time residents do not have any. On the other hand, the classifications bar from the franchise many other, admittedly new, residents who have become at least minimally, and often fully, informed about the issues. . . . Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State [could not] seriously maintain that it [wa]s 'necessary' to reside for a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections."[419]

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414 Dunn v. Blumstein, 405 U.S. 330, 341 (1972).

415 *Id.* at 345–46.

416 *Id.* at 348.

417 *Id.* at 353.

418 *Id.* at 356–57.

419 *Id.* at 358.

[K136] "The judgment in *Dunn v. Blumstein* invalidated the Tennessee one-year residence requirement for voting, but it agreed that the state's interest was obviously sufficient to limit voting to residents, to require registration for voting, and to close the registration books at some point prior to the election, a deadline that every resident must meet if he is to cast his vote at the polls."[420] Subsequently, district courts differed over the validity of a requirement that voters be registered for 50 days prior to election. The Court, although divided, sustained the provisions.[421] In so doing, the Court noted that, although the 50-day registration period "approache[d] the outer constitutional limits in this area,"[422] there was a "recent and amply justifiable legislative judgment that 50 days . . . [wa]s necessary to promote the State's important interest in accurate voter lists."[423]

[K137] No decision of the Court has extended the right to vote to individuals residing beyond the geographic confines of the governmental entity concerned, be it the state or its political subdivisions. In *Holt Civic Club*, residents of Holt, a small unincorporated community outside the corporate limits of the City of Tuscaloosa but within three miles thereof challenged the constitutionality of "police jurisdiction" statutes that extended municipal police, sanitary, and business licensing powers over those residing within three miles of certain corporate boundaries without permitting such residents to vote in municipal elections. The Court held that the statutes did not violate the Fourteenth Amendment. First, the Court emphasized that "a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." Thus, stripped of its voting rights attire, the equal protection issue presented by the residents of Holt became whether the state statutes giving extraterritorial force to certain municipal ordinances and powers bore some rational relationship to a legitimate state purpose. The Court found that they did. The statutory scheme at issue was "a rational legislative response to the problems faced by the State's burgeoning cities," and the legislature had a legitimate interest in ensuring that residents of areas adjoining city borders be provided "basic municipal services, such as police, fire, and health protection." Nor was it unreasonable for the legislature to require police jurisdiction residents to contribute through license fees to the expense of such services.[424]

c. Poll Taxes—Property Qualifications

[K138] In the seminal case *Harper v. Virginia Board of Elections*, the Court invalidated, under the Equal Protection Clause, a $1.50 poll tax imposed as a pre-condition to voting. Subjecting the Virginia poll tax to close scrutiny, the Court determined that "the right to vote is too precious, too fundamental to be so burdened or conditioned."[425]

[K139] In a variety of contexts, the Court has invalidated discriminatory election schemes limiting the franchise, in whole or in part, to property owners. The appellant

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420 *See* Storer v. Brown, 415 U.S. 724, 730–31 (1974).

421 Marston v. Lewis, 410 U.S. 679 (1973) *(per curiam)*; Burns v. Fortson, 410 U.S. 686 (1973) *(per curiam)*.

422 Burns v. Forston, 410 U.S. 686, 687 (1973).

423 Marston v. Lewis, 410 U.S. 679, 681 (1973); Burns v. Forston, 410 U.S. 686, 687 (1973).

424 Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 68–69, 74–75 (1978).

425 Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

in *Kramer* challenged a New York statute that limited eligibility to vote in local school board elections to persons who owned or leased taxable real property in the school district, or who had children enrolled in the public schools. The Court expressed no opinion whether a state might, in some circumstances, limit the franchise to those "primarily interested" in the election, but it held that the New York statute had impermissibly excluded many persons with "a distinct and direct interest in" the decisions of the school board, while at the same time including others who had, "at best, a remote and indirect interest in school affairs."[426] "The fact that the school district was supported by a property tax did not mean that only those subject to direct assessment felt the effects of the tax burden, and the inclusion of parents would not exhaust the class of persons interested in the conduct of local school affairs."[427]

[K140] *Cipriano* invalidated a Louisiana statute limiting the franchise in local revenue bond elections to the "property taxpayers" of the district. "As in *Kramer*, the city had failed to prove that, under its classification all those excluded from voting were, in fact, substantially less interested or affected than those permitted to vote. . . . The bonds in *Cipriano* were intended to finance extension and improvement of the city's utility system. [The Court] pointed out that the operation of a utility system affects property owners and nonproperty owners alike, and, since those not included among the eligible voters often use the utility services, they might well feel the effect of outstanding revenue bonds through the utility rates they would be required to pay."[428]

[K141] In *Phoenix v. Kolodziejski*, the Court ruled unconstitutional a similar restriction of the franchise to real property taxpayers in a general obligation bond issue. "The interests of property owners and nonproperty owners in a general obligation bond issue, [the Court] held, were not sufficiently disparate to justify excluding those owning no real property. The residents of the city, whether property owners or not, had a common interest in the facilities that the bond issue would make available, and they would all be substantially affected by the outcome of the election, both in terms of the benefits provided and the obligations incurred. Under the Phoenix bond arrangement, some of the debt service would be paid out of revenues other than property tax receipts, so nonproperty owners would be directly affected to some extent. [The Court] added, however, that even where the municipality looks only to property tax revenues for servicing general obligation bonds, the franchise cannot legitimately be restricted to real property owners: 'Property taxes may be paid initially by property owners, but a significant part of the ultimate burden of each year's tax on rental property will very likely be borne by the tenant, rather than the landlord, since . . . the landlord will treat the property tax as a business expense, and normally will be able to pass all or a large part of this cost on to the tenants in the form of higher rent.' In addition, [the Court] noted that property taxes on commercial property would normally be treated as a cost of doing business, and would 'be reflected in the prices of goods and services purchased by nonproperty owners and property owners alike.'"[429]

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[426] Kramer v. Union Free Sch. Dist., 395 U.S. 621, 632 (1969).

[427] *See* Hill v. Stone, 421 U.S. 289, 295 (1975).

[428] *See* Hill v. Stone, 421 U.S. 289, 296 (1975), *discussing* Cipriano v. City of Houma, 395 U.S. 701, 704–05 (1969).

[429] *See* Hill v. Stone, 421 U.S. 289, 296–97 (1975), *discussing* and *quoting* Phoenix v. Kolodziejski, 399 U.S. 204, 210–11 (1970).

[K142] Similarly, *Hill v. Stone* found invalid statutory provisions tying voting eligibility to property ownership in elections to approve issuance of bonds to finance a city library. Relying on the *Phoenix* case, the Court noted that "[e]ven under a system in which the responsibility of retiring the bonded indebtedness falls directly on property taxpayers, all members of the community share in the cost in various ways." Moreover, the Court rejected the argument that the challenged qualification furthered the state interest in encouraging prospective voters to render their property and thereby helped enforce the state's tax laws. In so doing, the Court emphasized that "[t]he use of the franchise to compel compliance with other, independent state objectives is questionable in any context." And it seemed "particularly dubious there, since, under the State's construction of the rendering requirement, an individual [would] be given the right to vote if he render[ed] any property at all, no matter how trivial. . . . The rendering requirement thus seem[ed] unlikely to have any significant impact on the asserted state policy of encouraging each person to render all of his property."[430]

[K143] However, the Court has held that "the electorate of a special purpose unit of government, may be apportioned to give greater influence to the constituent groups found to be most affected by the governmental unit's functions."[431] *Salyer* approved limiting the vote to landowners in electing the board of directors of a water storage district. The decision resulted from the Court's examination of the nature of the services provided by the water district in that case, and its conclusion that, "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group," the state could constitutionally disfranchise residents of the district who lacked the required special interest in the subject matter of the election.[432]

d. Literacy Tests

[K144] A state may constitutionally impose upon its citizens voting requirements reasonably "designed to promote intelligent use of the ballot."[433] Although literacy and intelligence are not synonymous, "[t]he ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . [In a] society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State [may] conclude that only those who are literate should exercise the franchise."[434] Under these considerations, *Lassiter* held that the use of a literacy test that is fair on its face and is not employed in a discriminatory fashion violates neither the Fourteenth nor the Fifteenth Amendment.[435]

[K145] In *Louisiana v. United States*, a state constitution required every voter who applied to register to "be able to understand" as well as "give a reasonable interpreta-

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[430] Hill v. Stone, 421 U.S. 289, 299–300 (1975).

[431] *See* Lockport v. Citizens for Cmty. Action, 430 U.S. 259, 266 (1977), *citing* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

[432] Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728 (1973). *See, in extenso,* para. K160. *See also* Ball v. James, 451 U.S. 355 (1981) (para. K160, n.491).

[433] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

[434] *Id.* at 51–52.

[435] *Id.* at 53. There, the Court upheld on its face a state statute requiring that the prospective voter "be able to read and write any section of the Constitution of North Carolina in the English language."

tion" of any section of the state or federal Constitution "when read to him by the registrar." The test gave voting registrars "a virtually uncontrolled discretion as to who should vote and who should not" and had been used to deter blacks from voting. Accordingly, the Court struck it down as a violation of the Fourteenth and Fifteenth Amendments.[436]

e. The Fifteenth Amendment

[K146] The purpose and command of the Fifteenth Amendment, enacted in the wake of the Civil War, are set forth in language both explicit and comprehensive. The national government and the states may not violate a fundamental principle: they may not deny or abridge the right to vote on account of race, color, and previous condition of servitude. The Amendment applies to "any election in which public issues are decided or public officials selected."[437]

[K147] The course of Fifteenth Amendment litigation in the Court demonstrates the variety and persistence of techniques designed to deprive blacks of the right to vote. A "grandfather clause" was invalidated in *Guinn.*[438] Procedural hurdles were struck down in *Lane v. Wilson.*[439] The white primary was outlawed in *Smith v. Allwright*, and *Terry v. Adams.*[440] Racially discriminatory registration challenges were nullified in *United States v. Thomas.*[441] Racial gerrymandering was forbidden by *Gomillion.*[442] Finally, discriminatory application of voting tests was condemned in *Louisiana v. United States.*[443]

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[436] Louisiana v. United States, 380 U.S. 145, 150 (1965). The Court has upheld a suspension of literacy tests and similar voting requirements under Congress' power to enforce the provisions of the Fourteenth and Fifteenth Amendments, as a measure to combat racial discrimination in voting, despite the facial constitutionality of the tests under *Lassiter. See* S. Carolina v. Katzenbach, 383 U.S. 301 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970).

[437] Terry v. Adams, 345 U.S. 461, 468 (1953).

[438] Guinn v. United States, 238 U.S. 347 (1915). There, the Court invalidated a statute that imposed a literacy requirement on voters but contained a "grandfather clause" applicable to individuals and their lineal descendants entitled to vote "on [or prior to] January 1, 1866." The determinative consideration for the Court was that the law, though ostensibly race-neutral, on its face "embod[ied] no exercise of judgment and rest[ed] upon no discernible reason" other than to circumvent the prohibitions of the Fifteenth Amendment. *Id.* at 363.

[439] Lane v. Wilson, 307 U.S. 268 (1939). In that case, Oklahoma statutes made registration prerequisite to voting, and provided generally that all citizens qualified to vote in 1916 who failed to register between April 30 and May 11, 1916, should be perpetually disfranchised, excepting those who had voted in 1914. The effect was that white people who were on the lists in 1914 in virtue of the provision of the Oklahoma Constitution called the "grandfather clause" which the Court adjudged unconstitutional in *Guinn* were entitled to vote; whereas colored people kept from registering and voting by that clause would remain forever disfranchised unless they applied for registration during the limited period of not more than 12 days.

[440] Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953). *See, in extenso*, paras. B15–B16.

[441] United States v. Thomas, 362 U.S. 58 (1960) *(per curiam).*

[442] Gomillion v. Lightfoot, 364 U.S. 339 (1960) ("uncouth 28-sided" municipal boundary line, allegedly drawn to exclude blacks). In subsequent cases involving racial gerrymandering, the Court relied on the Fourteenth Amendment.

[443] Louisiana v. United States, 380 U.S. 145 (1965).

[K148] "Ancestry can be a proxy for race."[444] *Rice v. Cayetano* addressed a Hawaiian statutory scheme that used ancestry to restrict the right to vote in the election for the governing authority of a state agency that administered programs designed for the benefit of two sub-classes of Hawaiian citizenry, "Hawaiians" and "native Hawaiians." State law defined "native Hawaiians" as descendants of not less than one-half part of the races inhabiting the Islands before 1778, and "Hawaiians"—a larger class that included "native Hawaiians"—as descendants of the peoples inhabiting the Hawaiian Islands in 1778. The trustees composing the governing authority of the agency were chosen in a statewide election in which only "Hawaiians" could vote. The Court noted that the very object of the foregoing statutory definition was "to treat the early Hawaiians as a distinct people, commanding their own recognition and respect." The history of the state's definition also demonstrated that the state had "used ancestry as a racial definition and for a racial purpose."[445] In addition, the Court rejected the state's argument that the restriction was race neutral, since it differentiated even among Polynesian people based on the date of an ancestor's residence in Hawaii, pointing out that "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral."[446] Thus, the state's electoral restriction enacted a race-based voting qualification. Further, the Court rejected the defenses advanced by the state in support of its voting law. First, the Court held that, even if Congress had the authority, delegated to the state, to treat Hawaiians or native Hawaiians as tribes, Congress could not authorize a state to create a voting scheme of the sort created there.[447] Moreover, the Court rejected Hawaii's argument that the voting restriction did no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust. In so doing, the Court stated: "All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others. Under the Fifteenth Amendment, voters are treated not as members of a distinct race, but as members of the whole citizenry. Hawaii may not assume, based on race, that petitioner or any other of its citizens will not cast a principled vote. To accept the position advanced by the State would give rise to the same indignities, and the same resulting tensions and animosities, the Amendment was designed to eliminate."[448] In light of these considerations, the Court struck down the restriction as violative of the Fifteenth Amendment.

f. Absentee Voting

[K149] In *McDonald*, a state statute provided for absentee voting by persons "medically incapacitated" and for pre-trial detainees who were incarcerated outside their county of residence. Appellants were a class of pre-trial detainees in Cook County, Illinois, already registered to vote, who sought to vote only by absentee ballot. Nevertheless, there was "nothing in the record to show that appellants [we]re, in fact, absolutely prohibited from voting by the State," since there was the possibility that the state might furnish some other alternative means of voting. Indeed, the record was "barren of any

444 Rice v. Cayetano, 528 U.S. 495, 514 (2000).
445 *Id.* at 515.
446 *Id.* at 516.
447 *Id.* at 519.
448 *Id.* at 523–24.

indication that the state might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own."[449] In light of these considerations, the Court concluded that the Illinois absentee ballot provisions were to be tested by the traditional standards for evaluating equal protection claims, and that, under those standards, the provisions could not be said to be arbitrary or unreasonable. Since there was nothing to show that a judicially incapacitated, pre-trial detainee was absolutely prohibited from exercising the franchise, it seemed "quite reasonable for Illinois' Legislature to treat differently the physically handicapped who [should,] after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot." Similarly, "the different treatment accorded unsentenced inmates incarcerated within and those incarcerated without their resident counties [might] reflect a legislative determination that, without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates. Such a temptation, with its attendant risks to prison discipline would, of course, be much less urgent with prisoners incarcerated out of state or outside their resident counties."[450]

[K150] Nevertheless, "permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause."[451] In *O'Brien v. Skinner*, New York awarded absentee registration privileges to eligible citizens who were unable to appear personally because of "illness or physical disability" and to citizens required to be outside their counties of residence on normal registration days because of their "duties, occupation or business." In addition, New York extended absentee voting privileges to those voters unable to get to the polls because of illness or physical disability, to those who were inmates of veterans' bureau hospitals, and to those who were absent from their home county on election day either because of "duties, occupation or business" or vacation. Indeed, those held in jail awaiting trial in a county other than their residence were also permitted to register by mail and vote by absentee ballot. Yet, persons confined for the same reason in the county of their residence were completely denied the ballot. The Court found that the New York statutes denied the latter category of qualified voters the equal protection of the laws guaranteed by the Fourteenth Amendment.[452]

g. Disenfranchisement of Convicted Felons

[K151] In *Richardson v. Ramirez*, the Court held that a state may disenfranchise "convicted felons who have completed their sentences and paroles." The Court found support in Section 2 of the Fourteenth Amendment, which exempts from the sanction of reduced congressional representation resulting from the denial of citizens' right to vote the denial of such right for "participation in rebellion, or other crime."[453]

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449 McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 808, nn.6–7 (1969).

450 *Id.* at 809–10.

451 Am. Party of Texas v. White, 415 U.S. 767, 795 (1974).

452 O'Brien v. Skinner, 414 U.S. 524, 530–31 (1974).

453 Richardson v. Ramirez, 418 U.S. 24, 54–56 (1974).

2. Candidacy Qualifications[454]

[K152] Noting that "the rights of voters and the rights of candidates do not lend themselves to neat separation,"[455] the Court has required states to provide substantial justification for any requirement that prevents a class of citizens from gaining ballot access. The Court has recognized that "the State's interest in keeping its ballots within manageable, understandable limits is" of fundamental importance.[456] "A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult, because of the size of the ballot, and hence would tend to impede the electoral process."[457] "Filing fees, however large, do not, in and of themselves, test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office. A large filing fee may serve the legitimate function of keeping ballots manageable but, standing alone, it is not a certain test of whether the candidacy is serious or spurious. A wealthy candidate with not the remotest chance of election may secure a place on the ballot by writing a check. Merchants and other entrepreneurs have been known to run for public office simply to make their names known to the public. [Moreover,] prohibitive filing fees . . . can effectively exclude serious candidates. Conversely, if the filing fee is more moderate, . . . impecunious but serious candidates may be prevented from running. Even in this day of high-budget political campaigns, . . . direct contact with thousands of voters by 'walking tours' [may be] a route to success [for a candidate.]"[458] Under such considerations, the Court has held unconstitutional state laws requiring candidates to pay prohibitively large filing fees as a condition to having their names placed on primary election ballots[459] or requiring the payment of even moderate fees by indigent candidates.[460]

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454 *See also* paras. I468 *et seq.*, I482. The power granted by the Constitution to each House of Congress to judge the "Qualifications of its own Members" (art. I, § 5, cl. 1) does not include the power to alter or add to the qualifications set forth in the Constitution's text. So too, the federal Constitution prohibits states from imposing congressional qualifications additional to those specifically enumerated in its text. *See* United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

455 Bullock v. Carter, 405 U.S. 134, 143 (1972).

456 *See* Lubin v. Panish, 415 U.S. 709, 715 (1974), *citing* Bullock v. Carter, 405 U.S. 134, 143–44 (1972).

457 Lubin v. Panish, 415 U.S. 709, 715 (1974).

458 Lubin v. Panish, 415 U.S. 709, 717 (1974).

459 Bullock v. Carter, 405 U.S. 134, 141–47 (1972) (fees as high as $8,900). The Court also found that the filing fees required by the challenged statute were not necessary to provide a means for financing state-mandated party primaries, noting, *inter alia*, that "it seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth." *Id.* at 147–48.

460 Lubin v. Panish, 415 U.S. 709, 715–18 (1974) (filing fee of $701). In so holding, the Court noted that "there are obvious means of testing the 'seriousness' of a candidacy which do not measure the probability of attracting significant voter support solely by the neutral fact of payment of a filing fee. States may, for example, impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election. . . . Similarly, a candidate who establishes that he cannot pay the filing fee required for a place on the primary ballot may be required to demonstrate the 'seri-

[K153] In *Turner v. Fouche*, the Court applied the Equal Protection Clause to a requirement that members of a local school board own real property, and it held the requirement unconstitutional, because it was not rationally related to any legitimate state interest. As the Court noted, "[i]t cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent, or a state and federal taxpayer contributing to the . . . annual school budget derived from sources other than the board of education's own levy on real property."[461] "Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do pose such an attachment, [a state] may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than" real property.[462]

[K154] In *Moore v. Ogilvie*, the Court struck down, on equal protection grounds, Illinois' requirement that the nominating petition of a candidate for statewide office include the signatures of at least 200 qualified voters from at least 50 counties. The statute applied "a rigid, arbitrary formula to sparsely settled counties and populous counties alike." Under this Illinois law, "the electorate in 49 of the counties which contain[ed] 93.4 percent of the registered voters [could] not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6 percent of registered voters properly distributed among the 53 remaining counties [might] form a new party to elect candidates to office. Th[e] law thus discriminate[d] against the residents of the populous counties of the State in favor of rural sections. It, therefore, lack[ed] the equality to which the exercise of political rights is entitled under the Fourteenth Amendment."[463]

3. The "One-Person, One-Vote" Principle—Apportionment

a. Congressional Elections

[K155] *Wesberry* held that the command of Article I, Section 2, of the Constitution that Representatives be chosen "by the People of the several States" means that, "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as

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ousness' of his candidacy by persuading a substantial number of voters to sign a petition in his behalf." *Id.* at 718–19.

461 Turner v. Fouche, 396 U.S. 346, 363–64 (1970).

462 *Id.* at 364. Subsequently, the Court applied the holding in *Turner* to strike down a requirement of local property ownership for membership on a local airport commission. *See* Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977) *(per curiam)*.

In *Quinn v. Millsap*, 491 U.S. 95, 107–09 (1989), the Court held that it is a form of invidious discrimination to require land ownership of all appointees to a body authorized to propose reorganization of local government. The Court noted, *inter alia*, that the mere fact that the board considered land use issues could not suffice to sustain a land ownership requirement in that case, since "the scope of the board's mandate [wa]s far more encompassing: it ha[d] the power to draft and submit a plan to reorganize the entire governmental structure of St. Louis city and county. The work of the board thus affect[ed] all citizens of the city and county, regardless of land ownership." *Id.* at 109.

463 Moore v. Ogilvie, 394 U.S. 814, 818–19 (1969).

another's."[464] As the Court explained further in *Kirkpatrick*, the "as nearly as practicable" standard "requires that the State make a good faith effort to achieve precise mathematical equality. . . . Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."[465] Article I, Section 2, therefore, "permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown."[466] "Thus, two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided, the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal."[467] "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, . . . these are all legitimate objectives that, on a proper showing, could justify minor population deviations. . . . The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely."[468]

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[464] Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964). Because of this requirement, the Court struck down a Georgia statute that allowed glaring discrepancies among the populations in that state's congressional districts.

[465] Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969).

[466] *Id.* at 531. The redistricting statute invalidated there contained total percentage deviations of 5.97 percent, which the state failed to justify. The Court held, *inter alia*, that (1) "to accept population variances, large or small, in order to create districts with specific [economic and social] interest orientations" is unconstitutional; (2) "[p]roblems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster;" (3) where population shifts can be predicted "with a high degree of accuracy," states may properly consider them and apply them, throughout the state, in a systematic manner. *Id.* at 533–35.

[467] Karcher v. Daggett, 462 U.S. 725, 730–31 (1983).

[468] *Id.* at 740–41. The Court also noted that (1) "there are no *de minimis* population variations, which could practicably be avoided, that may be considered as meeting the standard of Art. I, § 2, without justification;" (2) the census count provides "the only reliable—albeit less than perfect—indication of the districts' 'real' relative population levels," and furnishes "the only basis for good faith attempts to achieve population equality." *Id.* at 734, 738.

In *Wells v. Rockefeller*, 394 U.S. 542 (1969), the Court held that an attempt to maintain existing county lines was insufficient justification for a 12.1-percent variance. In explanation, the Court stated that an attempt "to keep regions with distinct interests intact" was insufficient because to accept such a justification "would permit groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations."

[K156] In *Department of Commerce v. Montana*, the state of Montana, several state officials, and Montana's members of Congress brought suit against the federal government, challenging as unconstitutional the method used to determine the number of representatives to which each state was entitled. The Court noted that the *Wesberry* line of cases all involved intra-state disparities in the population of voting districts that had resulted from a state's redistricting decisions, whereas Montana had challenged interstate disparities resulting from the actions of Congress. The Court "found this difference to be significant beyond the simple fact that Congress was due more deference than the States in this area. . . . While [the *Kirkpatrick*] standard could be applied easily to intrastate districting because there was no 'theoretical incompatibility entailed in minimizing both the absolute and the relative differences' in the sizes of particular voting districts, [the Court] observed that it was not so easily applied to interstate districting decisions where there was a direct trade-off between absolute and relative differences in size."[469] Finding that Montana demanded from the Court to choose between several measures of inequality—absolute difference in district size, absolute difference in share of a representative, relative difference in district size or share—in order to hold the *Wesberry* standard applicable to congressional apportionment decisions, the Court stated that "[n]either mathematical analysis nor constitutional interpretation provide[d] a conclusive answer" upon which to base that choice.[470] The Court further found that the Constitution itself, by guaranteeing a minimum of one representative for each state, made it virtually impossible in inter-state apportionment to achieve the standard imposed by *Wesberry*.[471] In conclusion, the Court emphasized that Congress' "good faith choice of a method of apportionment of Representatives among the several States 'according to their respective Numbers' commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard."[472]

Id. at 546. But in *Abate v. Mundt*, 403 U.S. 182 (1971), an apportionment for a county legislature having a maximum deviation from equality of 11.9 percent was upheld in the face of an equal protection challenge, in part because New York had a long history of maintaining the integrity of existing local government units within the county.

[469] *See* Wisconsin v. City of New York, 517 U.S. 1, 14 (1996), *discussing* Dep't of Commerce v. Montana, 503 U.S. 442, 461–62 (1992).

[470] Dep't of Commerce v. Montana, 503 U.S. 442, 463 (1992).

[471] *Id.* at 463.

[472] *Id.* at 464. The number of persons in each state is to be calculated by "actual Enumeration" conducted every ten years, "in such Manner as [Congress] shall by Law direct" (U.S. Const., art. I, § 2, cl. 3). "Because the Constitution provides that the number of Representatives apportioned to each State determines in part the allocation to each State of votes for the election of the President, the decennial *census* also affects the allocation of members of the electoral college." *See* Wisconsin v. City of New York, 517 U.S. 1, 5 (1996) (emphasis added). "The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.' . . . Hence, so long as the conduct of the . . . census is consistent with the constitutional language and the constitutional goal of equal representation, . . . it is within the limits of the Constitution." *See* Wisconsin v. City of New York, 517 U.S. 1, 19–20 (1996). *See also* Franklin v. Massachusetts, 505 U.S. 788, 803–06 (1992) (holding that allocation of overseas federal employees to their home states is consistent with the constitutional language and goal of equal representation).

b. State Elections

[K157] "[R]epresentative government is, in essence, self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. . . . Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature."[473] "[A]pportionment schemes which give the same number of representatives to unequal numbers of constituents, . . . dilute the value of the votes in the larger districts."[474] In *Reynolds v. Sims*, the Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis,"[475] noting that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, . . . or economic status."[476] This holding requires only "that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."[477]

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[473] Reynolds v. Sims, 377 U.S. 533, 565 (1964).

[474] Whitcomb v. Chavis, 403 U.S. 124, 141 (1971).

[475] *Id.* at 568.

[476] *Id.* at 566.

[477] *Id.* at 577. Although *total population* figures were, in fact, the basis of comparison in *Reynolds*, the Court's opinion carefully left open the question what population was being referred to. At several points, the Court discussed substantial equivalence in terms of *voter population or citizen population*, making no distinction between the acceptability of such a test and a test based on total population. Thus, it spoke of "[t]he right of a citizen to equal representation, and to have his vote weighted equally with those of all other citizens." *Id.* at 576. The Court also said: "[I]t is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id.* at 577. "[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579.

In *Burns v. Richardson*, 384 U.S. 73, 91 (1966), the Court held that "the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured." *Burns* stressed that neither in *Reynolds v. Sims* nor in any other decision had the Court "suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, . . . the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby. Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate under-representation of groups constitutionally entitled to participate in the electoral process or perpetuate a 'ghost of prior malapportionment.' Moreover, 'fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions.' . . . Such effects must be particularly a matter of concern where registration figures

[K158] "Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. . . . An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement."[478] Indeed, some deviations from population equality may be necessary to permit the states to pursue other legitimate objectives, such as "maintain[ing] the integrity of various political subdivisions . . . and provid[ing] for compact districts of contiguous territory."[479] In view of these considerations, the Court has held 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."[480] The Court's cases "have established, as a general matter, that an apportionment plan with a maximum population deviation under 10 percent falls within this category of minor deviations."[481] "A plan with larger disparities in population, however, creates a *prima facie* case of discrim-

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derived from a single election are made controlling for as long as 10 years." *Id.* at 92–93. In view of these considerations, the Court held that the Hawaii's registered voters basis satisfied the Equal Protection Clause "only because it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93. Moreover, Hawaii's special population problems, including large concentrations of military and tourists in Oahu, suggested that state citizen population, rather than total population, was the appropriate basis for comparison. *Id.* at 94–95.

In the vote dilution context, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), was a pathmarker. There, the city of Tuskegee redrew its boundaries to exclude black voters. This apportionment was unconstitutional not simply because it was motivated by race, but notably because it had a dilutive effect: it disenfranchised Tuskegee's black community: "The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections." *Id.* at 341.

Gray v. Sanders, 372 U.S. 368 (1963) addressed the operation of a county unit system under which state officials were elected by a majority of counties voting as units instead of by a majority of individual voters. The result was that the number of votes of persons living in large counties was given no more weight in electing state officers than was given to a far fewer number of votes of persons residing in small counties. This discrimination against large county voters was held to deny them the equal protection of the laws. The Court noted the county unit system would have been defective, even if unit votes were allocated strictly in proportion to population. If a candidate received 60 percent of the votes cast in a particular county, he would receive that county's entire unit vote, the 40 percent cast for the other candidates being discarded. *Id.* at 381, n.12. "The defect, however, continued to be geographic discrimination. Votes for the losing candidates were discarded solely because of the county where the votes were cast. Indeed, votes for the winning candidate in a county were likewise devalued, because all marginal votes for him would be discarded and would have no impact on the state-wide total." *See* Gordon v. Lance, 403 U.S. 1, 5 (1971).

478 Gaffney v. Cummings, 412 U.S. 735, 748–49 (1973).

479 Reynolds v. Sims, 377 U.S. 533, 578 (1964).

480 Gaffney v. Cummings, 412 U.S. 735, 745 (1973).

481 Brown v. Thomson, 462 U.S. 835, 842 (1983), *citing* Connor v. Finch, 431 U.S. 407, 418 (1977), and White v. Regester, 412 U.S. 755, 764 (1973).

ination, and therefore must be justified by the State."[482] The ultimate inquiry is "whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.'"[483]

[K159] *Avery v. Midland County* held that the *Reynolds* "one-person, one-vote" rule is applicable to the election of officials of a county government, if the elected officials exercise "general governmental powers over the entire geographic area served by the body."[484] In *Hadley*, the Court extended *Reynolds* to the election of trustees of a community college district "because those trustees 'exercised general governmental powers' and 'perform[ed] important governmental functions' that had significant effect on all citizens residing within the district."[485] But, in that case, the Court stated: "It is, of course, possible that there might be some case 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* . . . might not be required."[486]

[K160] The Court found such a case in *Salyer*. The Tulare Lake Basin Water Storage District involved there encompassed 193,000 acres, 85 percent of which were farmed by one or another of four corporations. Under California law, public water districts could acquire, store, conserve, and distribute water, and though the Tulare Lake Basin Water

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[482] Brown v. Thomson, 462 U.S. 835, 842–43 (1983).

[483] *Id.* at 843, *quoting* Mahan v. Howell, 410 U.S. 315, 328 (1973). *See also* Voinovich v. Quilter, 507 U.S. 146, 161 (1993).

The issue in *Brown v. Thomson* was whether the state of Wyoming had violated the Equal Protection Clause by allocating one of the 64 seats in its House of Representatives to a county the population of which was considerably lower than the average population per state representative. A 1981 Wyoming statute reapportioned the House of Representatives and provided for 64 representatives. Based on the 1980 census placing Wyoming's population at 469,557, the ideal apportionment would have been 7,337 persons per representative. Niobrara County, the state's least populous county, had been given one representative, even though its population was only 2,924. The Court found that the case presented "an unusually strong example of an apportionment plan the population variations of which were entirely the result of the consistent and nondiscriminatory application of a legitimate state policy." Wyoming, since statehood, had followed a constitutional policy "of using counties as representative districts and ensuring that each county ha[d] one representative." Moreover, Wyoming had applied the factor of preserving political subdivisions "free from any taint of arbitrariness or discrimination." Further, the Court held that Wyoming's policy of preserving county boundaries justified the additional deviations from population equality resulting from the provision of representation for Niobrara County, mainly because considerable population variations would remain even if Niobrara county's representative were eliminated. Id. at 843–47.

Mahan v. Howell, 410 U.S. 315 (1973), sustained a legislative reapportionment plan for the Virginia House of Delegates in which the maximum variation was 16.4 percent. The Court held that this deviation was justified by the state's policy of maintaining the integrity of political subdivision lines. This objective was rational, since it furthered the legislative purpose of facilitating enactment of statutes of local concern and preserved for the voters in the political subdivisions a voice in the state legislature on local matters. *Id.* at 325–28.

[484] Avery v. Midland County, 390 U.S. 474, 485 (1968).

[485] *See* Ball v. James, 451 U.S. 355, 363 (1981), *quoting* Hadley v. Junior Coll. Dist., 397 U.S. 50, 53–54 (1970).

[486] Hadley v. Junior Coll. Dist., 397 U.S. 50, 56 (1970).

Storage District had never chosen to do so, it could generate and sell any form of power it saw fit to support its water operations. The costs of the project were assessed against each landowner according to the water benefits the landowner received. At issue in the case was the constitutionality of the scheme for electing the directors of the district, under which only landowners could vote, and voting power was apportioned according to the assessed valuation of the voting landowner's property. The Court recognized that the Tulare Lake Basin Water Storage District did exercise "some typical governmental powers," including the power to hire and fire workers, contract for construction of projects, condemn private property, and issue general obligation bonds.[487] Nevertheless, the Court concluded that the district had "relatively limited authority," because "its primary purpose, indeed the reason for its existence, was to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin."[488] The Court also noted that the financial burdens of the district fell on the landowners in proportion to the benefits they received from the district, and that the district's actions therefore disproportionately affected the voting landowners.[489] The *Salyer* Court thus held that the strictures of *Reynolds* did not apply to the Tulare District, and it proceeded to inquire simply whether the statutory voting scheme based on land valuation at least bore some relevancy to the statute's objectives.[490] In this regard, the Court found that "[t]he California Legislature could quite reasonably have concluded that the number of landowners and owners of sufficient amounts of acreage whose consent was necessary to organize the district would not have subjected their land to the lien of its possibly very substantial assessments unless they had a dominant voice in its control."[491]

In *New York City Board of Estimate v. Morris*, 489 U.S. 688 (1989), the board consisted of three members elected citywide, plus the elected presidents of each of the city's five boroughs. "New York law assign[ed] to the board a significant range of functions common to municipal governments. Fiscal responsibilities include[d] calculating sewer and water rates, tax abatements, and property taxes on urban development projects. The board manage[d] all city property; exercise[d] plenary zoning authority; dispense[d] all franchises and leases on city property; fixe[d] generally the salaries of all officers and persons compensated through city moneys; and grant[ed] all city contracts." In addition, "the board share[d] legislative functions with the city council with respect to modifying and approving the city's capital and expense budgets." *Id.* at 694–96. Under these circumstances, the Court held that the board's selection process should comply with the "one-person, one-vote" requirement. Further, the city's proffered governmental interests—that the board, as structured, was essential to the successful government of New York City, was effective, and accommodated natural and political boundaries, as well as local interests—did not suffice to justify a 78-percent deviation from the one-person, one-vote ideal, in part because the city could be served by alternative ways of constituting the board that would minimize the discrimination in voting power.

[487] Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728, n.7 (1973).

[488] *Id.* at 728.

[489] *Id.* at 729.

[490] *Id.* at 730.

[491] *Id.* at 731. The exclusion of lessees from voting did not violate the Equal Protection Clause, since the short-term lessee's interest might be substantially less than that of a landowner and, the franchise being exercisable by proxy, other lessees might negotiate to have the franchise included in their leases. *Id.* at 731–33.

Ball v. James, 451 U.S. 355, 365–71 (1981), involved the Salt River Project Agricultural Improvement and Power District, a governmental entity that was delivering untreated water to the owners of 236,000 acres of land in central Arizona, and, to subsidize its water operations, it was selling electricity to hundreds of thousands of people in an area including a large part

[K161] *Gordon v. Lance* upheld West Virginia's constitutional and statutory requirement that political subdivisions might not incur bonded indebtedness or increase tax rates beyond those established by the State Constitution without the approval of 60 percent of the voters in a referendum election. Although "any departure from strict majority rule gives disproportionate power to the minority," the Court found that, "so long as such provisions do not discriminate against or authorize discrimination against any identifiable class, they do not violate the Equal Protection Clause."[492]

[K162] *Lockport* involved a New York law providing that a new county charter would go into effect only if it was approved in a referendum election by separate majorities of the voters who lived in the cities within the county, and of those who lived outside the cities. The "separate voter approval requirements [we]re based on the perception that the real and long-term impact of a restructuring of local government [wa]s felt quite differently by the different county constituent units that in a sense compete[d] to provide similar governmental services. Voters in these constituent units [we]re directly and differentially affected by the restructuring of county government, which [might] make

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of metropolitan Phoenix. Under state law, the system for electing the District's directors limited voting eligibility to landowners and apportioned voting power according to the number of acres owned. "[T]he services provided by the Salt River District [we]re more diverse and affect[ed] far more people than those of the Tulare Lake Basin Water Storage District involved in *Salyer*. Whereas the Tulare District included an area entirely devoted to agriculture and populated by only 77 persons, the Salt River District include[d] almost half the population of the state, including large parts of Phoenix and other cities. Moreover, the Salt River District, unlike the Tulare District, ha[d] exercised its statutory power to generate and sell electric power, and ha[d] become one of the largest suppliers of such power in the State. Further, whereas all the water delivered by the Tulare District went for agriculture, roughly 40% of the water delivered by the Salt River District [went] to urban areas or [wa]s used for nonagricultural purposes in farming areas. Finally whereas all operating costs of the Tulare District were born by the voting landowners through assessments apportioned according to land value, most of the capital and operating costs of the Salt River District ha[d] been met through the revenues generated by the selling of electric power. Nevertheless, a careful examination of the Salt River District reveal[ed] that, under the principles of the *Avery, Hadley*, and *Salyer* cases, these distinctions d[id] not amount to a constitutional difference." *Id.* at 365–66. The Salt River District did "not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*. It [could not] impose *ad valorem* property taxes or sales taxes" or "enact any laws governing citizens' conduct." Nor did "it administer such normal government functions as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services." *Id.* at 366. Second, the District's water functions, which constituted its "primary and originating purpose," were "relatively narrow." Although as much as 40 percent of the water delivered by the District went for non-agricultural, urban purposes, "[t]he constitutionally relevant fact [wa]s that all water . . . [wa]s distributed according to land ownership," and the District could not control the use to which the water was put by the landowners. *Id.* at 367–68. Nor was the provision of electricity, "in itself, the sort of general or important governmental function that would make the government provider subject to the *Reynolds* doctrine." And, in any event, the District's electric power functions were only incidental to, and thus could not change the character of, its water functions. *Id.* at 368. Finally, the District's functions bore a disproportionate relationship to the specific class of people whom the system made eligible to vote. Voting landowners were the only residents of the District whose lands were subject to liens to secure District bonds, who were subject to the District's acreage-based taxing power, and who committed capital to the District. *Id.* at 370.

[492] Gordon v. Lance, 403 U.S. 1, 6–7 (1971).

the provider of public services more remote and less subject to the voters' individual influence," and these differing interests of city and non-city voters in the adoption of a new county charter were sufficient under the Equal Protection Clause to justify the classifications made under the law.[493]

[K163] Multi-member districts, that is, districts that are represented by two or more legislators elected at large by the voters of the district, "are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single member districts in other parts of the State. But [multi-member districts may not be] used invidiously to cancel out or minimize the voting strength of racial groups. . . . 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."[494]

[K164] *Mobile v. Bolden* involved the at-large election system in Mobile, Alabama. Mobile was governed by three commissioners who exercised all legislative, executive, and administrative power in the municipality. Each candidate for the city Commission would run for one of three numbered posts in an at-large election and could only be elected by a majority vote. Plaintiffs brought a class action on behalf of all black citizens of Mobile alleging that the at-large scheme diluted their voting strength in violation of the

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[493] Lockport v. Citizens for Cmty. Action, 430 U.S. 259, 271–73 (1977).

[494] White v. Regester, 412 U.S. 755, 765–66 (1973). In *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Court observed that there was no proof that blacks were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when candidates were chosen, or to be included among the candidates slated by the Democratic Party. *Id.* at 150–51. Against this background, the Court concluded that the failure of the minority to have legislative seats in proportion to its population "emerge[d] more as a function of losing elections than of built-in bias against poor [blacks.]" *Id.* at 153. *Whitcomb* accordingly rejected a challenge to multi-member districts in Marion County, Indiana.

A similar challenge was sustained in *White v. Regester*, 412 U.S. 755, 766–67 (1973). There, the district court took into account (1) the history of official racial discrimination in Texas, which at times touched the right of blacks to register and vote and to participate in the democratic processes; (2) the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multi-member district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multi-member district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the district court thought. The district court also found that Dallas Committee for Responsible Government, a white-dominated organization, which was in effective control of Democratic Party candidate slating in Dallas County, was relying upon racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community. Based on the evidence before it, the district court concluded that the black community had been effectively excluded from participation in the Democratic primary selection process and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner. The Court held that these findings and conclusions were sufficient to sustain the district court's judgment with respect to the Dallas multi-member district.

Constitution. A four-Justice plurality noted that, to prevail in their contention that the at-large voting system violated the Equal Protection Clause of the Fourteenth Amendment, plaintiffs had to prove the system was "conceived or operated as [a] purposeful device to further racial . . . discrimination."[495] *Rogers v. Lodge* confirmed that a determination of discriminatory intent is a requisite to a finding of unconstitutional vote dilution under the Fourteenth Amendment.[496]

c. Judicial Redistricting

[K165] "[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."[497] "Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state apportionment nor permit federal litigation to be used to impede it."[498] Hence, "state redistricting responsibility should be accorded primacy to the extent possible when a federal court exercises remedial power. . . . A State should be given the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity. . . . When it does take the opportunity, the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law."[499] "When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act."[500]

[K166] "A court-ordered plan should 'ordinarily achieve the goal of population equality with little more than *de minimis* variation.'"[501] "Slight deviations are allowed under certain circumstances."[502] Moreover, a court-ordered reapportionment plan of a state legislature must avoid use of multi-member districts, unless "important and significant state considerations rationally mandate departure" from this principle.[503]

4. Racial Gerrymandering

[K167] In *Shaw I*, the Court considered whether plaintiffs' factual allegation—that the legislature had drawn the former district's boundaries for race-based reasons—if true,

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495 Mobile v. Bolden, 446 U.S. 55, 66, 73 (1980).

496 Rogers v. Lodge, 458 U.S. 613, 621–22 (1982). *See also* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481 (1997).

497 Chapman v. Meier, 420 U.S. 1, 27 (1975).

498 Growe v. Emison, 507 U.S. 25, 34 (1993).

499 Lawyer v. Dep't of Justice, 521 U.S. 567, 576–77 (1997).

500 Abrams v. Johnson, 521 U.S. 74, 79 (1997).

501 *Id.* at 98, *quoting* Chapman v. Meier, 420 U.S. 1, 26–27 (1975).

502 Abrams v. Johnson, 521 U.S. 74, 98 (1997), *citing* Chapman v. Meier, 420 U.S. 1, 26 (1975) ("With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features."); Karcher v. Daggett, 462 U.S. 725, 740 (1983) ("Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent[s].").

503 Chapman v. Meir, 420 U.S. 1, 26–27 (1975).

could underlie a legal holding that the legislature had violated the Equal Protection Clause. The Court held that it could, writing that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."[504] *Shaw I* "recognized a claim 'analytically distinct' from a vote dilution claim. . . . Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities,' . . . an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw [I]* is that the State has used race as a basis for separating voters into districts."[505] "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.' . . . Race-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by the Constitution.' . . . They also cause society serious harm."[506] As the Court concluded in *Shaw I*, "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny."[507]

[K168] A racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is, thus, constitutionally suspect. "This is true whether or not the reason for the racial classification is benign or the purpose remedial."[508] However, "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Electoral district lines are 'facially race neutral.'"[509] "[T]he courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the *predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect

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504 Shaw v. Reno, 509 U.S. 630, 649 (1993) *(Shaw I).*

505 *See* Miller v. Johnson, 515 U.S. 900, 911 (1995).

506 *Id.* at 911–12.

507 Shaw v. Reno, 509 U.S. 630, 657 (1993).

508 Shaw v. Hunt, 517 U.S. 899, 904–05 (1996) *(Shaw II).*

509 Bush v. Vera, 517 U.S. 952, 958 (1996).

for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can 'defeat a claim that a district has been gerrymandered on racial lines.'"[510]

[K169] *Shaw II* reversed a district court's holding that the boundary-drawing law in question did not violate the Constitution. The Court found that "the district's 'unconventional,' snake-like shape, the way in which its boundaries split towns and counties, its predominately African-American racial make-up, and its history, together demonstrated a deliberate effort to create a 'majority-black' district."[511] "Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents had come into play only after the race-based decision had been made."[512] Further, the Court held that the state had failed to show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its districting legislation was narrowly tailored to achieve that interest. "A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions."[513] But in this case, the district court had found that an interest in ameliorating past discrimination had not actually precipitated the use of race in the redistricting plan. Moreover, the district, as drawn, was not a remedy narrowly tailored to the state's professed interest in avoiding liability under Section 2 of the Voting Rights Act, which, *inter alia*, prohibited dilution of the voting strength of members of a minority group. Assuming, *arguendo*, that compliance

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[510] Miller v. Johnson, 515 U.S. 900, 915–16 (1995) (emphasis added). In that case, Georgia contended that its redistricting plan was necessary to meet the Justice Department's pre-clearance demands, under Section 5 of the Voting Rights Act of 1965 (which requires that states obtain prior federal approval before changing any voting practice or procedure and seeks to prevent voting procedure changes leading to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise). The Justice Department had interposed an objection to a prior plan that created only two majority-minority districts. The Court held that the challenged plan was not required by a correct reading of Section 5, and therefore compliance with that law could not justify race-based districting. *Id.* at 921 ("[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws"). The Court, thus, did not reach the question whether compliance with the Act, on its own, can be a compelling state interest under the proper circumstances.

United States v. Hays, 515 U.S. 737 (1995), recognized that a plaintiff who resides in a district that is the subject of a racial gerrymander claim has *standing* to challenge the legislation that created that district, but that a plaintiff from outside that district lacks standing, absent specific evidence that he has *personally* been subjected to a racial classification. A plaintiff's failure to show the requisite injury is not changed by the fact that the racial composition of his own district might have been different had the legislature drawn the adjacent majority-minority district (a district in which a majority of the population was a member of a specific minority group) another way. And evidence sufficient to support a racial gerrymandering claim with respect to a majority-minority district does not prove anything with respect to a neighboring majority-white district in which the plaintiff resides. *Id.* at 745–46. See also Sinkfield v. Kelley, 531 U.S. 28 (2000) *(per curiam)*.

[511] *See* Easley (Hunt) v. Cromartie, 532 U.S. 234, 238 (2001), *discussing* Shaw v. Hunt, 517 U.S. 899 (1996).

[512] Shaw v. Hunt, 517 U.S. 899, 907 (1996) *(Shaw II)*.

[513] *Id.* at 909.

with Section 2 might be a compelling interest, the Court decided that the district at issue could not remedy any potential Section 2 violation, since the minority group should be shown to be "geographically compact" to establish Section 2 liability, and it could not reasonably be suggested that the district contained a "geographically compact" population of any race. Relatedly, the Court rejected the argument that a majority-minority district (that is, a district in which a majority of the population is a member of a specific minority group) might be drawn anywhere if there was a strong basis in evidence for concluding that a Section 2 violation existed somewhere in the state, noting that Section 2 targeted vote dilution injury to individuals in a particular area, not to the minority as a group.[514]

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[514] *Id.* at 915–17. *See also Bush v. Vera*, 517 U.S. 952 (1996), where the Court struck down congressional districts crafted by Texas. This was a "mixed motive" case. Findings that Texas had substantially neglected traditional districting criteria such as compactness, that it had been committed from the outset to creating majority-minority districts, and that it had manipulated district lines to exploit unprecedentedly detailed racial data, taken together, weighed in favor of the application of strict scrutiny. Further, although factors other than race, particularly incumbency protection, had clearly influenced the legislature, the Court sustained the district court's conclusion that race had been the predominant factor motivating the drawing of district lines. Moreover, the Court found that the districts in question had not been narrowly tailored to serve a compelling state interest in complying with Sections 2 and 5 of the Voting Rights Act.

In *Hunt v. Cromartie*, 526 U.S. 541 (1999) *(Hunt I)*, a district court had granted summary judgment in favor of those challenging a district's boundaries. The court based its holding upon "uncontroverted material facts" showing that the boundaries created an unusually shaped district, split counties and cities, and, in particular, placed almost all heavily Democratic-registered, predominantly African-American voting precincts inside the district, while locating some heavily Democratic-registered, predominantly white precincts outside the district. This latter circumstance, said the court, showed that the legislature was trying to maximize new district's African-American voting strength, not the district's Democratic voting strength. The Court reversed. It "agreed with the District Court that the new district's shape, the way in which it split towns and counties, and its heavily African-American voting population all helped the plaintiffs' case. . . . But neither that evidence by itself, nor when coupled with the evidence of Democratic registration, was sufficient to show, on summary judgment, the unconstitutional race-based objective that plaintiffs claimed. That [wa]s because there was a genuine issue of material fact as to whether the evidence also was consistent with a constitutional political objective, namely, the creation of a safe Democratic seat. . . . [The Court] pointed to the affidavit of an expert witness for defendants, [who] had offered to show that because North Carolina's African-American voters were overwhelmingly Democratic voters, one could not easily distinguish a legislative effort to create a majority African-American district from a legislative effort to create a safely Democratic district. . . . And he had also provided data showing that registration did not indicate how voters would actually vote. [The Court] agreed that data showing how voters actually behave, not data showing only how those voters are registered, could affect the outcome of this litigation. It concluded that the case was 'not suited for summary disposition' and reversed the District Court." *See* Easley (Hunt) v. Cromartie, 532 U.S. 234, 238–39 (2001), *discussing Hunt I.*

On remand the district court again held that the legislature had unconstitutionally drawn the district's new boundaries. In *Easley (Hunt) v. Cromartie*, 532 U.S. 234 (2001) *(Hunt II)*, the Court held that the district court's was based on clearly erroneous findings. The modicum of evidence supporting the district court's conclusion taken together did not show that racial considerations predominated in the boundaries' drawing, because race in this case correlated closely with political behavior. The Court stressed that, *"where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party*

5. Political Gerrymandering

[K170] *Davis v. Bandemer* recognized that political gerrymandering claims are justiciable under the Equal Protection Clause, although the members of the Court were not in agreement as to the standards that would govern such a claim. A four-Justice plurality concluded that a political gerrymandering claim could succeed only where plaintiffs showed "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[515] As to the intent element, the plurality acknowledged that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."[516] "However, the effects prong was significantly harder to satisfy. Relief could not be based merely upon the fact that a group of persons banded together for political purposes had failed to achieve representation commensurate with its numbers, or that the apportionment scheme made its winning of elections more difficult. . . . Rather, it would have to be shown that, taking into account a variety of historic factors and projected election results, the group had been 'denied its chance to effectively influence the political process' as a whole, which could be achieved even without electing a candidate. . . . It would not be enough to establish, for example, that Democrats had been 'placed in a district with a supermajority of other Democratic voters' or that the district 'departs from preexisting political boundaries.' Rather, in a challenge to an individual district the inquiry would focus 'on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate.' A statewide challenge, by contrast, would involve an analysis of 'the voters' direct *or indirect* influence on the elections of the state legislature as a whole.'"[517] Justice Powell suggested an alternative method for evaluating equal protection claims of political gerrymandering. In his view, courts should look at a number of factors in considering these claims: the nature of the legislative procedures by which the challenged redistricting was accomplished and the intent behind the redistricting; the shapes of the districts and their conformity with political subdivision boundaries; and evidence concerning population disparities and statistics tending to show vote dilution.[518]

[K171] Nevertheless, in *Vieth*, a majority of the Court found that *Bandemer* provided no clear and manageable standards for measuring the burden a given partisan classification imposes on representational rights.[519] A four-member plurality held that political gerrymandering claims are non-justiciable, because no judicially discernible and

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attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance." Id. at 258 (emphasis added). Because appellees had failed to make any such showing in that case, the district court's contrary findings were clearly erroneous.

515 Davis v. Bandemer, 478 U.S. 109, 127 (1986).

516 *Id.* at 129.

517 *See* Vieth v. Jubelirer, 541 U.S. 267, 281–82 (2004), *discussing* and *quoting* Davis v. Bandemer, 478 U.S. 109, 132–33, 140–41 (1986) (emphasis added).

518 *Id.* at 173 (Powell, J., concurring in part and dissenting in part).

519 Vieth v. Jubelirer, 541 U.S. 267, 282–83 (2004) (plurality opinion); *id.* at 306–08 (Kennedy, J., concurring in judgment).

manageable standards for adjudicating such claims exist.[520] But five members of the Court were convinced that the plurality's position was erroneous.[521]

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[520] *Id.* at 281 (opinion of Scalia, J., joined by Rehnquist, C.J., O'Connor, and Thomas, JJ.). Appellants proposed a standard that retained the two-pronged framework of the *Bandemer* plurality—intent plus effect—but modified the type of showing sufficient to satisfy each. To satisfy appellants' intent standard, a plaintiff should "show that the mapmakers acted with a *predominant intent* to achieve partisan advantage," which could be shown "by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage." The Court found that appellants' proposed two-pronged standard based on Article I, Section 2, and the Equal Protection Clause was neither discernible nor manageable. The plurality noted that appellants were mistaken when they contended that their intent prong ("predominant intent") was no different from that which the Court had applied in racial gerrymandering cases. In those cases, the predominant intent test had been applied to the challenged district in which the plaintiffs voted. There, however, since "it would be quixotic to attempt to bar state legislatures from considering politics as they redraw district lines," appellants proposed a test that would be satisfied only when "partisan advantage was the predominant motivation *behind the entire statewide plan*." The plurality noted that "[v]ague as the 'predominant motivation' test might be when used to evaluate single districts, it all but evaporates when applied statewide. Does it mean, for instance, that partisan intent should outweigh all other goals—contiguity, compactness, preservation of neighborhoods, etc.—*statewide*? And how was the statewide 'outweighing' to be determined?" *Id.* at 285. Moreover, as the plurality pointed out, "[t]he Constitution clearly contemplates districting by political entities, *see* Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics. . . . By contrast, the purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered. Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it. Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial gerrymandering." *Id.* at 285–86. The effects prong of appellants' proposal required (1) that the plaintiffs show that the rival party's voters were systematically "packed" or "cracked;" and (2) that the court be persuaded from the totality of the circumstances that the map could thwart the plaintiffs' ability to translate a majority of votes into a majority of seats. But this standard was not discernible. As the plurality noted, "a person's politics is rarely as readily discernible—and *never* as permanently discernible—as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Id.* at 287. Even if the standard were discernible, it was not judicially manageable. The plurality said that there is no effective way to ascertain a party's majority status, and, in any event, majority status in statewide races does not establish majority status for particular district contests. *Id.* at 288.

[521] Justice Kennedy concluded that all possibility of judicial relief should not be foreclosed in such cases, because a limited and precise rationale might yet be found to correct an established constitutional violation. Justice Kennedy noted, *inter alia*, that courts confront two obstacles when presented with a claim of injury from partisan gerrymandering. "First is the lack of comprehensive and neutral principles for drawing electoral boundaries. No substantive definition of fairness in districting commands general assent. Second is the absence of rules to limit and confine judicial intervention." *Id.* at 306–07. Justice Kennedy further noted:

> That courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here. Those controversies implicate a different inquiry. They involve sorting permissible classifications in the redistricting context from impermissible ones. Race is an impermissible classification. . . .

6. Equality in the Counting and Recounting of Votes

[K172] On November 8, 2000, the day following the Presidential election, the Florida division of elections reported that Bush had received 2,909,135 votes, and Gore, had received 2,907,351 votes, a margin of 1,784 for Governor Bush. Because Bush's margin

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> A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.
>
> The object of districting is to establish 'fair and effective representation for all citizens. . . . At first it might seem that courts could determine, by the exercise of their own judgment, whether political classifications are related to this object or instead burden representational rights. The lack, however, of any agreed upon model of fair and effective representation makes this analysis difficult to pursue.
>
> [However,] the more abstract standards that guide analysis of all Fourteenth Amendment claims suffic[e] to assure justiciability of such claims.
>
> That no [workable] standard has emerged in this case should not be taken to prove that none will emerge in the future.

Id. at 307–08, 310–11.

Under Justice Souter's proposed standard, in order to challenge a particular district, a plaintiff must show

(1) that he is a member of a "cohesive political group;"
(2) "that the district of his residence . . . paid little or no heed" to traditional districting principles;
(3) that there were "specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group;"
(4) that a hypothetical district exists, which includes the plaintiff's residence, remedies the packing or cracking of the plaintiff's group, and deviates less from traditional districting principles; and
(5) that "the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group."

When those showings have been made, the burden would shift to the defendants to justify the district "by reference to objectives other than naked partisan advantage." *Id.* at 347–51 (dissenting opinion of Justice Souter, joined by Justice Ginsburg).

In evaluating a challenge to a specific district, Justice Stevens would apply the standard set forth in the racial gerrymandering cases and ask "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles." Under this analysis, "if no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength, then no rational basis exists to save the district from an equal protection challenge." *Id.* at 339.

Justice Breyer's proposal focused on "the unjustified use of political factors to entrench a minority in power." By entrenchment he meant "a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power." By *unjustified* entrenchment he meant that "the minority's hold on power is purely the result of partisan manipulation and not other factors. These 'other' factors that could lead to 'justified' (albeit temporary) minority entrenchment would include sheer happenstance, the existence of more than two major parties, the unique constitutional requirements of certain representational bodies such as the Senate, or reliance on traditional (geographic, communities of interest, etc.) districting criteria." *Id.* at 360–61.

of victory was less than one-half of a percent of the votes cast, an automatic machine recount was conducted under the election code, the results of which showed Bush still winning the race but by a diminished margin. Gore then sought manual recounts in four counties, pursuant to Florida's election protest provisions. A dispute arose concerning the deadline for local county canvassing boards to submit their returns to the Secretary of State (Secretary). The Secretary declined to waive the November 14 deadline imposed by statute. The Florida supreme court, however, set the deadline at November 26. The Court granted *certiorari* and vacated the Florida supreme court's decision, finding considerable uncertainty as to the grounds on which it was based.[522] On December 11, the Florida supreme court issued a decision on remand reinstating that date. On November 26, the Florida elections canvassing commission certified the results of the election and declared Bush the winner of Florida's 25 electoral votes. On November 27, Gore, pursuant to Florida's contest provisions, filed a complaint in Leon County circuit court contesting the certification. He sought relief pursuant to a state statute providing that "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" would be grounds for a contest. The Florida supreme court held that Gore had satisfied his burden of proof with respect to his challenge to Miami-Dade County's failure to tabulate, by manual count, 9,000 ballots on which the machines had failed to detect a vote for President ("under-votes"). A "legal vote," as determined by the state supreme court, was one in which there was "a clear indication of the intent of the voter." The Florida supreme court therefore ordered a hand recount of the 9,000 ballots in Miami-Dade County. The Court found that the recount procedures the Florida supreme court had adopted were not "consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."[523] Much of the controversy revolved around ballot cards designed to be perforated by a stylus but that, either through error or deliberate omission, had not been perforated with sufficient precision for a machine to count them. In some cases a piece of the card—a chad—was hanging, say by two corners. In other cases, there was no separation at all, just an indentation. "The Florida Supreme Court ha[d] ordered that the intent of the voter be discerned from such ballots. . . . This [wa]s unobjectionable as an abstract proposition and a starting principle. The problem inhere[d] in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances [wa]s practicable and . . . necessary."[524] However, the record showed that the standards for accepting or rejecting contested ballots might vary not only from county to county but, indeed, within a single county from one recount team to another. Moreover, "the actual process by which the votes were to be counted raise[d] further concerns [because the court's order] did not specify who would recount the ballots. The county canvassing boards were forced to pull together *ad hoc* teams comprised of judges from various Circuits who had no previous training in handling and interpreting ballots. Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount." Such a recount process was "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial offi-

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522 Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) *(per curiam).*

523 Bush v. Gore, 531 U.S. 98, 105 (2000) *(per curiam).*

524 *Id.* at 105–06.

cer."[525] "When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."[526] The state had not shown that its procedures included the necessary safeguards. Upon due consideration of these difficulties, the Court found it "obvious that the recount [could not] be conducted in compliance with the requirements of equal protection and due process without substantial additional work." Finally, since federal law required that any controversy or contest designed to lead to a conclusive selection of electors be completed by December 12, since that date was upon the Court, and since there was no recount procedure in place under the State supreme court's order that comported with minimal constitutional standards, it was evident that any recount seeking to meet the December 12 date would be unconstitutional for the reasons discussed above. Hence, the Court reversed the judgment of the supreme court of Florida ordering a recount to proceed.[527]

J. ECONOMIC AND SOCIAL LEGISLATION[528]

1. *In General*

[K173] "Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose."[529] As the Court pointed out in *Vance*, social and economic legislation is valid "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that can only conclude that the legislature's actions were irrational."[530] Classifications in such legislation come to the Court "bearing a strong presumption of validity," and "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'"[531]

2. *Protection of Legitimate Expectations*[532]

[K174] The Court has acknowledged that "classifications serving to protect legitimate expectation and reliance interests serve a legitimate governmental objective and do not

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525 *Id.* at 109.

526 *Id.* at 109.

527 *Id.* at 110.

528 *See also* paras. D11 *et seq. (residency requirements)*; paras. F73–F76 *(abortion funding).*

529 Hodel v. Indiana, 452 U.S. 314, 331 (1981).

530 Vance v. Bradley, 440 U.S. 93, 97 (1979).

531 Fed. Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 314–15 (1993), *quoting* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973). The fact that a member of the class, which is regulated, may suffer economic losses not shared by others is not a barrier to economic legislation. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 260 (1964), *citing* Bowles v. Willingham, 321 U.S. 503, 518 (1944).

The Court has recognized repeatedly that *a legislature constitutionally may prohibit a convicted felon from engaging in certain activities. See* Lewis v. United States, 445 U.S. 55, 66 (1980) (firearms disability); Richardson v. Ramirez, 418 U.S. 24 (1974) (disenfranchisement); De Veau v. Braisted, 363 U.S. 144 (1960) (proscription against holding office in a waterfront labor organization); Hawker v. New York, 170 U.S. 189 (1898) (prohibition against the practice of medicine).

532 *See also* para. K185.

deny equal protection of the laws."[533] In *Fritz*, the Court determined that a denial of dual "windfall" retirement benefits to some railroad workers but not others did not violate the Equal Protection Clause, because "Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits."[534] In *New Orleans v. Dukes*, the Court held that an ordinance banning certain street vendor operations, but grandfathering existing vendors who had been in operation for more than eight years, did not violate the Equal Protection Clause, mainly because the city "could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation."[535] In *Kadrmas*, the Court decided that a prohibition on user fees for bus service in "reorganized" school districts, but not in "non-reorganized" school districts, did not violate the Equal Protection Clause, *inter alia*, because "the legislature could conceivably have believed that such a policy would serve the legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans."[536]

[K175] Prior to 1977, spousal benefits under the Social Security Act were payable only to husbands or widowers who could demonstrate dependency on their wives for one-half of their support, whereas wives and widows were entitled to benefits without any such showing of dependency on their husbands. In March, 1977, *Califano v. Goldfarb* held that the gender-based dependency requirement for widowers violated the equal protection component of the Due Process Clause of the Fifth Amendment. Thereafter, while repealing the dependency requirement for widowers and husbands, Congress, in order to avoid a fiscal drain on the Social Security trust fund, enacted a "pension off-set" provision that generally required the reduction of spousal benefits by the amount of federal or state government pensions received by the Social Security applicant. However, in order to protect the interests of those individuals who had retired or were about to retire and who had planned their retirements in reliance on their entitlement, under pre-1977 law, to spousal benefits unreduced by government pension benefits, Congress exempted from the pension off-set requirement those spouses who were eligible to receive pension benefits prior to December 1982, and who would have qualified for unreduced spousal benefits under the Act as administered in January 1977. In *Heckler v. Mathews*, the Court found that the gender-based classification of the pension off-set exception was constitutional. Although temporarily reviving the gender-based classification invalidated in *Goldfarb*, the off-set exception furthered the "legitimate and important" governmental objective of protecting individuals who had planned their retirements in reasonable reliance on the law in effect prior to that decision under which they could receive spousal benefits unreduced by the amount of government pensions to which they were also entitled. This objective provided an "exceedingly persuasive justification" for the gender-based classification incorporated in the off-set exception.[537] And "[a]lthough an unconstitutional scheme could not be retained for an unduly prolonged period in the name of protecting reliance interests, . . . there [wa]s

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533 Nordlinger v. Hahn, 505 U.S. 1, 13 (1992).

534 United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 178 (1980).

535 New Orleans v. Dukes, 427 U.S. 297, 305 (1976) *(per curiam)*.

536 Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 465 (1988).

537 Heckler v. Mathews, 465 U.S. 728, 745–48 (1984).

no indication that the off-set exception suffered from [such a flaw.]"[538] Moreover, the means employed by the statute was "substantially related" to the achievement of that objective. "By reviving for a 5-year period the eligibility criteria in effect in January, 1977, the exception [wa]s narrowly tailored to protect only those individuals who [had] made retirement plans prior to the changes in the law that occurred after that date. Individuals who were eligible for spousal benefits before the law changed and who retire[d] within five years of the statute's enactment [might] reasonably be assumed to have begun planning for their retirement prior to the adoption of the offset provision. . . . Such persons, men as well as women, [could] receive spousal benefits unreduced by their government pensions, while those persons, men as well as women, who first became eligible for benefits after January, 1977, [could] not."[539]

3. Regulation of Economic Activities

[K176] *Railway Express* involved a New York city traffic regulation that forbade the operation of any advertising vehicle on the streets, but it excepted vehicles that had upon them business notices or advertisements of the products of the owner and that were not used merely or mainly for advertising. The city had found that advertising on vehicles using the streets of New York city constituted a distraction to vehicle drivers and to pedestrians alike and therefore affected the safety of the public in the use of the streets. The Court held that the classification at issue had relation to the purpose for which it had been made, and did not transgress the Equal Protection Clause. The local authorities might "well have concluded that those who advertised their own wares on their trucks d[id] not present the same traffic problem in view of the nature or extent of the advertising which they use[d]." And the fact that the city had seen "fit to eliminate from traffic advertising vehicles, but d[id] not touch what [could] be even greater distractions in a different category, such as the vivid displays on Times Square, [wa]s immaterial," for "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[540]

[K177] In *Lee Optical*, the Court dealt with a claim that the Equal Protection Clause of the Fourteenth Amendment was violated by an Oklahoma statute that subjected opticians to a system of detailed regulation but that exempted sellers of ready-to-wear glasses. In sustaining the statute, the court noted that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies," and that "the ready-to-wear branch of this business [might] not loom large in Oklahoma or [might] present problems of regulation distinct from the other branch."[541]

[K178] In *New Orleans v. Dukes*, a city ordinance that, to preserve the character of a historic area, prohibited the sale of food from pushcarts unless the vendor had been in business for at least eight years was challenged under the Equal Protection Clause. Noting that the city could reasonably decide that "newer businesses were less likely to have built up substantial reliance interests in continued operation" in the French Quarter, and that the vendors who qualified under the "grandfather clause" had themselves "become part of the distinctive character and charm that distinguish[ed]" the

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538 *Id.* at 746.

539 *Id.* at 749.

540 Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949).

541 Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

French Quarter, the Court held that the city could rationally choose to eliminate vendors of more recent vintage.[542]

[K179] *Stanglin* involved a city ordinance restricting admission to certain dancehalls to persons between the ages of 14 and 18. Considering that the Constitution does not recognize "a generalized right of 'social association' that includes chance encounters in dancehalls," the Court decided that the ordinance implicated no suspect class and impinged on no constitutionally protected right. Moreover, there was a rational relationship between the age restriction at issue and the city's interest in promoting the welfare of teenagers. The city "could reasonably conclude . . . that teenagers might be susceptible to corrupting influences if permitted, unaccompanied by their parents, to frequent a dancehall with older persons," and "that limiting dancehall contacts between juveniles and adults would make less likely illicit or undesirable juvenile involvement with alcohol, illegal drugs, and promiscuous sex. It [wa]s true that the city allow[ed] teenagers and adults to rollerskate together, but skating involves less physical contact than dancing. The differences between the two activities may not be striking, but differentiation need not be striking in order to survive rational basis scrutiny."[543]

[K180] *Beach Communications* involved a federal statute drawing a distinction between cable and satellite television facilities that served separately owned and managed buildings and those that served one or more buildings under common ownership or management. Facilities in the latter category were exempt from regulation as long as they provided services without using public rights-of-way. The Court found that there were at least two possible rational bases for the distinction. First, "common ownership was thought to be indicative of those systems for which the costs of regulation would outweigh the benefits to consumers." A legislator might rationally assume that such systems "would typically be limited in size, or would share some other attribute affecting their impact on the welfare of cable viewers such that regulators could 'safely ignore' these systems." Moreover, subscribers who could negotiate with one voice through a common owner or manager might have greater bargaining power relative to the cable or satellite TV operator and therefore less need for regulatory protection. A second conceivable basis for the statutory distinction was concern over the "potential for effective monopoly power." The first satellite television operator to gain a foothold by installing a dish on one building in a block of separately owned buildings would have a significant cost advantage in competing for the remaining subscribers, because it could connect additional buildings for the cost of a length of cable, while its competitors would have to recover the cost of their own satellite facilities. Thus, the first operator could charge rates well above its cost and still undercut the competition.[544]

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[542] New Orleans v. Dukes, 427 U.S. 297, 305 (1976) *(per curiam). Dukes* overruled *Morey v. Doud*, 354 U.S. 457 (1957), where the Court had invalidated, as violative of the Equal Protection Clause, a provision in the Illinois Community Currency Exchanges Act, excepting money orders of the American Express Company an old, established, worldwide enterprise of unquestioned solvency and high financial standing, from the requirement that any firm selling or issuing money orders in the state must secure a license and submit to state regulation.

[543] Dallas v. Stanglin, 490 U.S. 19, 25, 27–28 (1989).

[544] Fed. Communications Comm'n v. Beach Communications, Inc. 508 U.S. 307, 317–20 (1993).

4. State Taxation[545]

[K181] "The States . . . have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden, so long as those divisions and burdens are reasonable."[546] "The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways."[547] "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. . . . Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which, in their judgment, produce reasonable systems of taxation."[548] As stated in *Allied Stores*, "[t]he States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. . . . 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.'"[549] In each case,

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[545] *See also* paras. J140 *et seq. (dormant Commerce Clause)*. "The Commerce Clause, unlike the Equal Protection Clause, is integrally concerned with whether a state purpose implicates local or national interests. The Equal Protection Clause, in contrast, is concerned with whether a state purpose is impermissibly discriminatory; whether the discrimination involves local or other interests is not central to the inquiry to be made. Thus, the fact that promotion of local industry is a legitimate state interest in the Commerce Clause context says nothing about its validity under equal protection analysis." *See* Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 876, n.6 (1985).

"[I]n some peculiar circumstances, state tax classifications facially discriminating against inter-state commerce may violate the Equal Protection Clause even when they pass muster under the Commerce Clause." *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 311 (1997). *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), involved an Alabama statute that facially discriminated against inter-state commerce by imposing a lower gross premiums tax on in-state than out-of-state insurance companies. The case did not present a Commerce Clause violation only because Congress, in enacting the McCarran-Ferguson Act, intended to authorize states to impose taxes that burden inter-state commerce in the insurance field. *Id.* at 880. The Court nonetheless invalidated Alabama's classification, because neither of the two purposes furthered by the statute was legitimate under the Equal Protection Clause. *Id.* at 883.

[546] Allegheny Pittsburgh Coal Co v. Webster, 488 U.S. 336, 344 (1989).

[547] Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890).

[548] Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973).

[549] Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526–27 (1959), *quoting* Ohio Oil Co. v. Conway, 281 U.S. 146, 159 (1930). In the former case, the Court used the phrase "palpably arbi-

"[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."[550]

[K182] The Court has "declined to hold that narrow exemptions from a general scheme of taxation necessarily render the overall scheme invidiously discriminatory."[551] "For purposes of rational basis review, 'the latitude of discretion is notably wide in . . . the granting of partial or total exemptions upon grounds of policy.'"[552]

[K183] "When it comes to taxes on corporations and taxes on individuals, great leeway is permissible so far as equal protection is concerned."[553] Hence, a state may decide to tax property held by corporations at a different rate than property held by individuals. *Lehnhausen* upheld, for example, an Illinois provision subjecting corporations and similar entities, but not individuals, to *ad valorem* taxes on personalty.[554]

[K184] At issue in *Allegheny Pittsburgh* was the practice of a West Virginia county tax assessor of assessing recently purchased property on the basis of its purchase price, while making only minor modifications in the assessments of property that had not recently been sold. As the Court noted, "[t]he use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command. As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes, . . . it does not require immediate general adjustment on the basis of the latest market developments. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners."[555] However, the challenged practice was "not an example of transitional delay in adjustment of assessed value resulting in inequalities in assessments of comparable property." Properties sold recently had been reassessed and taxed at values between eight and 35 times that of comparable neighboring properties that had not been sold, and these discrepancies had continued for more than ten years with little change. "The county's adjustments to the assessments of property not recently sold [we]re too small to seasonably dissipate the remaining disparity between these assessments and the assessments based on a recent

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trary" or "invidious" as defining the limits placed by the Equal Protection Clause on state power. *Id.* at 530.

[550] Allegheny Pittsburgh Coal Co v. Webster, 488 U.S. 336, 344 (1989), *quoting* Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

[551] *See* Nordlinger v. Hahn, 505 U.S. 1, 16–17 (1992), *citing* Regan v. Taxation with Representation of Washington, 461 U.S. 540, 550–51 (1983) (denial of a tax exemption to nonprofit lobbying organizations, but with an exception for veterans' groups, does not violate equal protection, for veterans have been obliged to drop their own affairs to take up the burdens of the nation, subjecting themselves to the mental and physical hazards, as well as the economic and family detriments that are peculiar to military service and that do not exist in normal civilian life).

[552] Nordlinger v. Hahn, 505 U.S. 1, 17 (1992), *quoting* F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[553] Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 360 (1973).

[554] *Id.* at 359–65.

[555] Allegheny Pittsburgh Coal Co v. Webster County, 488 U.S. 336, 343 (1989).

purchase price." Accordingly, the Court determined that the unequal assessment practice violated the Equal Protection Clause.[556]

[K185] *Nordlinger* addressed a California provision that embodied an "acquisition value" system of taxation, whereby property was reassessed up to current appraised value upon new construction or a change in ownership. Exemptions from this reassessment provision existed for two types of transfers: exchanges of principal residences by persons over the age of 55 and transfers between parents and children. Over time, the acquisition-value system created dramatic disparities in the taxes paid by persons owning similar pieces of property. Longer-term owners paid lower taxes reflecting historic property values, while newer owners had to pay higher taxes reflecting more recent values. The Court found that the foregoing acquisition value assessment scheme did not violate the Equal Protection Clause. The scheme rationally furthered at least two legitimate state interests. "First, the State ha[d] a legitimate interest in local neighborhood preservation, continuity, and stability. . . . The State therefore legitimately [could] decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established, 'mom-and-pop' businesses by newer chain operations."[557] "Second, the State legitimately [could] conclude that a new owner, at the point of purchasing his property, d[id] not have the same reliance interest warranting protection against higher taxes as d[id] an existing owner. The State [might] deny a new owner at the point of purchase the right to 'lock in' to the same assessed value as [wa]s enjoyed by an existing owner of comparable property, because an existing owner rationally [might] be thought to have vested expectations in his property or home that [we]re more deserving of protection than the anticipatory expectations of a new owner at the point of purchase. A new owner ha[d] full information about the scope of future tax liability before acquiring the property, and if he [thought] the future tax burden [wa]s too demanding, he [could] decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, d[id] not have the option of deciding not to buy his home if taxes bec[ame] prohibitively high. To meet his tax obligations, he might be forced to sell his home or to divert his income away from the purchase of food, clothing, and other necessities."[558] The two exemptions at issue also rationally furthered legitimate purposes. California "reasonably could have concluded that older persons in general should not be discouraged from moving to a residence more suitable to their changing family size or income," and that "the interests of family and neighborhood continuity and stability [we]re furthered by, and warrant an exemption for, transfers between parents and children."[559]

[K186] *Racing Association* involved an Iowa tax scheme under which adjusted revenues from slot machines on excursion riverboats were taxed at a maximum rate of 20 percent, while adjusted revenues from slot machines at racetracks were subject to a maximum tax rate of 36 percent. The Iowa supreme court had found that the 20 percent/36

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[556] *Id.* at 344–45.

[557] Nordlinger v. Hahn, 505 U.S. 1, 12 (1992).

[558] *Id.* at 12–13. The Court distinguished *Allegheny Pittsburgh*, noting the absence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor's unequal assessment scheme. *Id.* at 15.

[559] *Id.* at 17.

percent tax rate differential violated the federal Constitution's Equal Protection Clause, because, in its view, that difference "frustrated" what it saw as the law's basic objective, namely, rescuing the racetracks from economic distress. The Court disagreed with this holding. As the Court noted, "the Iowa law, like most laws, might predominately serve one general objective, say, helping the racetracks, while containing subsidiary provisions that sought to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balanced objectives but still served the general objective when *seen as a whole*. After all, if every subsidiary provision in a law designed to help racetracks had to help those racetracks and nothing more, then there could be no taxation of the racetracks at all."[560] Moreover, the Iowa legislation, *seen as a whole*, could "rationally be understood . . . to advance the racetracks' economic interests. Its grant to the racetracks of authority to operate slot machines should help the racetracks economically to some degree—even if its simultaneous imposition of a tax on slot machine adjusted revenue mean[t] that the law provide[d] less help than [the Racing Association] might like. At least a rational legislator might so believe. And the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide."[561] "Once one realize[d] that not every provision in a law must share a single objective, one ha[d] no difficulty finding the necessary rational support for the 20 percent/36 percent differential at issue. That difference, harmful to the racetracks, [wa]s helpful to the riverboats, which [we]re also facing financial peril. . . . [A]side from simply aiding the financial position of the riverboats, the legislators [might] have wanted to encourage the economic development of river communities or to promote riverboat history, say, by providing incentives for riverboats to remain in the State, rather than relocate to other States. . . . Alternatively, they [might] have wanted to protect the reliance interests of riverboat operators, whose adjusted slot machine revenue had previously been taxed at the 20 percent rate. All these objectives [we]re rational ones, which lower riverboat tax rates could further and which suffice[d] to uphold the different tax rates."[562]

[K187] "[A] State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence."[563] In *Western & Southern*, the Court explicitly held that the Equal Protection Clause imposes limits upon a state's power to condition the right of a foreign corporation to do business within its borders. As the Court stated, "whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose."[564] *Western & Southern* rejected an equal protection challenge to a California statute imposing a California tax on foreign insurance companies doing business within the state, when the home states of those companies imposed a similar tax on California insurers entering their borders. The Court held that California's purpose in enacting the retaliatory tax—"to promote the interstate business of domestic insurers by deterring other States

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560 Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 108 (2003) (emphasis added).

561 *Id.* at 108.

562 *Id.* at 109.

563 Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985).

564 W. & S. Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 667–68 (1981).

from enacting discriminatory or excessive taxes"—was a legitimate one. Moreover, the California legislature "rationally could have believed" that the retaliatory tax would promote that purpose.[565] By contrast, *Metropolitan Life* held that, under the circumstances of this case, encouraging the formation of new domestic insurance companies within Alabama and encouraging capital investment in the state's assets and governmental securities were not, standing alone, legitimate state purposes that could permissibly be furthered by imposing discriminatorily higher taxes on non-resident corporations.[566]

[K188] In *Northeast Bancorp*, Massachusetts and Connecticut were not favoring local corporations at the expense of out-of-state corporations, but they were favoring out-of-state corporations domiciled within the New England region over out-of-state corporations from other parts of the country. That case involved substantially similar Connecticut and Massachusetts statutes providing that an out-of-state bank holding company with its principal place of business in one of the other New England states could acquire an in-state bank, provided that the other state accorded equivalent reciprocal privileges to the enacting state's banking organizations. The Court held that the statutes in question did not violate the Equal Protection Clause. It found that Connecticut and Massachusetts, in enacting their statutes, had considered that "interstate banking on a regional basis . . . combine[d] the beneficial effect of increasing the number of banking competitors with the need to preserve a close relationship between those in the community who need[ed] credit and those who provid[ed] credit," and that "immediate acquisition of [in-state] banks by holding companies headquartered outside the New England region would threaten the independence of local banking institutions." Noting that "banking and related financial activities are of profound local concern," the Court concluded that these concerns met the traditional rational basis for judging equal protection claims.[567]

[K189] In *Allied Stores*, a domestic merchandiser challenged, on equal protection grounds, an Ohio statute that exempted foreign corporations from a tax on the value of merchandise held for storage within the state. The Court upheld the tax, finding that the purpose of encouraging foreign companies to build or lease and operate warehouses within Ohio, with the attendant benefits to the state's economy, was a legitimate state purpose.[568]

[K190] "[E]qual treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state."[569] In *Williams v. Vermont*, the Court invalidated a state's residency restriction on the availability of a sales tax credit for use tax paid to another state. Vermont collected a use tax when cars were registered with it, but the tax was not imposed if the car had been purchased in Vermont and a sales tax had been paid. The tax was also reduced by the amount of any sales or use tax paid to another state if that state would afford a credit for taxes paid to Vermont in similar circumstances. The credit was available, however, only if the registrant was a Vermont resident at the time he had paid the taxes. Moreover, a Vermont

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565 *Id.* at 668, 671–72. The Privileges and Immunities Clause (Art. IV, Sect. 2) is inapplicable to corporations. *Id.* at 656.

566 Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 876–83 (1985).

567 Ne. Bancorp, Inc. v. Bd. of Governors, Fed. Reserve Sys., 472 U.S. 159, 177–78 (1985).

568 Allied Stores of Ohio v. Bowers, 358 U.S. 522, 529 (1959).

569 Halliburton Oil Well Co. v. Reily, 373 U.S. 64, 70 (1963).

resident enjoyed a credit for any sales taxes paid to a reciprocating state, even if he had registered and used the car there before registering it in Vermont. The Court decided that no legitimate purpose was furthered by the foregoing discriminatory exemption. "[R]esidence at the time of purchase [wa]s a wholly arbitrary basis on which to distinguish among Vermont registrants—at least among those who [had] used their cars elsewhere before coming to Vermont. . . . The distinction between them b[ore] no relation to the statutory purpose [of raising revenue] . . . for the maintenance and improvement of Vermont roads." The customary rationale for a use tax—relating to "protect[ing] local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices"—had "no application to purchases made out-of-state by those who were not residents of the taxing State at the time of purchase." Nor could the distinction be justified by a state policy of making those who used the highways contribute to their maintenance and improvement, for this policy did "not explain the exemption for a resident who [had] bought a car elsewhere and [had] paid a tax to another State, which, . . . [wa]s directly contrary to the user-pays principle." Finally the Court rejected the justification that the exemption was designed to encourage inter-state commerce by enabling Vermont residents, faced with limited automobile offerings at home, to shop outside the state without penalty. The credit might "rationally further Vermont's legitimate interest in facilitating Vermonters' out-of-state purchases, but this interest d[id] not extend to the facilitation of Vermonters' out-of-state use. Vermont [could] choose not to penalize old residents who [had] used their cars in other States, but it [could not] extend that benefit to old residents and deny it to new ones."[570]

5. Welfare Benefits[571]

[K191] "Governmental decisions to spend money to improve the general public welfare in one way and not another are not confided to the courts. The discretion belongs to the legislature unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."[572] This standard of review is premised on the legislature's "plenary power to define the scope and the duration of the entitlement to . . . benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program."[573] Hence, despite recognition that laws and regulations allocating welfare funds involve "the most basic economic needs of impoverished human beings," the Court has held that, if the relevant classifications have some "reasonable basis," they do not offend the Constitution simply because they are "not made with mathematical nicety or because, in practice, [they] resul[t] in some inequality."[574]

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[570] Williams v. Vermont, 472 U.S. 14, 23–27 (1985).

[571] *See also* paras. D12–D16 *(durational residency requirements)*; para. D25 *(statute providing that benefits are not to be paid for any month that the recipient spends entirely outside of the United States)*; paras. K74 *et seq.*, K90 *(gender discrimination)*; paras. K98–K99 *(illegitimacy classifications)*; paras. K106, K108, K113 *(alienage classifications).*

[572] Bowen v. Owens, 476 U.S. 340, 345 (1986), *quoting* Mathews v. De Castro, 429 U.S. 181, 185 (1976).

[573] Atkins v. Parker, 472 U.S. 115, 129 (1985).

[574] Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[K192] *Dandridge* involved an equal protection attack upon Maryland's Aid to Families with Dependent Children (AFDC) program (a federal-state cooperative welfare program) that provided aid in accordance with the family's standard of need, but that limited the maximum grant to $250 per family, regardless of size, thereby reducing the per capita allowance for children of large families. The Court held that the state's maximum grant regulation for welfare recipients did not unconstitutionally discriminate between children in large and small families, finding a solid foundation for the regulation in "the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." Although "in some AFDC families there [might] be no person who [wa]s employable," and although "with respect to AFDC families whose determined standard of need [wa]s below the regulatory maximum the employment incentive [wa]s absent, the Equal Protection Clause did not require the State to "choose between attacking every aspect of a problem or not attacking the problem at all. . . . It is enough that the State's action be rationally based and free from invidious discrimination."[575]

[K193] In *Jefferson v. Hackney*, recipients of AFDC challenged the system, whereby Texas, in order to allocate its fixed pool of welfare money among persons with acknowledged need, applied a percentage reduction factor to arrive at a reduced standard of need, the factor being lower for AFDC than for other categorical assistance programs (the AFDC was funded at 75 percent of recognized need, whereas the state paid 100 percent of recognized need to the aged, and 95 percent to the disabled and the blind). The Court found that Texas' decision to provide somewhat lower welfare benefits for AFDC recipients was not invidious or irrational. "Since budgetary constraints d[id] not allow the payment of the full standard of need for all welfare recipients, the State [could] have concluded that the aged and infirm [we]re the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments [we]re, of course, possible, it [wa]s not irrational for the State to believe that the young [we]re more adaptable than the sick and elderly, especially because the latter ha[d] less hope of improving their situation in the years remaining to them. Whether or not one agree[d] with this state determination, there [wa]s nothing in the Constitution that forb[ade] it."[576]

[K194] *Bowen v. Gilliard* involved an amendment to the statute authorizing Federal Aid to Families with Dependent Children (AFDC), which required that a family's eligibility for benefits take into account, with certain specified exceptions, the income of all parents, brothers, and sisters living in the same home. There, the Court held that the above requirement did not violate Fifth Amendment due process and equal protection principles, when it was applied to require a family wishing to receive AFDC benefits to

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[575] Dandridge v. Williams, 397 U.S. 471, 486–87 (1970). The Court concluded: "We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the State] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Id.* at 487.

[576] Jefferson v. Hackney, 406 U.S. 535, 549 (1972).

include, within its unit, a child for whom child support payments were being made by a non-custodial parent. The amendment rationally served both "Congress' goal of decreasing federal expenditures," and "the Government's separate interest in distributing benefits among competing needy families in a fair way." It was also rational for Congress "to adjust the AFDC program to reflect the fact that support money generally provides significant benefits for entire family units. This conclusion [wa]s not undermined by the fact that there [we]re no doubt many families in which some—or perhaps all—of the support money [wa]s spent in a way that d[id] not benefit the rest of the family. In determining how best to allocate limited funds among the extremely large class of needy families eligible for AFDC benefits, Congress [wa]s entitled to rely on a class-wide presumption that custodial parents ha[d] used, and [might] legitimately use, support funds in a way that [wa]s beneficial to entire family units."[577]

[K195] The federal food stamp program was established in 1964 for the twin purposes of promoting the agricultural economy and alleviating hunger and malnutrition among the needy members of "the other America." The program determined eligibility and benefit levels on a "household," rather than an individual, basis. Under this program, needy households, whose members complied with a work requirement, were entitled to purchase enough food stamps to provide those households with nutritionally adequate diets. The challenged provision in *Murry* was a section of the Food Stamp Act that rendered ineligible for food stamps any household that included a member over 18 years of age who had been claimed as a tax dependent by a taxpayer who was not himself eligible for the stamps. The legislative history suggested that the sole reason for enactment of this section was to prevent the receipt of food stamps by the children of more affluent families. However, "[t]ax dependency in a prior year seem[ed] to have no relation to the 'need' of the dependent in the following year." The Court, thus, held that the tax "deduction taken for the benefit of the parent in a prior year [wa]s not a rational measure of the need of a different household with which the child of the tax deducting parent live[d.]" In addition, the administration of the Act allowed no hearing to show that the tax deduction was irrelevant to the need of the household. For these reasons, the provision violated the Due Process Clause of the Fifth Amendment.[578]

[K196] *Moreno* held that a statutory definition of "household," which excluded any living group containing an individual unrelated to any other member of the group, did not rationally further the government's interest in preventing fraud or any other legitimate purpose of the food stamp program. First, the Court noted, the Food Stamp Act contained other, independent provisions, aimed specifically at the problems of fraud and of the voluntarily poor. Moreover, in practical operation, the foregoing definition excluded from participation in the food stamp program "not those persons who [we]re likely to abuse the program but, rather, only those persons who [we]re so desperately in need of aid that they [could not] even afford to alter their living arrangements so as to retain their eligibility."[579]

[K197] In *Lyng v. Castillo*, the Court considered a constitutional challenge to the definition of "household" in the Food Stamp Act, as amended in 1981, which treated parents, siblings, and children who lived together, but not more distant relatives or

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577 Bowen v. Gilliard, 483 U.S. 587, 599–600 (1987).

578 United States Dep't of Agric. v. Murry, 413 U.S. 508, 513–14 (1973).

579 United States Dep't of Agric. v. Moreno, 413 U.S. 528, 536–38 (1973).

unrelated persons who did so, as a single household for purposes of defining eligibility for food stamps. The disadvantaged class was that comprised by parents, children, and siblings. However, "[c]lose relatives are not a 'suspect' or 'quasi-suspect' class." Nor did "the statutory classification 'directly and substantially' interfere with family living arrangements, and thereby burden a fundamental right." As the Court explained, the challenged definition did "not order or prevent any group of persons from dining together. Indeed, in the overwhelming majority of cases, it probably ha[d] no effect at all. It [wa]s exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the costs of separate housing would almost certainly exceed the incremental value of the additional stamps."[580] Judged under the "rational basis" standard of review, the provision did not violate the constitutional guarantee of equal treatment. "As a general matter, the economies of scale that [might] be realized in group purchase and preparation of food surely justified Congress in providing additional food stamp benefits to households that could not achieve such efficiencies. Moreover, the Legislature's recognition of the potential for mistake and fraud and the cost-ineffectiveness of case-by-case verification of claims that individuals ate as separate households unquestionably warrant[ed] the use of general definitions in this area."[581] Further, "Congress could reasonably determine that close relatives sharing a home tend[ed] to purchase and prepare meals together, while distant relatives and unrelated individuals might not be so inclined. In that event, even though close relatives [we]re undoubtedly as honest as other food stamp recipients, the potential for mistaken or misstated claims of separate dining would be greater in the case of close relatives than would be true for those with weaker communal ties, simply because a greater percentage of the former category in fact prepare[d] meals jointly than the comparable percentage in the latter category. The additional fact that close relatives represent[ed] by far the largest proportion of food stamp recipients might well have convinced Congress that limited funds would not permit the accommodation given distant relatives and unrelated persons to be stretched to embrace close relatives as well. Finally, Congress might have reasoned that it would be somewhat easier for close relatives—again, almost by definition—to accommodate their living habits to a federal policy favoring common meal preparation than it would be for more distant relatives or unrelated persons to do so. Because of these differences, . . . Congress could rationally conclude that the two categories merited differential treatment."[582]

[K198] In *Lyng v. Automobile Workers*, the Court rejected an equal protection attack on an amendment to the Food Stamp Act providing that no household could become eligible for benefits while a household member was on strike or receive an increase in the allotment of food stamps it was already receiving because the income of the striking member had decreased. The Court decided that the amendment did not violate the equal protection component of the Due Process Clause of the Fifth Amendment, since it was "rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes." In addition, the amendment furthered the legitimate purpose of protecting "the fiscal integrity of Government programs, and of the Government as a whole." Congress had already found it necessary to restrict eligibility in the food stamp program and to reduce the amount of deductions that were allowed to recipients. Rather than undertaking further budget cuts in

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580 Lyng v. Castillo, 477 U.S. 635, 638 (1986).

581 *Id.* at 640–41.

582 *Id.* at 642–43.

these or other areas, and in order to avoid favoritism in labor disputes, Congress had determined that it would do better to pass the challenged statute. The Constitution did not permit the Court to disturb that judgment.[583]

[K199] In *Hodory*, the Court upheld a statute that denied unemployment compensation benefits to workers who were thrown out of work as a result of a labor dispute other than a lockout. The complaining worker there was a non-striking employee of a parent company that had found it necessary to close, because its subsidiary was on strike. The Court held that the statute did not involve any discernible fundamental interest or affect with particularity any protected class, and the test of constitutionality, therefore, was whether the statute had a rational relation to a legitimate state interest. The unemployment compensation statute touched upon more than just the recipient. It provided for the creation of a fund produced by contributions from private employers. The disqualification was triggered by "a labor dispute other than a lockout." In other words, if a union went on strike, the employer's contributions were not increased, but if the employer locked employees out, all his employees thus put out of work were compensated and the employer's contributions accordingly were increased. "Although one might say that this system provide[d] only 'rough justice,' its treatment of the employer [wa]s far from irrational. . . . [And] [t]he rationality of this treatment [wa]s . . . independent of any 'innocence' of the workers collecting compensation."[584]

[K200] *Weinberger v. Salfi* sustained a nine-month duration-of-relationship eligibility requirement for the wife and stepchildren of a deceased wage earner. The stated purpose of the requirement was to prevent the use of sham marriages to secure Social Security payments. "While it [wa]s possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule which [might] not exclude some obviously sham arrangements, [the Court thought] it clear that Congress could rationally choose to adopt such a course. Large numbers of people [we]re eligible for the program, and [we]re potentially subject to inquiry as to the validity of their relationships to wage earners. . . . Not only d[id] the prophylactic approach thus obviate the necessity for large numbers of individualized determinations, but it also protect[ed] large numbers of claimants who satisfy[ied] the rule from the uncertainties and delays of administrative inquiry into the circumstances of their marriages."[585]

[K201] *Mathews v. De Castro* involved a statutory classification of the Social Security Act, whereby a married woman under 62 whose husband retired or became disabled was granted monthly benefits under the Act if she had a minor or other dependent child in her care, but a divorced woman under 62 whose ex-husband retired or became disabled did not receive such benefits. In concluding that the classification did not deny equal protection, the Court observed: "Divorce, by its nature, works a drastic change in the economic and personal relationship between a husband and wife. . . . Congress could have rationally assumed that divorced husbands and wives depend less on each

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[583] Lyng v. Auto. Workers, 485 U.S. 360, 371, 373 (1988). The Court also found that the statute did not infringe the individual appellees' right to associate with their families, or the associational rights of the individual appellees and their unions, or the workers' right to express themselves about union matters free of coercion by the government. *Id.* at 364–69.

[584] Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 489, 491 (1977).

[585] Weinberger v. Salfi, 422 U.S. 749, 767, 781–82 (1975).

other for financial and other support than do couples who stay married. The problems that a divorced wife may encounter when her former husband becomes old or disabled may well differ in kind and degree from those that a woman married to a retired or disabled husband must face. . . . She may not feel the pinch of the extra expenses accompanying her former husband's old age or disability. . . . It was not irrational for Congress to recognize this basic fact in deciding to defer monthly payments to divorced wives of retired or disabled wage earners until they reach the age of 62."[586]

[K202] *Califano v. Boles* held that a section of the Social Security Act restricting "mother's insurance benefits" to widows and divorced wives of wage earners did not violate the equal protection component of the Due Process Clause of the Fifth Amendment by thus denying such benefits to the mother of an illegitimate child, because she was never married to the wage earner who fathered the child. Such denial bore a rational relation to the government's desire "to limit the category of beneficiaries to those who actually suffer[ed] economic dislocation upon the death of a wage earner and [we]re likely to be confronted at that juncture with the choice between employment or the assumption of full-time child care responsibilities." Congress "could reasonably conclude that a woman who ha[d] never been married to the wage earner [wa]s far less likely to be dependent upon the wage earner at the time of his death. He was never legally required to support her, and therefore was less likely to have been an important source of income. Thus, the possibility of severe economic dislocation upon his death [wa]s more remote." Besides, "the incidental and, to a large degree, speculative impact of the provision at issue on illegitimate children as a class [wa]s not sufficient to treat the denial of 'mother's insurance benefits' to unwed mothers as discrimination against the children." The focus of these benefits was on the economic dilemma of the surviving spouse or former spouse, whereas the needs, as such, of the minor children of the deceased wage earner were addressed through the separate "child's insurance benefits" provided by the Act.[587]

6. Wealth Discrimination[588]

[K203] The Court has "rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict or heightened equal protection scrutiny."589 Financial need alone does not identify a suspect class for purposes of equal protection analysis.[590]

[K204] In *James v. Valtierra*, it was contended that a California referendum requirement violated the Fourteenth Amendment, because it imposed a mandatory referendum in the case of an ordinance authorizing low-income housing, while referenda with respect to other types of ordinances had to be initiated by the action of private individuals. The Court rejected the claim. California's entire history demonstrated the repeated use of

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586 Mathews v. De Castro, 429 U.S. 181, 188–89 (1976).

587 Califano v. Boles, 443 U.S. 282, 289, 296 (1979).

588 *See also* paras. C62 *et seq. (access to courts)*; paras. F73–F76 *(abortion funding)*; paras. K191 *et seq. (welfare benefits)*; paras. K139 *et seq.*, K152–K153 *(voting or candidacy qualifications)*; paras. D19, K121, K209–K210 *(education)*.

589 *See* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988), *citing* Harris v. McRae, 448 U.S. 297, 322–23 (1980); Ortwein v. Schwab, 410 U.S. 656, 660 (1973).

590 *See* Maher v. Roe, 432 U.S. 464, 471 (1977).

referenda to give citizens a voice on questions of public policy. Moreover, "an examination of California law reveal[ed] that persons advocating low income housing ha[d] not been singled out for mandatory referenda while no other group [should] face that obstacle." Mandatory referenda were required for approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexations, for amendments on laws first enacted by voter initiative, or for alienation of municipal parks. Finally, the challenged procedure "ensure[d] that all the people of a community [would] have a voice in a decision which [might] lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It [gave] them a voice in decisions that [would] affect the future development of their own community." This procedure for democratic decisionmaking did not violate the Equal Protection Clause.[591]

[K205] On several occasions, the Court has held that a person's inability to pay money demanded by the state does not justify the total deprivation of a constitutionally or statutorily protected right or interest. The Court first began looking closely at discrimination against the poor in the criminal area. *Griffin* established the principle that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[592] In *Griffin*, and its progeny,[593] the Court invalidated state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process. The payment requirements in each case were found to occasion *de facto* discrimination against those who, because of their indigency, were totally unable to pay for transcripts. In *Douglas v. California*, and in *Halbert v. Michigan*, relying on "that equality demanded by the Fourteenth Amendment," the Court held that denial of counsel to indigents on first appeal amounted to unconstitutional discrimination against the poor.[594]

[K206] In *Williams v. Illinois*, Williams, convicted of petty theft, received the maximum sentence of one year's imprisonment and a $500 fine. As permitted by Illinois statute, the judgment provided that, if, when the one-year sentence expired, Williams did not immediately pay the fine and court costs, he was to remain in jail a length of time sufficient to satisfy the total debt, calculated at the rate of $5 per day. The Court held that "the Equal Protection Clause of the Fourteenth Amendment require[d] that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." Therefore, the Illinois statute, as applied to Williams, who was too poor to pay the fine, violated the Equal Protection Clause. However, at the same time, the Court was careful to observe that "the State is

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591 James v. Valtierra, 402 U.S. 137, 141–43 (1971).

592 Griffin v. Illinois, 351 U.S. 12, 19 (1956).

593 *See* Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958); Draper v. Washington, 372 U.S. 487 (1963); Gardner v. California, 393 U.S. 367 (1969).

Britt v. North Carolina, 404 U.S. 226 (1971), involved trials taken place in a small town before the same judge and with the same counsel and court reporter, who was well known to defense counsel and other local lawyers and would have read back his notes to defense counsel before the second trial had he been asked to do so. Since petitioner "had available an informal alternative which appear[ed] to be substantially equivalent to a transcript," the Court concluded that, in the narrow circumstances of this case, a transcript was not needed for petitioner' defense.

594 Douglas v. California, 372 U.S. 353, 358 (1963); Halbert v. Michigan, 545 U.S. 605 (2005).

not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination, since it would enable an indigent to avoid both the fine and imprisonment for nonpayment, whereas other defendants must always suffer one or the other conviction."[595]

[K207] *Tate v. Short*, involved an indigent defendant incarcerated for non-payment of fines imposed for violating traffic ordinances. Under Texas law, traffic offenses were punishable only by fines, not imprisonment. When Tate could not pay $425 in fines imposed for nine traffic convictions, he was jailed pursuant to the provisions of another Texas statute and a municipal ordinance that required him to remain in jail a sufficient time to satisfy the fines, again calculated at the rate of $5 per day. The Court reversed on the authority of *Williams v. Illinois*, saying: "Since Texas has legislated a 'fines only' policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues, but obviously does not serve that purpose; the defendant cannot pay, because he is indigent, and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment."[596] The Court also pointed out that there are "other alternatives to which the State may constitutionally resort to serve its valid interest in enforcing payment of fines," such as a procedure for collecting fines through installment plans.[597]

[K208] But criminal procedure has not defined the boundaries within which wealth discriminations have been struck down. Indeed, the Court has scrutinized wealth discrimination in a wide variety of areas. For example, in *Shapiro v. Thompson*, the Court found that deterring indigents from migrating into a state was not a constitutionally permissible state objective.[598] *Turner v. Fouche* found that Georgia could not constitutionally require ownership of land as a qualification for membership on a county board of education, since the requirement was not rationally related to any legitimate state interest. As the Court explained, an ability to understand the issues concerning one's community does not depend on ownership of real property, and the lack of ownership does not establish a lack of attachment to the community.[599] In *Harper v. Virginia Board of Elections*, the Court found a state poll tax violative of equal protection because of the burden it placed on the poor's exercise of the franchise.[600] In *Bullock v. Carter*, it invalidated a state law requiring the payment of prohibitively large filing fees by candidates in primary elections, noting that such a system "falls with unequal weight on voters, as well as candidates, according to their economic status."[601] And *Lubin* held that, "in the

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595 Williams v. Illinois, 399 U.S. 235, 244 (1970).

596 Tate v. Short, 401 U.S. 395, 399 (1971).

597 *Id.* at 399, 400, n.5.

598 Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

599 *See* Turner v. Fouche, 396 U.S. 346, 363–64 (1970). *See also* Quinn v. Millsap, 491 U.S. 95, 107 (1989) ("it is a form of invidious discrimination to require land ownership of all appointees to a body authorized to propose reorganization of local government").

600 Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668–70 (1966).

601 Bullock v. Carter, 405 U.S. 134, 144 (1972).

absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay."[602]

7. Education[603]

[K209] "[A] State may 'not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools.'"[604] But the undisputed importance of education has not caused the Court to depart, as a matter of principle, from the usual standard for reviewing a state's social and economic legislation. *Rodriguez* held that education is not a right protected by the Constitution,[605] and that "a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside."[606] In that case, the Court upheld against an equal protection challenge Texas' system of financing its public schools, under which almost half of the revenues for funding elementary and secondary schools came from a large state-funded program designed to provide a basic minimal education in every school, while most of the remainder of the funds came from local sources—in particular, local property taxes. Hence, school districts with a low property tax base, from which they could raise only meager funds, offered a lower quality of education to their students than the wealthier districts. In examining the equal protection status of these disparities, the Court declined to apply any heightened scrutiny based either on wealth as a suspect classification or on education as a fundamental right. The majority stressed that the system allegedly discriminated "against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen[ed] to have less taxable wealth than other districts," and it did "not operate to the peculiar disadvantage of any suspect class."[607] Nor did the Texas school financing system impermissibly interfere with the exercise of a "fundamental" right or liberty, since education is not within the limited category of rights recognized by the Court as guaranteed by the Constitution. "Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [other constitutional rights, there was] no indication that the . . . levels of educational expenditures in Texas provide[d] an education that [fell] short."[608] In light of the above, it was concluded that the state's school financing scheme would be constitutional if it bore "some rational relationship to a legitimate state purpose."[609] Applying this standard, the dual Texas system was deemed reasonably structured to accommodate two separate forces: "the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the

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602 Lubin v. Panish, 415 U.S. 709, 718 (1974).

603 *See also* para. D19 *(bona fide residency requirements for free primary and secondary schooling)*; paras. K6, K15, K17, K22–K25, K39–K50 *(racial discrimination)*; paras. K79, K86, K92 *(access to higher education and gender discrimination)*; para. K121 *(free schooling for children of illegal aliens).*

604 Plyler v. Doe, 457 U.S. 202, 229 (1982), *quoting* Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

605 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18–55 (1973).

606 *Id.* at 70 (Marshall, J. dissenting).

607 *Id.* at 28.

608 *Id.* at 36–37.

609 *Id.* at 44.

best education it [could] afford for its own children. . . . While assuring a basic education for every child in the State, [the system] permit[ted] and encourage[d] a large measure of participation in and control of each district's schools at the local level."[610] In view of this rational basis, the Court concluded that the mere "happenstance" that the quality of education might vary from district to district, because of varying property values within the districts, did not render the system "so irrational as to be invidiously discriminatory." In particular, the Court found that "any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary."[611]

[K210] *Kadrmas* involved a North Dakota statutory scheme, dated back to 1947, under which thinly populated school districts were authorized to "reorganize" themselves into larger districts, so that education could be provided more efficiently, and reorganization plans, which obviously would contemplate an increase in the distance that some children would travel to school, should include provisions for transporting students back and forth from their homes. The details of these provisions might vary from district to district, but once a reorganization plan was adopted, the transportation provisions could be changed only with the approval of the voters. In 1979, the state enacted a statute expressly indicating that non-reorganized school districts could charge a fee for transporting students to school, and that such fees might not exceed the estimated cost to the school district of providing the service. The statute was challenged by the Kadrmas family, which refused to agree to the busing fee. At the outset, the Court remarked that the 1979 statute discriminated against no suspect class and interfered with no fundamental right, noting, *inter alia*, that the Kadrmas family could find—and, indeed, had found—a private alternative to the public school bus service for which it had to pay a fee. Applying the rational relation test, the Court then held that a state's decision to allow school boards of non-reorganized districts the option of charging patrons a user fee for bus service was constitutionally permissible. "The Constitution does not require that such service be provided at all, and . . . choosing to offer the service [does not] entail a constitutional obligation to offer it for free. . . . [E]ncouraging local school districts to provide bus service is a legitimate state purpose, . . . [and it] is rational for the State to refrain from undermining its objective with . . . a rule . . . requiring that general revenues be used to subsidize an optional service that will benefit a minority of the district's families."[612] Moreover, the challenged distinction between reorganized and non-reorganized school districts did not create an equal protection violation, for it was purposed to encourage school district reorganization and a more effective school system. The legislation provided incentive for the people to approve school district reorganization by alleviating parental concerns regarding the cost of student transportation in the reorganized district.[613] Besides, the requirement that reorganized school districts furnish or pay for transportation for students living far away from school was not imposed directly by statute but rather by the reorganization plans that were statutorily required in the reorganization process. "Thus, the one definitely established difference between reorganized and nonreorganized districts [wa]s this: in the latter, local school boards [could] impose a bus service user fee on their own authority, while the

610 *Id.* at 49.

611 *Id.* at 53–54.

612 Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 462 (1988).

613 *Id.* at 463.

direct approval of the voters would be required in reorganized districts. That difference, however, simply reflect[ed] voluntary agreements made during the history of North Dakota's reorganization process, and it could scarcely be thought to make the State's laws arbitrary or irrational."[614] Besides, even assuming, that the state had forbidden reorganized school districts to charge user fees for bus service under any circumstances, it was evident that the legislature "could conceivably have believed that such a policy would serve the legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans. Because this purpose could have no application to nonreorganized districts, the legislature could just as rationally conclude that those districts should have the option of imposing user fees on those" who would take advantage of the schoolbus service.[615]

K. GOVERNMENT EMPLOYMENT[616]

[K211] Governmental employment is not a fundamental right for purposes of the Equal Protection Clause.[617] In *Harrah*, a school board had found that the persistent noncompliance of a teacher with the continuing education requirement incorporated into her employment contract constituted "willful neglect of duty" under a state statute and had refused to renew her contract. Since the teacher had neither asserted nor established the existence of any suspect classification or the deprivation of any fundamental constitutional right, the only inquiry was whether the state's classification was rationally related to the state's objective. The challenged action met this test. "The School Board's concern with the educational qualifications of its teachers [could not,] under any reasoned analysis, be described as impermissible, and [it was not contended] that the Board's continuing-education requirement [bore] no rational relationship to that legitimate governmental concern." Moreover, the sanction of contract non-renewal, imposed uniformly on the "class" of teachers who refused to comply with the continuing education requirement, was quite rationally related to the board's objective of enforcing the continuing education obligation of its teachers.[618]

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614 *Id.* at 465.

615 *Id.* at 465.

616 *See also* paras. K123–K125 *(mandatory retirement age).*

617 *See* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) *(per curiam).*

618 Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199, 201 (1979) *(per curiam).* That the board, having been deprived by the legislature of the sanction previously employed to enforce the continuing education requirement (denial of salary increases), had substituted in its place another, albeit more onerous, sanction in no way altered the equal protection analysis of the teacher's claim.

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), involved a policy barring the hiring of *methadone users as transit employees.* The district court had concluded that employment in non-sensitive jobs could not be denied to methadone users who had progressed satisfactorily with their treatment for one year, and who, when examined individually, satisfied the Transit Authority's employment criteria. The Court rejected this position. First, it pointed out "an employment policy that postpones eligibility until the treatment program has been completed, rather than accepting an intermediate point on an uncertain line, is rational. It is neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass." *Id.* at 591–92. Moreover, even assuming that the challenged policy was broader than necessary to exclude those methadone users who were not actually qualified to work for the Transit Authority, and that it was probably unwise for a large employer like the Transit Authority to rely on a gen-

L. REMEDIAL ISSUES[619]

[K212] "A remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination.]'"[620] "A proper remedy for an unconstitutional exclusion . . . aims to 'eliminate [so far as possible] the discriminatory effects of the past' and to 'bar like discrimination in the future.'"[621]

[K213] Where a statute is defective because of underinclusion, there exist "two remedial alternatives: [a] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."[622] In this regard, the legislature's overall purpose is given due consideration.[623] In cases involving "equal protection challenges to underinclusive federal benefits statutes, th[e] Court has suggested that extension, rather than nullification, is the proper course,"[624] mainly because "an injunction suspending the programs' operation would impose hardship on beneficiaries whom Congress plainly meant to protect."[625]

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eral rule, instead of individualized considerations of every job applicant, such "assumptions concern[ed] matters of personnel policy that d[id] not implicate the principle safeguarded by the Equal Protection Clause. [The challenged classification] served the general objectives of safety and efficiency. . . . Because it d[id] not circumscribe a class of persons characterized by some unpopular trait or affiliation, it d[id] not create or reflect any special likelihood of bias on the part of the ruling majority. Under these circumstances, it [wa]s of no constitutional significance that the degree of rationality [wa]s not as great with respect to certain ill-defined subparts of the classification as it [wa]s with respect to the classification as a whole." *Id.* at 592–93.

619 *See also* para. A29 *(standing)*; paras. K40 *et seq. (remedying racial segregation)*; para. K78 *(welfare benefits)*; para. K86 *(military education and sex discrimination).*

620 United States v. Virginia, 518 U.S. 515, 547 (1996), *quoting* Milliken v. Bradley, 433 U.S. 267, 280 (1977).

621 United States v. Virginia, 518 U.S. 515, 547 (1996), *quoting* Louisiana v. United States, 380 U.S. 145, 154 (1965). In *Miller v. Albright*, 523 U.S. 420, 452–59 (1998), Justices Scalia and Thomas held that the complaint should be dismissed, because the Court had no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress. The two Justices noted that, even if the Court "were to agree that the difference in treatment between the illegitimate children of citizen-fathers and citizen-mothers [wa]s unconstitutional, [it] could not, consistent with the extremely limited judicial power in this area, remedy that constitutional infirmity by declaring petitioner to be a citizen or ordering the State Department to approve her application for citizenship." *Id.* at 454–55.

622 Heckler v. Mathews, 465 U.S. 728, 738 (1984).

623 *Cf.* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 153 (1980).

624 *See* Califano v. Westcott, 443 U.S. 76, 89 (1979), *citing* Jimenez v. Weinberger, 417 U.S. 628, 637–38 (1974). Indeed, the Court regularly has affirmed district court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977), *aff'g* 396 F. Supp. 308, 309 (E.D.N.Y. 1975); Califano v. Silbowitz, 430 U.S. 924 (1977), *summarily aff'g* 397 F. Supp. 862, 871 (S.D. Fla.1975); Jablon v. Califano, 430 U.S. 924 (1977), *summarily aff'g* 399 F. Supp. 118, 132–33 (D. Md. 1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), *aff'g* 367 F. Supp. 981, 991 (D.N.J. 1973); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973), *aff'g* 345 F. Supp. 310, 315–16 (D.D.C. 1972); Richardson v. Griffin, 409 U.S. 1069 (1972), *summarily aff'g* 346 F. Supp. 1226, 1237 (D. Md. 1972).

625 Califano v. Westcott, 443 U.S. 76, 90 (1979).

M. STATE LAWS AGAINST PRIVATE DISCRIMINATION[626]

[K214] States have the power "to pursue the . . . important goal of ensuring nondiscriminatory access to commercial opportunities in the society."[627] "At common law, innkeepers, smiths, and others who 'made profession of a public employment' were prohibited from refusing, without good reason, to serve a customer."[628] "The duty was a general one and did not specify protection for particular groups. The common law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations."[629] In consequence, most states chose to counter discrimination by enacting detailed statutory schemes. State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains. Over time, the public accommodations laws have expanded to cover places and entities beyond those covered by the common law. Public accommodations laws have also broadened in scope to protect more groups; they have expanded beyond those groups that have been given heightened equal protection scrutiny under the Court's cases. Thus, they set forth a wide variety of traits that cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates, and sexual orientation.[630] "Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."[631]

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626 *See also* paras. F20, K48–K50 *(racial discrimination in private schools)*; para. H139 *(religious discrimination in private employment)*; paras. K55–K58, K128 *(repeal of anti-discrimination legislation)*; para. K18 *(remedial discrimination)*.

627 *See* Roberts v. United States Jaycees, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring in part and concurring in judgment).

628 Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 571 (1995).

629 Romer v. Evans, 517 U.S. 620, 627–28 (1996), *citing* Civil Rights Cases, 109 U.S. 3, 25 (1883). However, under the Commerce Clause, Congress may regulate economic activity in a clearly defined group of public accommodations that substantially affects inter-state commerce. *See*, in particular, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (sustaining civil rights laws forbidding discrimination at local motels, and holding that such laws do not violate the Fifth Amendment as being a deprivation of property or liberty without due process of law); Katzenbach v. McClung, 379 U.S. 294 (1964) (same for restaurants).

630 See Romer v. Evans, 517 U.S. 620, 629 (1996).

631 *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 572 (1995), *citing* New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11–16 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548–49 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 624–26 (1984). In those associational freedom cases, after finding a compelling state interest in eradicating discrimination based on sex, race, or other grounds, the Court went on to examine whether or not the application of the state law would impose any "serious burden" on the organization's rights of expressive association, and concluded that it would not. *See, in extenso*, paras. I438–I440.

By contrast, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the Court held that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Likewise in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court decided that New Jersey's public

[K215] *New York State Club Association* involved New York City's Human Rights Law that forbade discrimination based on race, creed, sex, and other grounds by any "place of public accommodation, resort or amusement" but specifically exempted "any institution, club or place of accommodation which is in its nature distinctly private." A 1984 amendment provided that any "institution, club or place of accommodation," other than a benevolent order or a religious corporation, "shall not be considered in its nature distinctly private" if it "has more than four hundred members, provides regular meal service and regularly receives payment . . . directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." A non-profit association, consisting of a consortium of 125 other private New York clubs and associations, attacked on its face, as violative of the Equal Protection Clause, the amendment's exemption deeming benevolent orders and religious corporations to be "distinctly private." However, it was "plausible that these associations differ[ed] in their practices and purposes from other private clubs." And the city council could have reasonably believed that the exempted organizations were different in kind from appellant's members, "at least in the crucial respect of whether business activity [wa]s prevalent among them." In addition, appellant had failed to carry its considerable burden of showing that the foregoing view was erroneous, since there was no evidence that "a detailed examination of the practices, purposes, and structures of the exempted organizations would show them to be identical in this and other critical respects to the private clubs" that were covered under the city's anti-discrimination provisions. Without any such showing, appellant's facial attack on the Law under the Equal Protection Clause should founder.[632]

accommodations law, to the extent that required the Boy Scouts to admit a homosexual as a scoutmaster, violated the Boy Scouts' First Amendment right of expressive association. *See, in extenso,* paras. I245, I441.

[632] New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 16, 18 (1988).

THE CONSTITUTION OF THE UNITED STATES

The Constitution of the United States was drawn up by the Federal Convention of 1787 to create the system of Federal Government, which began to function in America in 1789. Since then, twenty-seven amendments have been added. The first ten, called the ***Bill of Rights,*** *were adopted in 1791. The twenty-seventh amendment was ratified in 1992.*

PREAMBLE

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE ONE

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

When vacancies happen in the Representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one Vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen

every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Section 4. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

Section 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform Laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current Coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful Buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Section 9. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince or foreign State.

Section 10. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE TWO

Section 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President chosen for the same term, be elected, as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not lie an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section 3. He shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4. The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE THREE

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE FOUR

Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, But shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE FIVE

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its consent, shall be deprived of it's equal suffrage in the Senate.

ARTICLE SIX

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE SEVEN

The ratification of the Conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the Independence of the United States of America the twelfth, in witness whereof we have hereunto subscribed our Names,

GEO. WASHINGTON—President and deputy from Virginia

New Hampshire
JOHN LANGDON
NICHOLAS GILMAN

Massachusetts
NATHANIEL GORHAM
RUFUS KING

Connecticut
WM SAML JOHNSON
ROGER SHERMAN

New York
ALEXANDER HAMILTON

New Jersey
WIL. LIVINGSTON
DAVID BREARLEY
WM PATERSON
JONA. DAYTON

Pennsylvania
B FRANKLIN
THOMAS MIFFLIN
ROBT MORRIS
GEO CLYMER
THOS FITZSIMONS
JARED INGERSOLL
JAMES WILSON
GOUV. MORRIS

Delaware
GEO READ
GUNNING BEDFORD JUN.
JOHN DICKINSON
RICHARD BASSETT
JACO. BROOM

Maryland
JAMES McHENRY
DAN of ST THO JENIFER
DANL CARROLL

Virginia
JOHN BLAIR
JAMES MADISON JR.

North Carolina
WM BLOUNT
RICHD DOBBS SPAIGHT
HU WILLIAMSON

South Carolina
J. RUTLEDGE
CHARLES COTESWORTH PINCKNEY
CHARLES PINCKNEY
PIERCE BUTLER

Georgia
WILLIAM FEW
ABR BALDWIN

Attest
William Jackson

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

AMENDMENT ONE (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT TWO (1791)

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

AMENDMENT THREE (1791)

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT FOUR (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT FIVE (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT SIX (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT SEVEN (1791)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

AMENDMENT EIGHT (1791)

Excessive bail shall not lie required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT NINE (1791)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT TEN (1791)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT ELEVEN (1798)

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or subjects of any foreign State.

AMENDMENT TWELVE (1804)

The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT THIRTEEN (1865)

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT FOURTEEN (1868)

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

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT FIFTEEN (1870)

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this AMENDMENT by appropriate legislation.

AMENDMENT SIXTEEN (1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration.

AMENDMENT SEVENTEEN (1913)

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature

of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

AMENDMENT EIGHTEEN (1919)

Section 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by Congress.

AMENDMENT NINETEEN (1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any States on account of sex.

The Congress shall have power by appropriate legislation to enforce the provisions of this article.

AMENDMENT TWENTY (1933)

Section 1. The terms of the President and Vice-President shall end at noon on the twentieth day of January, and the terms of Senators and Representatives at noon on the third day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice-President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice-President-elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT TWENTY-ONE (1933)

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. The article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT TWENTY-TWO (1951)

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who May be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT TWENTY-THREE (1960)

Section 1. The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice-President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice-President, to be electors appointed by a State; and they shall meet in the district and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT TWENTY-FOUR (1964)

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT TWENTY-FIVE (1967)

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice-President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice-President, the President shall nominate a Vice-President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice-President as Acting President.

Section 4. Whenever the Vice-President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice-President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice-President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four day to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice-President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT TWENTY-SIX (1971)

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT TWENTY-SEVEN (1992)

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

TABLE OF CASES

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