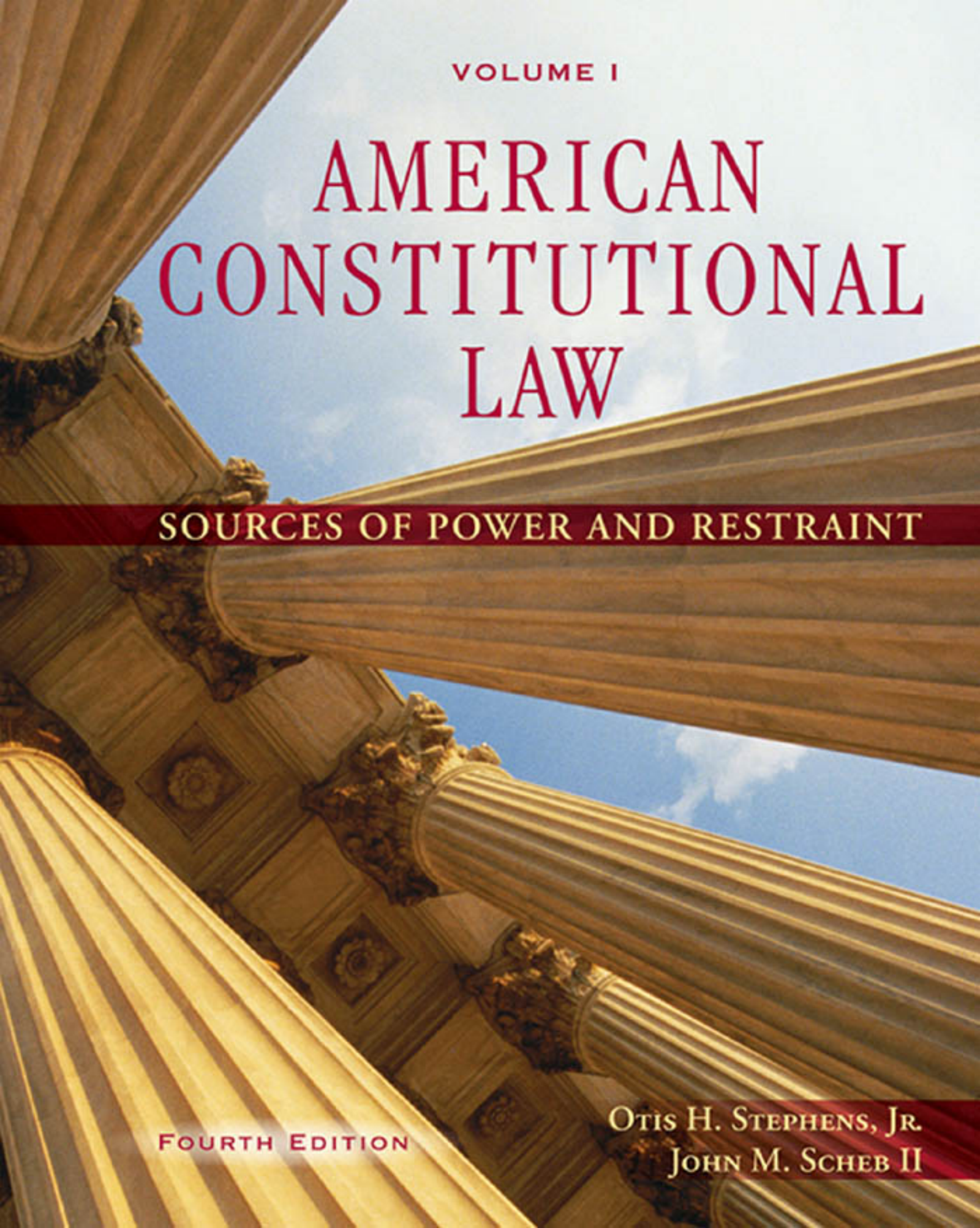
VOLUME I
AMERICAN CONSTITUTIONAL LAW
SOURCES OF POWER AND RESTRAINT
FOURTH EDITION
OTIS H. STEPHENS, JR.
JOHN M. SCHEB II

American Constitutional Law Volume I

FOURTH EDITION

Sources of Power and Restraint

Otis H. Stephens, Jr.
University of Tennessee, Knoxville

John M. Scheb II
University of Tennessee, Knoxville

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Otis H. Stephens, Jr., and John M. Scheb II

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Essays and Cases (1988), with Otis H. Stephens, Jr.; *An Introduction to the American Legal System* (2002), with Judge John M. Scheb; *Government and Politics in Tennessee* (2002), with William Lyons and Billy Stair; *Criminal Law and Procedure,* 5th edition (2005), with Judge John M. Scheb; *Law and the Administrative Process* (2005), also with Judge John M. Scheb; and *American Government: Politics and Political Culture*, 4th edition (2006), with William Lyons. Most recently Professor Scheb co-edited, along with Otis H. Stephens, Jr., and Kara E. Stooksbury, *An Encyclopedia of American Civil Rights and Liberties* (2006).

Contents

Preface

American constitutional law, to paraphrase Charles Evans Hughes, is what the Supreme Court says it is. But of course it is much more than that. Constitutional law is constantly informed by numerous actors' understandings of the meaning of the United States Constitution. Lawyers, judges, politicians, academicians, and, of course, citizens all contribute to the dialogue that produces constitutional law. Consequently, the Constitution remains a vital part of American public life, continuously woven into the fabric of our history, politics, and culture. Our goal in writing this textbook is to illustrate this premise in the context of the most salient and important provisions of the Constitution.

Volumes I and II of *American Constitutional Law* contain thirteen chapters covering the entire range of topics in constitutional law. Each of the chapters includes an introductory essay providing the legal, historical, political, and cultural context of Supreme Court jurisprudence in a particular area of constitutional interpretation. Each introductory essay is followed by a set of edited Supreme Court decisions focusing on salient constitutional issues. In selecting and editing these cases, we have emphasized recent trends in major areas of constitutional interpretation. At the same time, we have included many landmark decisions, some of which retain importance as precedents while others illustrate the transient nature of constitutional interpretation.

Although the Supreme Court plays a very important role in American politics, its function is limited to deciding cases that pose legal questions. Accordingly, its political decisions are rendered in legal terms. Because it is both a legal and a political institution, a complete understanding of the Court requires some knowledge of both law and politics. While political discourse is familiar to most college students, the legal world can seem rather bewildering. Terms such as *habeas corpus, ex parte, subpoena duces tecum,* and *certiorari* leave the impression that one must master an entirely new language just to know what is going on, much less achieve a sophisticated understanding. Although we do not believe that a complete mastery of legal terminology is necessary to glean the political from the legal, we recognize that understanding the work of the Supreme Court is a complex task. We have tried to minimize this complexity by deleting as much technical terminology as possible from the judicial opinions excerpted in this book without damaging the integrity of those opinions. Nevertheless, despite our attempts at editing out distracting citations, technical terms, and mere verbiage, the task of understanding Supreme Court decisions remains formidable. It is one that requires concentration, patience, and above all the determination to grasp what may at times seem hopelessly abstruse. We firmly believe that all students of American politics and law, indeed all citizens, should make the effort.

In preparing the fourth edition, we have endeavored to incorporate the important developments that have taken place during the five years since the third edition was completed. Most significant among these were: 1) the passing of the Rehnquist Court and the dawn of the Roberts

Court; and 2) a series of Supreme Court decisions stemming from the ongoing war on terrorism. Of course, during the past five years the Court has rendered numerous consequential decisions across the entire range of constitutional law. We have attempted to acknowledge all, or nearly all, of them in our introductory essays and to incorporate several of them into our set of edited cases. We have also restored a number of significant older cases that were not included in the second or third editions. Thus, this edition is not only much more current, but much more comprehensive as well.

In completing this new edition, we have benefitted from the encouragement and advice of our colleagues and students in the Department of Political Science and the College of Law at the University of Tennessee. In particular, we wish to thank Dr. Thomas Y. Davies, Alumni Distinguished Service Professor of Law, for sharing his insights on several important questions of constitutional history. Rachel Pearsall, a Ph.D. student in political science, has provided able assistance at important stages of work on this edition; as have Aaron Belville and Charles Patrick, 2006 graduates of our College of Law; and research assistants Eric Lutton, Adam Ruf, Caitlin Shockey, and Nicholas Zolkowski, all third-year law students.

We wish to express our gratitude to the editorial team at Wadsworth, in particular, Michael Rosenberg and Rebecca Green, for their support and encouragement. We would also like to express our appreciation to the many scholars who reviewed this edition and its predecessors, a list of whom appears on the following page. Their comments, criticisms, and suggestions were extremely helpful.

Finally, we wish to acknowledge the support provided by our wives, Mary Stephens and Sherilyn Scheb. This book is dedicated to them.

Although many people contributed to the development and production of this book, we, as always, assume full responsibility for any errors that may appear herein.

Otis H. Stephens, Jr.
John M. Scheb II
Knoxville, Tennessee
August 1, 2006

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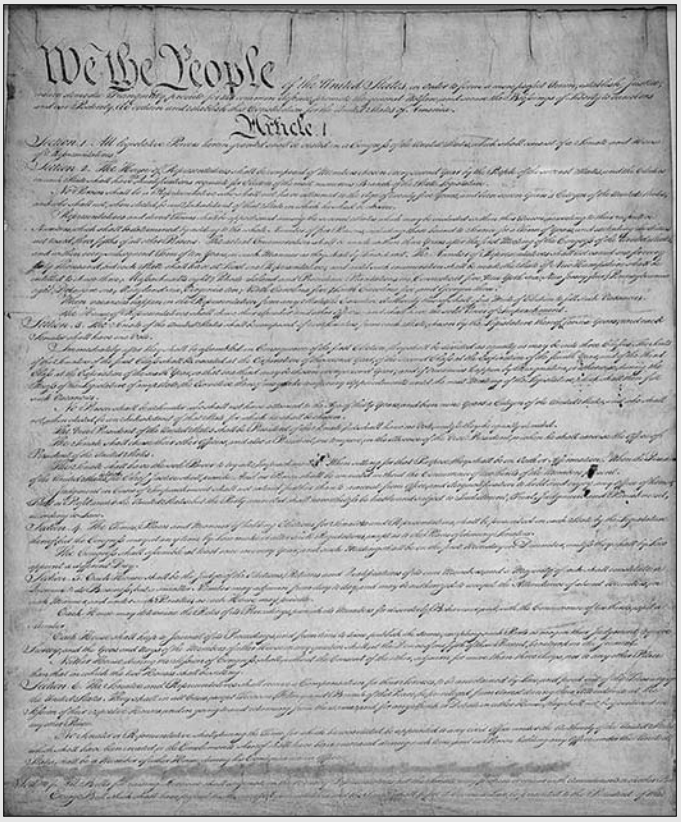
Introduction

Chapter Outline

"The Constitution . . . shall be the supreme Law of the Land. . . ."

—Article VI, U.S. Constitution



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WHAT IS CONSTITUTIONAL LAW?

American constitutional law refers to the principles of the U.S. Constitution as they relate to the organization, powers, and limits of government and to the relationship between government and the American people. American constitutional law has two basic components: the institutional dimension and the civil rights/civil liberties dimension. The former area embraces issues of presidential, congressional, and judicial power, as well as questions of state versus national authority and problems of interstate relations. The latter area involves claims of personal freedom and legal and political equality, usually asserted in opposition to exercises of governmental power. These components are equally important and are given more or less equal emphasis in this book.

The Constitution is not a self-executing document. It is only through **interpretation** in the context of live disputes over real-world issues that the Constitution takes on continuing meaning, force, and relevance. Interpretation is the process by which the abstract principles of the Constitution are given operational meaning. Most important are the interpretations rendered by the U.S. Supreme Court. Although Congress, the president, and lower courts participate in deciding what the Constitution means, the Supreme Court's interpretations of the nation's charter are the most authoritative. Thus, constitutional law consists primarily of the Supreme Court's decisions applying the Constitution to a broad range of social, economic, and political issues.

Why Study Constitutional Law?

Questions of constitutional law may seem abstract, remote, or even hopelessly esoteric to the average citizen. In reality, however, the Constitution touches the lives of ordinary Americans in countless ways, many of which are revealed in this book. In constitutional law one sees all of the theoretical and philosophical questions underlying our political system, as well as the great public issues of the day, acted out in a series of real-life dramas. Questions of constitutional law are therefore too important to be reserved exclusively to judges, lawyers, and scholars. Every citizen, and certainly every student of American government, ought to have at least a rudimentary understanding of constitutional law.

THE ADOPTION AND RATIFICATION OF THE CONSTITUTION

The study of constitutional law begins logically with the adoption and ratification of the Constitution itself. The Constitution was adopted in 1787 by a convention of delegates representing twelve of the thirteen states in the Union at that time. Fifty-five delegates convened at Independence Hall in Philadelphia during the hot summer of 1787 to devise a plan for a successful national government. The delegates went to Philadelphia because the existing arrangements had proved to be anything but successful.

The Articles of Confederation

Since the end of the American Revolution, the United States had been governed by a weak national authority consisting only of the Congress and a few administrators. This arrangement had been formalized under the **Articles of Confederation**, proposed to the States by Congress in 1777 but not ratified until 1781. At this stage in its history, the United States was hardly a nation at all, but rather a mere collection

of independent states, each jealous and suspicious of the others. Most ominous of all was the ever-present threat of the European colonial powers, which still had designs on the New World and were ready to intervene should the U.S. government collapse.

The Articles of Confederation were adopted to provide the basis for a "perpetual union" among the states, but the system of government established by the Articles proved to be dysfunctional. Congress, the sole organ of the government under the Articles, was a **unicameral** (one-house) **legislature** in which each state had one vote. A supermajority of nine states was required for Congress to adopt any significant measure, making it virtually impossible for it to act decisively.

Under the Articles of Confederation, Congress had no power to tax and was reduced to requisitioning funds from the states, which were less than magnanimous. During the first two years under the Articles, Congress received less than $1.5 million of the more than $10 million it requested from the states. This was especially problematic as Congress tried to fund the Continental Army, which was still at war with the British until the Peace of Paris was signed in 1783. After the Peace, Congress struggled to repay the massive war debt it had incurred; the states, for the most part, treated the national debt as somebody else's problem.

Perhaps most significantly, Congress lacked the authority to regulate **interstate commerce.** It was therefore powerless to prevent the states from engaging in trade protectionism that prevented the emergence of an integrated national economy and exacerbated the depressed and unstable economy that existed in the wake of the Revolutionary War. Commercial regulations varied widely among the states. The states sought to safe-guard their interests by instituting **protective tariffs** and fees. A tariff is a charge made on a product being brought into a country, or in this case, a state. The purpose of a tariff is to protect those in the state who wish to produce and sell that product. Of course, when one state instituted a tariff, it was predictable that other states would retaliate with tariffs of their own. As a result, farmers in New Jersey had to pay a fee to cross the Hudson River en route to sell their products in New York City. This frustrated the development of a national economy and depressed economic growth. Although Congress could coin money, the states were not prohibited from issuing their own currency, which further inhibited interstate economic activity.

Under the Articles, there was no presidency to provide leadership and speak for the new nation with a unified voice. This omission was, of course, deliberate, because many Americans feared a restoration of the monarchy. As a consequence, states began to develop their own foreign policies; some even entered into negotiations with other countries.

The Articles of Confederation provided for no national court system to settle disputes between states or parties residing in different states. The lack of predictable enforcement of contracts between parties in different states inhibited interstate economic activity. The fact that no one could look to any overarching authority to settle disputes or provide leadership contributed to the sense of disunity.

Finally, by their own terms, the Articles could not be amended except by unanimous consent of the states. Any state could veto a proposed change in the confederation. In 1781, Congress proposed an amendment to the states authorizing the imposition of a 5 percent duty on imports and goods condemned by prize cases. Twelve states agreed to this modest tax proposal, but Rhode Island refused to give its consent, thus blocking the revenue measure. In 1783, Congress initiated another effort to obtain taxing power, but New York's refusal to support this amendment in 1786 killed the proposal. In 1784, Congress attempted to persuade the states to grant it the power to regulate navigation, an important aspect of

commerce, but again, the effort came to nothing. Under the Articles of Confederation, the national government was thus ineffectual.

Meanwhile, much to the delight of the European colonial powers, the "perpetual union" was disintegrating. In the absence of leadership by Congress, the states, facing this dire situation, began to take the initiative. At the instigation of James Madison of Virginia and Maryland leaders including future Supreme Court Justice Samuel Chase, a conference was convened at Mt. Vernon, George Washington's home, in the spring of 1785 to address conflicts between the two states over navigation of the Potomac. Virginia and Maryland later came to a "working agreement" over navigation of Chesapeake Bay and some of its tributaries. In this connection they requested the cooperation of Pennsylvania and Delaware. Thus efforts at cooperative action by the states were under way by the mid-1780s. These first steps in the direction of state-initiated joint action significantly influenced the movement toward a more concerted effort to revise the Articles of Confederation.

Shays's Rebellion

By 1786 it was widely recognized that the Articles of Confederation were in serious need of repair, if not replacement. This recognition was reinforced by an historic confrontation that occurred in Massachusetts during late 1786 and early 1787. Daniel Shays, a veteran of the Battle of Bunker Hill, led a ragtag army composed primarily of disgruntled farmers in a rebellion against state tax collectors and courts. The object of **Shays's rebellion** was to prevent foreclosure on numerous farms whose owners were bankrupt. Unable to put down the rebellion by itself, the Massachusetts state government requested assistance from the national confederation. Congress adopted a plan to raise an army, but most states were unwilling to provide the necessary funds. Shays's army succeeded in taking over a considerable area of western Massachusetts until it was defeated by a band of mercenaries hired by wealthy citizens who feared a popular uprising. The inability of the national government to respond effectively to Shays's rebellion was the single most important event in generating broad support for a constitutional convention.

The Annapolis Convention

In the meantime, early in 1786, Virginia, led by James Madison and Edmund Randolph, initiated a process for convening a meeting to which all the states were invited for the purpose of considering ways to resolve growing problems of interstate commerce. On the first Monday in September, the date on which the meeting was scheduled to begin in Annapolis, Maryland, delegates from only five States had assembled. While the Annapolis Convention resolved nothing, Alexander Hamilton of New York wrote the Report of the Convention, including a recommendation to Congress to call a convention for the purpose of revising the Articles of Confederation. Led by Virginia, six states over the next several months appointed "deputies" to an informally proposed convention to meet in Philadelphia in May, 1787, to undertake revision of the Articles of Confederation. Responding to this initiative, Congress, on February 21, 1787, issued the call for a federal convention to meet in Philadelphia "for the sole and express purpose of revising the Articles of Confederation." All the states were invited to send delegations, each of which would have an equal vote at the convention. The delegates were chosen by their respective state legislatures. Only Rhode Island refused to participate.

Delegates to the Philadelphia Convention

The states chose a total of seventy-four delegates to the Philadelphia Convention of 1787. The fifty-five delegates who ultimately attended were drawn, for the most part, from the nation's elite: landowners, lawyers, bankers, manufacturers, physicians, and businessmen. The delegates were, on the whole, highly educated men of wealth and influence. Some commentators, most notably Charles A. Beard, have suggested that the delegates to the **Constitutional Convention of 1787** were motivated primarily by their own upper-class economic interests, interests that would be threatened by political instability. In Beard's view, the overriding motivation of the delegates was the protection of private property rights against actions of the state legislatures.

Other commentators have argued that the delegates were first and foremost practical politicians who were concerned both about the economic interests of their respective states and about their common nationality. Certainly those who gathered in Philadelphia were aware that whatever document they produced would have to be approved by their respective states. Their goal was to design an effective system of national government that could win popular approval in a nation that had just fought a revolution and was still highly suspicious of centralized power.

Like most of their fellow citizens, the delegates to the Constitutional Convention were sensitive to the dangers of concentrated power and were thus committed to the Lockean notion of **limited government.** Although most of the Framers of the Constitution were not democrats in the modern sense, they did subscribe (at least in principle) to the idea of **popular sovereignty.** Thus they were also committed to the goal of **representative government.** But the Framers were equally mindful of the danger that unchecked representative government might degenerate into the **tyranny of the majority.** They certainly accorded great importance to the need to protect the liberty and property of the individual. Their goal was to design an effective national government that would not oppress the people or threaten their liberties.

The Framers accepted the existence of the states as sovereign political entities, and indeed they drew from the recent experience of the states in adopting their own constitutions after independence from England was declared in 1776. There was no question of doing away with the states and creating a **unitary system** of government. Yet most of the delegates knew that without a strong national government, economic growth, and political stability would be seriously undermined by interstate rivalries.

Thus, the underlying theme of the Framers' thinking was the need for balance, moderation, and prudence. This levelheaded, pragmatic approach to the daunting task of designing a new system of government was largely responsible for the success of the Constitutional Convention.

The Constitutional Convention

After electing George Washington as the presiding officer and deciding to conduct their business in secret, the delegates chose to abandon the Articles of Confederation altogether and fashion a wholly new constitution. The decision to "start from scratch" was risky because, although there was broad consensus on the need for a new and improved governmental system, there were many issues that sharply divided the delegates. There was no guarantee that they would ever be able to agree on a substitute for the Articles of Confederation. While the delegates agreed on basic assumptions, goals, and organizing principles, they differed sharply over a number of important matters.

By far the two greatest sources of disagreement were (1) the conflict between the small and large states over representation in Congress and (2) the cleavage between

northern and southern states over slavery. But there were a number of other divisive issues. Should there be one president or multiple executives? How should the president be chosen? Should there be a national system of courts, or merely a national supreme court to review decisions of the existing state tribunals? What powers should the national government have over interstate and foreign commerce? Some of these disagreements were so serious as to cause a number of the delegates to pack their bags and leave Philadelphia, and for a time it appeared that the convention might fail.

Representation in Congress As noted earlier, under the Articles of Confederation all states were equally represented in a unicameral Congress. Representatives of the larger states preferred that representation be proportional to state population. The **Virginia Plan**, conceived by James Madison and presented to the convention by Virginia Governor Edmund Randolph, called for a bicameral Congress in which representation in both houses would be based on state populations. Delegates from the smaller states, fearing that their states would be dominated by such an arrangement, countered with the **New Jersey Plan**, which called for preserving Congress as it was under the Articles.

After a few days of intense debate described by Alexander Hamilton as a "struggle for power, not for liberty," Roger Sherman of Connecticut proposed a compromise. Congress would be comprised of two houses: a House of Representatives in which representation would be based on a state's population and a Senate in which all states would be equally represented.

Slavery Although it was not fully apparent in 1787, the most fundamental conflict underlying the convention was the cleavage between North and South over the slavery question. It was a conflict about human rights, to be sure. But it was also a clash of different types of political economies and different political cultures. In the South there was a thriving plantation economy, where slave labor played an important part in generating wealth for the plantation owners. The political culture of the South was more aristocratic and traditional. By contrast, the North was on the verge of an industrial revolution. Agriculture in the North was based on family farms. The political culture was more democratic and, from the southern point of view, considerably more moralistic. Southern delegates at the Constitutional Convention feared that the new national government would try to end the slave trade and possibly try to abolish slavery altogether. At the same time, southern delegations wanted slaves in their states to be counted as persons for the purpose of determining representation in the new House of Representatives. Northern delegates, realizing that the support of the South was crucial to the success of the new nation, finally agreed to two compromises over slavery. First, they agreed that Congress would not have the power to prohibit the importation of slaves into the United States until 1808. And then, for purposes of representation in Congress (and the apportionment of direct taxes), each slave would count as three-fifths of a person.

The Battle over Ratification

On September 17, 1787, thirty-nine delegates representing twelve states placed their signatures on what they hoped would become the nation's new fundamental law. They then adjourned to the City Tavern to celebrate their achievement and discuss a final challenge: The Constitution still had to be ratified, as provided in Article VII, before it could become the "supreme Law of the Land." Today we look to the Constitution as a statement of our national consensus—an expression of our shared political culture. But in 1787 the potential ratification of the Constitution was a divisive political issue; moreover, ratification was by no means a foregone conclusion. Interestingly, while the

small states had been the obstacle at the Philadelphia Convention, it was in several of the larger states—Massachusetts, New York, and Virginia—that opposition to ratification was the most intense. But there was division within every state.

Unlike the Articles of Confederation, the Constitution of 1787 did not require unanimous consent of the states to be ratified. Rather, it called for the Constitution to take effect upon ratification by nine of the thirteen states. Instead of allowing the state legislatures to consider ratification, the Constitution called for a popular convention to be held in every state. And by rejecting a motion to hold another constitutional convention, the Framers presented the states with an all-or-nothing choice.

Federalists versus Anti-Federalists Supporters of the Constitution called themselves Federalists; opponents were dubbed Anti-Federalists. Federalist sympathies were found mainly in the cities, among the artisans, shopkeepers, merchants, and, not insignificantly, the newspapers. Anti-Federalist sentiment was strongest in rural areas, especially among small farmers. The Anti-Federalists were poorly organized and, consequently, less effective than their Federalist opponents. Moreover, they were constantly on the defensive. Because they were opposing a major reform effort, they were seen as defending a status quo that was unacceptable to most Americans. Still, the Anti-Federalists had considerable support and succeeded in making ratification a close question in some states.

The most eloquent statement of the Anti-Federalist position was Richard Henry Lee's *Letters of the Federal Farmer,* published in the fall of 1787. Lee, a principal architect of the Articles of Confederation, thought that the newly proposed national government would threaten both the rights of the states and the liberties of the individual.

Perhaps Lee's most trenchant criticism of the new Constitution was that it lacked a bill of rights. Lee pointed out that state constitutions, without exception, enumerated the rights of citizens that could not be denied by their state governments. The only conclusion Lee could draw was that the Philadelphia Convention and its handiwork, the Constitution, did not place a premium on liberty. However wrongheaded this criticism, it touched a nerve among the American people. Ultimately, the Federalists would secure ratification for the new Constitution only by promising to support a series of amendments that would become the **Bill of Rights.**

The Federalist Papers Despite their popular appeal, *Letters of the Federal Farmer* and the other Anti-Federalist tracts were no match for the brilliant essays written by Alexander Hamilton, James Madison, and John Jay in defense of the new Constitution. ***The Federalist Papers*** were published serially in New York newspapers during the winter of 1788 and without question helped to secure ratification of the Constitution in that crucial state. Yet *The Federalist,* as the collected papers are generally known, was much more than a set of time-bound political tracts. *The Federalist* represented a clear statement of the theoretical underpinnings of the Constitution. It continues to be relied on, not only by scholars but by judges and legislators in addressing questions of constitutional interpretation.

The Ratifying Conventions Delaware was the first state to ratify the Constitution, approximately three months after the close of the Philadelphia Convention. Within nine months after the convention, the necessary ninth state had signed on. But the two of the largest and most important states, Virginia and New York, became battlegrounds over ratification. Although the Constitution became the "supreme Law of the Land" when the ninth state, New Hampshire, approved it in June 1788, it was vital to the success of the new nation that Virginia and New York get on board.

At the Virginia ratifying convention, Patrick Henry, a leader of the Anti-Federalist cause, claimed that four-fifths of Virginians were opposed to ratification. But the oratory of Edmund Randolph, combined with the prestige of George Washington, finally carried the day. The Federalists won Virginia by a vote of 89 to 79. The news that Virginia had approved the new Constitution gave the Federalists considerable momentum. In July, New York followed Virginia's lead in approving the Constitution by three votes. The two holdouts, North Carolina and Rhode Island, not wanting to be excluded from the Union, followed suit in November 1789 and May 1790, respectively. The new Constitution was in effect and fully legitimized by "the consent of the governed."

THE UNDERLYING PRINCIPLES OF THE CONSTITUTION

The document the Framers produced has been characterized as "conservative," and when the Constitution is compared to the Declaration of Independence, the label is not altogether inappropriate. Whereas the Declaration of Independence sought to justify a revolution, the Framers of the Constitution were concerned with the inherently more conservative task of nation building. But in 1787, the political philosophy underlying the Constitution was fairly revolutionary. It fused classical republican ideas of the rule of law and limited government with eighteenth century liberal principles of individual liberty and popular sovereignty.

Equally radical in the late eighteenth century was the notion of a written constitution to which government would be forever subordinated. The English constitution, with which the Framers were well acquainted, consists of unwritten traditions and parliamentary enactments that are seen as fundamental but which may be altered through ordinary legislation. The Framers rejected the concept of legislative supremacy, opting instead for a government subordinated to a supreme written charter that could not be easily changed.

The framework of government delineated in the Constitution is built on five fundamental principles: (1) the **rule of law;** (2) **separation of powers** among the legislative, executive, and judicial branches of government; (3) a system of **checks and balances** among these branches; (4) a system of **federalism**, or division of power between the national government and the states; and (5) **individual rights.**

The Rule of Law

The Constitution is the embodiment of the founders' belief in the rule of law. The idea is that government and society can be regulated by law, not subjected to the whims of powerful but potentially capricious rulers. The Constitution rests on the belief that no one in power should be above the law. Even the legislature, the people's elected representatives, should be bound to respect the principles and limitations contained in the "supreme Law of the Land." The subordination of government to law was seen by the Framers as a means of protecting individual rights to life, liberty, and property.

It must be understood that the Constitution imposes limits on *government* action; purely *private* actions are generally beyond the scope of constitutional law. Individuals are not constrained by the Constitution unless they are government officials or persons acting under the authority of government. Yet the actions of private individuals are subject to the constraints of the civil and criminal law. In addition to imposing constitutional limitations on government, the rule of law requires that citizens

who are wronged by others have opportunities to seek justice through the courts. It also means that persons who offend society's rules are brought into court to answer for their crimes. Of course, the rule of law is a two-way street: Defendants in civil and criminal cases are entitled to procedural fairness.

Separation of Powers

The Framers of the Constitution had no interest in creating a **parliamentary system**, because they believed that parliaments could be manipulated by monarchs or captured by impassioned but short-lived majorities. Accordingly, parliaments provided insufficient security for liberty and property. The delegates believed that only by allocating the three basic functions of government (legislative, executive, and judicial) into three separate, coordinate branches could power be appropriately dispersed. As James Madison wrote in *The Federalist,* No. 47, "the accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." Thus the Constitution allocates the legislative, executive, and judicial powers of the national government across three separate, independent branches. The first three articles of the Constitution, known as the **distributive articles,** define the structure and powers of Congress (Article I), the executive (Article II), and the judiciary (Article III).

Separation of powers was not a totally original idea. James Madison and the other delegates were well aware of the arguments in support of separation of powers by the eighteenth century French political philosopher Montesquieu. They were also mindful of the fact that the new state constitutions adopted during or after the Revolutionary War were based on separation of powers. Yet the Framers were equally aware that in most states the legislatures dominated the executive and judicial branches. The system of checks and balances created by the Framers is designed to ensure that no single branch of the national government can permanently dominate the other branches.

Checks and Balances

At the urging of James Madison, the delegates became convinced that a system of checks and balances would be necessary if separate, coordinate branches of government were to be maintained. In Madison's view, power must be divided, checked, balanced, and limited. In *The Federalist,* No. 51, one of his greatest essays, Madison expounded on this theme:

> [T]he great security against a gradual concentration of the several powers [of the government] in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. . . . It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither internal nor external controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Constitution contains a number of "auxiliary precautions." The president is authorized to veto bills passed by Congress, but Congress can override the president's veto by a two-thirds majority in both houses. The president is given the power to appoint judges, ambassadors, and other high government officials, but the Senate must consent to these appointments. The president is commander in chief, but Congress has the authority to declare war, raise and support an army and a navy, and make rules governing the armed forces. The president is empowered to call Congress into special session, but is duty bound to appear "from time to time" to inform Congress as to the "State of the Union." These provisions were designed to create a perpetual competition between the Congress and the executive branch for control of the government, with the expectation that neither institution would permanently dominate the other. That is, in fact, how things have worked out.

As we have noted, the Framers were concerned not only with the possibility that one institution might dominate the government, but that a popular majority might gain control of both Congress and the presidency and thereby institute a tyranny of the majority. An important feature of the system of checks and balances is the different length of terms for the president, members of the House, and U.S. Senators. Representatives are elected every two years; Senators serve for six-year terms. Presidents, of course, hold office for four years. The staggered terms of the president and the Senate, in particular, are designed to make it difficult (although certainly not impossible) for a transitory popular majority to get and keep control of the government.

The Framers said much less about the judiciary, which Alexander Hamilton described in *The Federalist,* No. 78, as the "least dangerous branch" of the new national government. The president and the Senate are given the shared power to appoint federal judges, but these appointments are for life. Congress is authorized to establish lower federal courts and determine their jurisdiction; it may even regulate the appellate jurisdiction of the Supreme Court. But Congress is prohibited from reducing the salaries of sitting judges. The only means of removing members of the judiciary is through a cumbersome impeachment process, but this requires proof that the judge has committed "high crimes" or misdemeanors. Clearly, the Framers wanted to create an independent federal judiciary that would be insulated from partisan political pressures.

Judicial Review The text of the Constitution is silent on the means by which the judiciary can check and balance the other branches. In *Marbury v. Madison* (1803), the single most important case in American constitutional history, the Supreme Court asserted the power to review acts of Congress and declare them null and void if they are found to be contrary to the Constitution. Seven years later, in *Fletcher v. Peck* (1810), the Court extended this power to encompass the validity of state laws under the federal Constitution. Commonly referred to as **judicial review,** the power of the federal courts to rule on the constitutionality of legislation is nowhere explicitly provided for in the Constitution. However, many of the Framers supported the concept of judicial review, and most probably expected the courts to exercise this power. In any event, the power of judicial review is now well established. By assuming this power, the federal judiciary greatly enhanced its role in the system of checks and balances. Moreover, the courts took on primary responsibility for interpreting and enforcing the Constitution.

Federalism

As noted previously, the states had well-established governments by the mid-1770s. It was simply inconceivable that the state governments would be abolished in favor

of a unitary system—that is, one in which all political power rests in the central government. But the decision to retain the states as units of government was much more than a concession to political necessity. The Framers, who after all represented their respective states at the Constitutional Convention, believed in federalism as a means of dispersing power. After a revolutionary war fought against distant colonial rulers, the founders believed that government should be closer to the governed. Moreover, there were dramatic differences in political culture among the states; there was no way that a distant national government could command the loyalty and support of a diverse people. Finally, there were the practical problems of trying to administer a country spread out along a thousand-mile seaboard. The states were much better equipped to do this.

Individual Rights

Without question, the protection of the liberty and property of the individual was among the Framers' highest goals. Yet the original Constitution had little to say about individual rights. This is because the Framers assumed that the limited national government they were creating would not be a threat to individual liberty and property. Of course, not everyone shared this perspective. Thomas Jefferson, who has been described as the "missing giant" of the Constitutional Convention, was disappointed that the Framers failed to include a bill of rights in the document they adopted. Jefferson's concern was widely shared in his native state of Virginia, where ratification of the Constitution was a close question. Fortunately, a gentleman's agreement was worked out whereby ratification was obtained in Virginia and other key states on the condition that Congress would immediately take up the matter of creating a bill of rights. The first ten amendments to the Constitution, known collectively as the Bill of Rights, were adopted by the 1st Congress in 1789 and ratified by the requisite nine states in 1791. Today, issues arising under various provisions of the Bill of Rights (for example, abortion, the death penalty, and school prayer) are both important questions of constitutional law and salient issues of public policy.

THE ENDURING CONSTITUTION

The Constitution has been amended seventeen times since the ratification of the Bill of Rights. Undoubtedly the most important of these amendments are the Thirteenth, Fourteenth, and Fifteenth, ratified in 1865, 1868, and 1870, respectively.

The Thirteenth Amendment abolished slavery, or "involuntary servitude." The Fourteenth Amendment was designed primarily to prohibit states from denying equal protection and due process of law to the newly freed former slaves. The Fifteenth Amendment forbade the denial of voting rights on the basis of race. These so-called Civil War Amendments attempted to eradicate the institution of slavery and the inferior legal status of black Americans. Although the abstract promises of the Civil War Amendments went unfulfilled for many years (some would say they remain unfulfilled even today), they represented the beginning of a process of democratization that has fundamentally altered the character of the American political system. It is important to recognize that the Fourteenth Amendment in particular, with its broad requirements of equal protection and due process, has become a major source of legal protection for civil rights and liberties, extending far beyond issues of racial discrimination.

Constitutional Democracy

When the Framers met in Philadelphia in 1787, the right to vote was, for the most part, limited to white men of property. In fact, all fifty-five of the delegates to the Constitutional Convention were drawn from this segment of the population. Women were regarded as second-class citizens and most blacks, being slaves, held no legal rights. The Civil War, industrial and commercial expansion, and waves of immigration in the late nineteenth century, together with two world wars and the Great Depression in the twentieth century, produced fundamental changes in the nature of American society. Inevitably, social forces have produced dramatic changes in the legal and political systems. The basic thrust of these changes has been to render the polity more democratic —that is, more open to participation by those who were once excluded.

Through constitutional amendment and changing interpretations of existing constitutional language, the **constitutional republic** designed by the Framers has become a **constitutional democracy.** This fundamental change in the character of the political system testifies to the remarkable adaptability of the Constitution itself.

Built-in Flexibility

Although the Constitution was intended to limit the power of government, it was not designed as a straitjacket. Through a number of general, open-ended provisions, the Constitution enables government to respond to changing social, political, and economic conditions. Obviously, America in the twenty-first century is a radically different place from the America the founders knew. Yet the United States is governed essentially by the same set of institutions the Framers designed, and by the Constitution of 1787, modified by twenty-seven Amendments. In fact, the U.S. Constitution is the oldest written constitution still in effect in the world.

The adaptability of the Constitution is fundamentally due to the open-ended nature of numerous key provisions of the document. This is particularly evident in the broad language outlining the legislative, executive, and judicial powers. Article I permits Congress to tax and spend to further the "general welfare," a term that has taken on new meaning in modern times. Article II gives the "executive Power" to the president but does not define the precise limits thereof. Article III likewise invests the Supreme Court with "judicial Power" without elaborating on the limits of that power. Such open-ended provisions endow the Constitution with a built-in flexibility that has enabled it to withstand the test of time.

Judicial Interpretation of the Constitution

The Constitution's remarkable adaptability is to a very considerable degree a function of the power of the courts, and especially the U.S. Supreme Court, to interpret authoritatively the provisions of the document. In *Marbury v. Madison* (1803), the Supreme Court asserted that "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is." In *Marbury,* Chief Justice John Marshall was referring not only to the interpretation of ordinary legislation, but to the interpretation of the Constitution itself. While the courts do not have a monopoly on constitutional interpretation, ever since *Marbury v. Madison* it has been widely recognized and generally accepted that the interpretations rendered by the courts are authoritative.

Judges, lawyers, politicians, and scholars have long debated theories of how the eighteenth century Constitution should be understood and applied to the issues of the day. As the federal courts have assumed a more central role in the public policy

making process, the debate over constitutional interpretation has become more heated and more public.

On one side of the debate are those who subscribe to the **doctrine of original intent** (or "original meaning," as some prefer), which holds that in applying a provision of the Constitution to a contemporary question, judges should attempt to determine what the Framers intended the provision to mean. On the other side are those who champion the idea of a "living Constitution," the meaning of which must change to reflect the spirit of the age. This debate is often lurking behind disagreements over particular constitutional questions ranging from abortion to voting rights. It is being constantly reargued and rekindled by the decisions of the Supreme Court.

In some instances, the language of the Constitution leaves little room for varying judicial interpretation. For example, Article I, Section 3, provides unequivocally that "[t]he Senate of the United States shall be composed of two Senators from each State." But not all of the Constitution's provisions are as obvious in meaning. Perhaps the best example is the Necessary and Proper Clause of Article I, Section 8. It is through this clause that the Supreme Court, in what can certainly be considered the second most important case in American constitutional law, *M'Culloch v. Maryland* (1819), endowed Congress with a deep reservoir of **implied powers.**

Another example of broad language is Article I, Section 8, Clause 3, giving Congress the authority to "regulate Commerce . . . among the several States." Under this clause the Supreme Court has upheld sweeping congressional action in the fields of labor relations, antitrust policy, highway construction, airline safety, environmental protection, criminal justice, and civil rights, to name just a few of the more prominent examples.

The Constitution and Modern Government

The central tendency of modern constitutional interpretation has been to increase the power and scope of the national government. Some would say that this expansion has occurred at the expense of **states' rights** and individual freedom. There is no doubt that the modern Constitution, largely by necessity, allows for a far more extensive and powerful federal government than the Framers would have desired or could have imagined. Yet the Supreme Court has not lost sight of the Framers' ideal of limited government and has shown its willingness and ability to curtail the exercise of governmental power. In *United States v. Nixon* (1974), the Watergate tapes case, the Court refused to condone an assertion of presidential power that flatly contradicted the Framers' principle of the rule of law. More recently, in *City of Boerne v. Flores* (1997), the Court stood up to Congress, striking down a popular statute, the Religious Freedom Restoration Act. Irrespective of whether one approves of the decisions rendered in *Nixon* and *Boerne,* these rulings demonstrated that the Supreme Court takes the Constitution seriously, and that the Constitution still embodies the Framers' idea that the government may not always do what it pleases.

The Constitution in Times of Crisis

In the wake of the terrorist attacks on America on September 11, 2001, the government effectively declared a new war on terrorism. After obtaining congressional approval, President George W. Bush ordered military force to be used against Osama bin Laden's al-Qaeda forces in Afghanistan as well as the Taliban government that provided them sanctuary. Congress enacted new laws aimed at increasing security at the nation's borders and at airports and giving law enforcement authorities broader powers to investigate suspected terrorists. Federal agencies proposed new regulations

to increase domestic security. In the face of the new war on terrorism, some wondered whether constitutional values of limited government, federalism, checks and balances, and especially civil rights and liberties might be cast aside. Would the government exceed constitutional restraints? Would courts stand up for civil rights and personal liberties in the face of overwhelming public sentiment to protect American security? Five years after the 9/11 attacks, civil rights and liberties are still alive and well in the United States and the courts have not shied away from confronting a number of legal and constitutional questions arising from the ongoing war on terrorism. It is worth noting in this context that the Constitution has withstood many crises, including a civil war, two world wars, and a great depression.

The Constitution endured the dramatic social, economic, and technological changes of the twentieth century. It survived the Cold War and the cultural revolution of the 1960s. Although the Constitution will be sorely tested by a potentially prolonged war on terrorism, history suggests that it will pass this test, too.

KEY TERMS

interpretation
Articles of Confederation
unicameral legislature
interstate commerce
protective tariffs
Shays's rebellion
Constitutional Convention of 1787
limited government
popular sovereignty
representative government
tyranny of the majority
unitary system
Virginia Plan
New Jersey Plan
Bill of Rights
The Federalist Papers
rule of law
separation of powers
checks and balances
federalism
individual rights
parliamentary system
distributive articles
judicial review
constitutional republic
constitutional democracy
doctrine of original intent
implied powers
states' rights

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VOLUME 1

Sources of Power and Restraint

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"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

—Justice Sandra Day O'Connor, Writing for the Court in *Gregory v. Ashcroft* (1991)

1 The Supreme Court in the Constitutional System

Chapter Outline

"It is emphatically the province and duty of the judicial department, to say what the law is."

—Chief Justice John Marshall, Writing for the Court in *Marbury v. Madison* (1803)

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INTRODUCTION

The U.S. Supreme Court is the leading actor on the stage of American constitutional law. While other courts (federal and state) have occasion to interpret the U.S. Constitution, they can be and often are overruled by the Supreme Court. Unlike the decisions of other courts, Supreme Court decisions have authoritative nationwide application. Accordingly, the Supreme Court occupies a position of preeminence in the American constitutional system.

The Supreme Court operates within an elaborate framework of legal principles, precedents, and procedures. Because of its institutional status as an independent branch of government, and the fact that the legal questions it addresses often involve important issues of public policy, the Court is both a political and a legal entity. The Court's political role is highlighted every time the Court addresses a controversial public issue such as abortion, school prayer, gay rights, affirmative action, or the death penalty. On occasion the Court's decisions have immediate impact on the political process itself. Such was the case in *Bush v. Gore* (2000), in which the Court effectively decided the outcome of a presidential election (for further discussion and an excerpt of this remarkable decision, see Chapter 8, Volume II).

Because the Supreme Court is at once a legal and a political institution, an understanding of the Court and its most significant product, constitutional interpretation, requires knowledge of both law and politics. In this book we attempt to enhance both. In this first chapter we examine the Supreme Court as an institution—its practices, powers, and procedures. We explain how constitutional cases reach the High Court and how they are decided once there. Most importantly, we describe the origin and development of **judicial review,** the crux of judicial power and the principal means by which constitutional law develops. We examine the exercise of judicial review and, just as important, the constraints on the exercise of this power. Finally, we examine the behavior of the Court from the standpoint of modern political science.

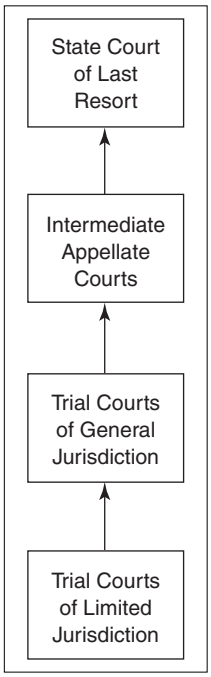

FIGURE 1.1
A Model State Court System

THE COURTS: CRUCIBLES OF CONSTITUTIONAL LAW

Constitutional law evolves through a process of judicial interpretation in the context of particular cases. These cases may arise in either federal or state courts. The federal courts are those established by Congress to hear cases arising under federal law and certain disputes where the parties reside in different states. State courts are those established by each of the fifty state governments within the United States. Most cases in state and federal courts do not pose constitutional questions. But when they do, the courts' decisions in those cases contribute to the development of constitutional law.

State Court Systems

Each of the fifty states has its own court system, responsible for cases arising under the laws of that state. These laws include the state constitution, statutes enacted by the state legislature, orders issued by the governor, regulations promulgated by various state agencies, and ordinances (local laws) adopted by cities and counties. But state courts also have occasion to consider questions of federal law, including federal constitutional questions.

Although no two state court systems are identical, all of them contain trial and appellate courts (see Figure 1.1). **Trial courts** make factual determinations based on the presentation of evidence and apply established legal principles to resolve disputes. **Appellate courts,** on the other hand, exist to correct legal errors made by trial courts

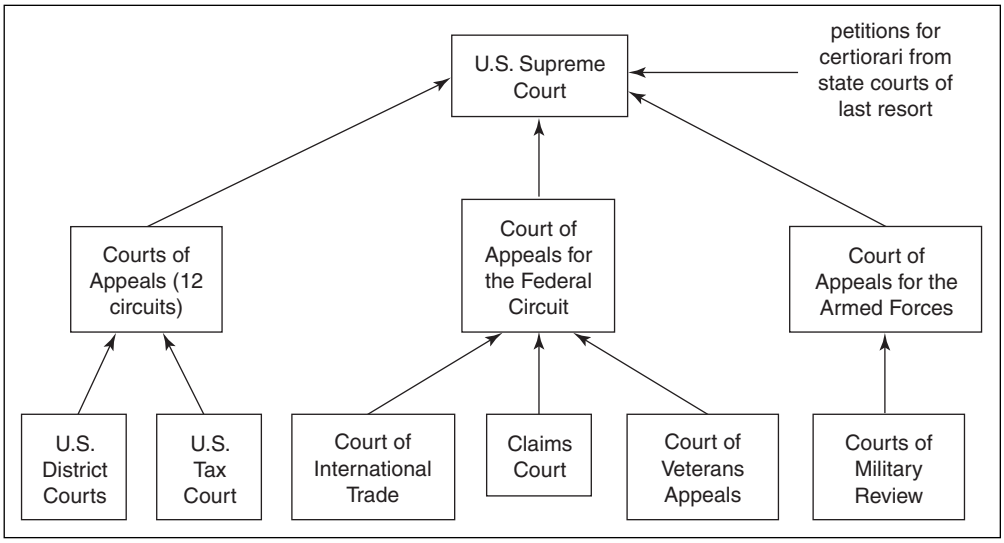

FIGURE 1.2
The Federal Court System

and to settle controversies about disputed legal principles. Both trial and appellate courts are called on from time to time to decide questions of constitutional law. Each state has a court of last resort, usually called the state supreme court, which speaks with finality on matters of state law. To the extent that a state supreme court decision involves a question of federal law, however, its decision is reviewable by the U.S. Supreme Court.

The Federal Court System

The national government operates its own system of **federal courts** with authority throughout the United States and its territories. Federal courts decide cases arising under the Constitution of the United States and statutes enacted by Congress. In addition, the **jurisdiction** of these courts extends to cases involving executive orders issued by the president, regulations established by various federal agencies, and treaties and other agreements between the United States and foreign countries.

The **court of last resort** in the federal judiciary is, of course, the U.S. Supreme Court. The Supreme Court sits atop a hierarchy of appellate and trial courts, as displayed in Figure 1.2. Article III of the Constitution provides that "[t]he 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." Beginning with the landmark Judiciary Act of 1789, Congress used this authority primarily to create and empower the federal court system. Over the years Congress has expanded and modified the system, giving us the three-tiered structure we have today.

The U.S. District Courts The **U.S. District Courts** are the major trial courts in the federal system. These courts are granted authority to conduct trials and hearings in civil and criminal cases arising under federal law. Normally, one federal judge presides at such hearings and trials, although federal law permits certain exceptional cases to be decided by panels of three judges. According to figures compiled by the Administrative

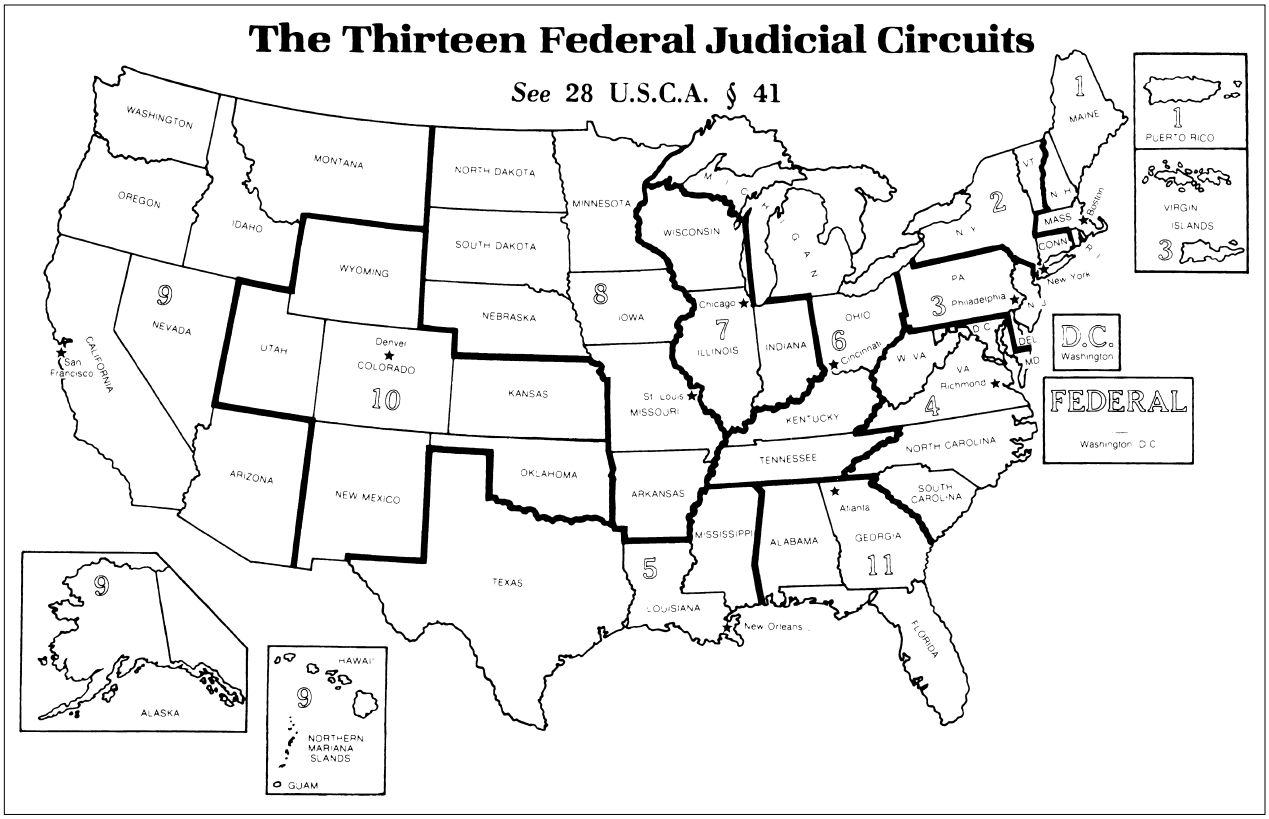

FIGURE 1.3
The Thirteen Federal Judicial Circuits
Source: See 28 U.S.C.A. § 41.

Office of the U.S. Courts, during the twelve-month period ending on March 1, 2005, approximately 349,000 cases were filed in the federal district courts.

Section 2 of the Judiciary Act of 1789 created thirteen District Courts, one for each of the eleven states then in the Union and one each for the parts of Massachusetts and Virginia that were later to become the states of Maine and Kentucky, respectively. From the outset, then, the District Courts have been state contained, with Congress adding new districts as the nation has grown. Today, there are ninety-four federal judicial districts, each state being allocated at least one. Tennessee, for example, has three federal judicial districts corresponding to the traditional eastern, middle, and western "grand divisions" of the state. California, New York, and Texas are the only states with four federal judicial districts.

The U.S. Courts of Appeals The intermediate appellate courts in the federal system are the **U.S. Courts of Appeals.** These courts did not exist until passage of the Judiciary Act of 1891. Prior to that time, appeals from the decisions of the District Courts were heard by the Supreme Court or by Circuit Courts that no longer exist. Today, the Courts of Appeals are commonly referred to as the "circuit courts," because each one of them presides over a geographical area known as a circuit (see Figure 1.3). The nation is divided into twelve circuits, each comprising one or more federal judicial districts, plus one "federal circuit" that is authorized to grant appeals from decisions

of specialized federal courts. Typically, the circuit courts hear appeals from the federal districts within their circuits. For example, the U.S. Court of Appeals for the Eleventh Circuit, based in Atlanta, hears appeals from the District Courts located in Alabama, Georgia, and Florida. The Court of Appeals for the District of Columbia Circuit, based in Washington, D.C., has the very important additional function of hearing appeals from numerous quasi-judicial administrative agencies in the federal bureaucracy.

Appeals in the circuit courts are normally decided by rotating panels of three judges, although under exceptional circumstances these courts will decide cases en banc, meaning that all of the judges assigned to the court will participate in the decision. On average, twelve judges are assigned to each circuit, but the number varies according to caseload. According to data compiled by the Administrative Office of the U.S. Courts, during the one-year period ending on March 1, 2005, the total number of cases commenced in the U.S. Courts of Appeals was 65,418.

Specialized Federal Courts Congress has also established a set of specialized courts, including the Tax Court, which exists to resolve disputes between taxpayers and the Internal Revenue Service; the Court of International Trade, which adjudicates controversies between the federal government and importers of foreign goods; the Court of Veterans' Appeals, which reviews decisions of the Board of Veterans' Appeals regarding veterans' claims to benefits; and the Court of Federal Claims, which is responsible for adjudicating civil suits for damages brought against the federal government.

Military Tribunals Under the Uniform Code of Military Justice, crimes committed by persons in military service are prosecuted before courts-martial. Each branch of service has its own court of military review, the decisions of which are subject to review by a civilian court known as the U.S. Court of Appeals for the Armed Forces. In the wake of the terrorist attacks of September 11, 2001, President George W. Bush issued a controversial executive order allowing international terrorists to be tried by "military commissions" rather than by federal district courts.

The U.S. Supreme Court Although the **U.S. Supreme Court** is explicitly recognized in Article III of the Constitution, it was not formally established until passage of the **Judiciary Act of 1789.** The Judiciary Act provided for a Court composed of a chief justice and five associate justices. In 1807 the Court was expanded to include seven justices, and in 1837 Congress increased the number to nine. During the Civil War, the number of justices was briefly increased to ten. In 1869 Congress reestablished the number at nine, where it has remained to this day. Although Congress theoretically could expand or contract the membership of the Court, powerful tradition militates against doing so.

The Supreme Court's first session opened in New York City on Monday, February 1, 1790. Because no cases appeared on the docket, the session was adjourned ten days later. During its first decade, 1790–1801, the Court met twice a year for brief terms beginning in February and August. Over the years, the Court's annual sessions have expanded along with its workload and its role in the political and legal system. As society has grown larger, more complex, and more litigious, the Supreme Court's agenda has swelled. The Court now receives some 8,000 petitions each year from parties seeking review, and there is no indication that the Court's caseload will soon decline.

Since 1917, the Court's annual term has begun on the "first Monday of October." Until 1979, the Court adjourned its sessions for the summer, necessitating sessions to handle urgent cases arising in July, August, or September. Since 1979, however, the Court has stayed in continuous session throughout the year, merely declaring a recess

at the end of each Term (typically near the end of June) for a summer vacation. For example, the Court's October 2005 Term ended on Thursday, June 29, 2006.

Federal Court Jurisdiction

The jurisdiction of the federal courts is determined both by the language of Article III of the Constitution and statutes enacted by Congress. The jurisdiction of the federal courts, while broad, is not unlimited. There are two basic categories of federal jurisdiction. First, and most important for students of constitutional law, is **federal question jurisdiction.** The essential requirement here is that a case must present a federal question—that is, a question arising under the U.S. Constitution, a federal statute, regulation, executive order, or treaty. Of course, given its expansive modern role, the federal government has produced a myriad of statutes, regulations, and executive orders. Consequently, most important questions of public policy can be framed as issues of federal law, thus permitting the federal courts to play a tremendous role in the policy making process. The second broad category, **diversity of citizenship jurisdiction,** applies only to civil suits and is unrelated to the presence of a question of federal law. To qualify under federal diversity jurisdiction, a case must involve parties from different states and an amount in controversy that exceeds $75,000.

Although the issue of jurisdiction can be viewed as an external constraint on the courts, in that Congress actually writes the statutes that define jurisdiction, it functions as an internal constraint as well. This is especially true at the Supreme Court level, where the exercise of jurisdiction is subject to the discretion of the justices. In 1988 Congress made the appellate jurisdiction of the Supreme Court almost entirely discretionary by greatly limiting the so-called **appeals by right.** Today, the Court's appellate jurisdiction is exercised almost exclusively through the **writ of certiorari,** which is issued at the Court's discretion. Federal law authorizes the Court to grant certiorari to review all cases, state or federal, that raise questions of federal law. This extremely wide discretion permits the Court to set its own agenda, facilitating its role as a policy maker, but allowing the Court to avoid certain issues that may carry undesirable institutional consequences. The Court may deflect, or at least postpone dealing with, issues that it considers "too hot to handle." This flexible jurisdiction, then, can be used as a means to expand or limit the Court's policy making role, depending on the issue at hand.

Article III of the Constitution declares that the Supreme Court shall have **original jurisdiction** "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party" (modified by the Eleventh Amendment). Congress has enacted legislation giving the District Courts **concurrent jurisdiction** in cases dealing with "Ambassadors, other public Ministers and Consuls," as well as in cases between the U.S. government and one or more state governments. As a result, the Supreme Court has exclusive original jurisdiction only in suits between state governments, often involving boundary disputes. These cases, while important in themselves, represent a minute proportion of the Court's caseload.

The Supreme Court's **appellate jurisdiction** extends to all federal cases "with such Exceptions, and under such Regulations as the Congress shall make" (U.S. Constitution, Article III, Section 2). Appellate cases coming to the Supreme Court from the lower federal courts usually come from the thirteen Courts of Appeals, although they may come from the U.S. Court of Appeals for the Armed Forces, or, under special circumstances, directly from the District Courts. Appellate cases may also come from the state courts of last resort, usually, but not always, designated as state supreme courts.

Although Congress is authorized to regulate the appellate jurisdiction of the Supreme Court, it has rarely used this power to curtail the Court's authority. Rather,

Congress has facilitated the institutional development of the Court by minimizing its mandatory appellate jurisdiction and thus giving it control over its own agenda. Likewise, Congress has delegated to the Court the authority to promulgate **rules of procedure** for itself and the lower federal courts. Consequently, the Supreme Court is nearly autonomous with respect to the determination of its decision making process.

TO SUMMARIZE:

- Constitutional law evolves through a process of judicial interpretation in the context of particular cases. These cases may arise in either state or federal courts.
- The most authoritative judicial interpretations of the Constitution are those rendered by the U.S. Supreme Court.
- Although the Supreme Court has both original and appellate jurisdiction, its appellate jurisdiction is far more important because the Court's principal function is to review lower federal court decisions and state court decisions involving federal questions. Federal law authorizes the Court to grant certiorari to review all cases, state or federal, that raise substantial federal questions. Because certiorari is granted at the Court's discretion, the Court has extensive control over its own agenda. This facilitates the Court's role as a policy making body.

CROSSING THE THRESHOLD: ACCESS TO JUDICIAL REVIEW

Throughout its history the Supreme Court has consistently refused to render advisory opinions. This policy dates from an early circuit court opinion in which two members of the Supreme Court joined a federal district judge in refusing to advise Congress and the Secretary of War on soldiers' pension applications (see *Hayburn's Case* [2 U.S. 408 1792]). In 1793 Chief Justice John Jay, expressing the view of the Court, wrote a letter to President George Washington declining his request for advice regarding the status of American neutrality in the war between France and England.

The Genesis of Constitutional Law Cases

Consistent with its refusal to render advisory opinions, the Supreme Court's decisions are limited to real controversies between adverse parties. These controversies take the form of cases. The court case is the basic building block of American law. Cases, including those presenting constitutional questions, begin in one of two ways: as **civil suits** or **criminal prosecutions.**

A civil suit begins when one party, the **plaintiff**, files suit against another party, the **defendant**. Sometimes, a plaintiff files a **class action** on behalf of all "similarly situated" persons. In some civil cases, the plaintiff accuses the defendant of violating his or her constitutional rights. Because constitutional rights are essentially limitations on the actions of government, the **respondent** in such a civil suit is generally a governmental official. Suits against government agencies per se are often, but not always, barred by the doctrine of **sovereign immunity.** Congress and every state legislature have passed laws waiving sovereign immunity with regard to certain types of claims.

Every civil suit seeks a remedy for an alleged wrong. The remedy may be monetary compensation for **actual damages** or **punitive damages.** It may be a court order requiring **specific performance** from or barring specified action by the defendant. It may be a simple **declaratory judgment**—a statement from the court declaring the

rights of the litigants. Sometimes, a plaintiff will seek an **injunction** against a defendant to cause an ongoing injury to cease or to prevent an injury from occurring.

In a civil suit alleging the violation of a constitutional right, all of the aforementioned remedies are available to the plaintiff. However, because many government officials (judges, legislators, governors, and so forth) are immune from suits for monetary damages stemming from their official decisions or actions, suits against government officials tend to seek declaratory judgments and/or injunctions. A person who is threatened with criminal prosecution under an unconstitutional statute may seek an injunction against enforcement of the law by filing a civil suit against the prosecutor. *Roe v. Wade,* the landmark abortion decision, began when Jane Roe, an unmarried pregnant woman, brought suit against Henry Wade, the district attorney in Dallas, Texas, seeking to permanently enjoin Wade from enforcing the state's abortion law against her and other "similarly situated" women (see Chapter 6, Volume II).

In certain instances individuals whose constitutional rights have been violated may recover monetary damages. The Civil Rights Act of 1866 (42 U.S.C. § 1983) permits courts to award monetary damages to plaintiffs whose constitutional rights are violated by persons acting under "color of law." A good example of this type of action is seen in the Rodney King case, in which the plaintiff recovered monetary damages in a Section 1983 lawsuit stemming from an incident of police brutality in Los Angeles that was witnessed on TV by the entire nation.

Criminal prosecutions often raise constitutional issues. As noted above, one who is threatened with criminal prosecution under an unconstitutional statute can seek an injunction to bar the prosecutor from enforcing the law. Once a prosecution is under way, however, the usual means of challenging a statute is by filing a **demurrer** to an **indictment** or through the appropriate **pretrial motion.** If one is convicted under an arguably unconstitutional statute, the appropriate remedy is, of course, an appeal to a higher court. Many criminal convictions are challenged in this way. As an illustration, consider the case of *Texas v. Johnson* (1989), the landmark "flag burning" case. Gregory Johnson was convicted of violating the Texas law making it a crime to desecrate the American flag. He appealed his conviction to the Texas Court of Criminal Appeals, the state court of last resort in criminal cases, arguing that the conviction violated his constitutional rights. The Court of Criminal Appeals agreed, saying the state flag desecration law was unconstitutional. The state of Texas obtained review in the U.S. Supreme Court on a writ of certiorari, but to no avail. The Supreme Court, in a highly publicized and controversial decision, agreed with the Texas Court of Criminal Appeals: It was held unconstitutional to punish someone for the act of burning the American flag as a form of political protest (see Chapter 3, Volume II).

Very often constitutional issues arise in criminal cases owing to the actions of the police or the prosecutor, or decisions made by the trial judge on the admission of evidence or various trial procedures. The federal Constitution provides a host of protections to persons accused of crimes, including freedom from unreasonable searches and seizures, compulsory self-incrimination, double jeopardy, and cruel and unusual punishments (see Chapter 5, Volume II). Frequently, these protections are invoked by persons challenging their convictions on appeal.While the overwhelming majority of these appeals are resolved by intermediate appellate courts or state courts of last resort, a small number of such cases are heard each term by the U.S. Supreme Court. Some of the Supreme Court's most famous decisions, e.g., *Mapp v. Ohio* (1961) and *Miranda v. Arizona* (1966), have involved the rights of persons accused of crimes.

Habeas Corpus The Constitution explicitly recognizes the **writ of habeas corpus,** an ancient common law device that persons can use to challenge the legality of arrest or imprisonment. One who believes that he or she is being illegally detained, even if that

person is in prison after being duly convicted and exhausting the ordinary appeals process, may seek a writ of habeas corpus in the appropriate court. In 2002, relatives of foreign nationals apprehended pursuant to the "war on terrorism" and incarcerated at the American naval base at Guantanamo Bay, Cuba sought habeas corpus relief in the federal courts. Despite lower court decisions holding that federal courts did not have jurisdiction, the Supreme Court held that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority." This controversial decision opened the door to judicial review of the confinement of hundreds of alleged enemy combatants being held in indefinite detention by the military pursuant to an order of the President (see *Rasul v. Bush* [2004], excerpted at the end of this chapter).

The federal habeas corpus statute affords opportunities to persons convicted of crimes to obtain review of their convictions in federal courts, even if they received appellate review in the state courts. Some of the Supreme Court's most important decisions in the area of criminal procedure, for example, *Gideon v. Wainwright* (1963), have come in federal habeas corpus cases filed by state prisoners. A proliferation of such cases beginning in the 1960s led critics to call for the curtailment or outright abolition of federal habeas corpus review of state criminal cases. Although it has not been abolished, federal habeas corpus review has been restricted in recent years, both through congressional and judicial action (see Chapter 5, Volume II).

Standing

After determining that a real case or controversy exists, a federal court must ascertain whether the plaintiff or petitioner has **standing.** This is simply a determination of whether these parties are the appropriate ones to litigate the legal questions presented by the lawsuit. The Supreme Court has developed an elaborate body of principles defining the nature and contours of standing. Essentially, to have standing a party must have a personal stake in the case. Thus, a plaintiff must have suffered some direct and substantial injury, or be likely to suffer such an injury if a particular legal wrong is not redressed. A defendant must be the party responsible for perpetrating the alleged legal wrong.

In most situations a taxpayer does not have standing to challenge policies or programs that he or she is forced to support. In *Frothingham v. Mellon* (1923), the Supreme Court held that one who invokes federal judicial power "must be able to show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the statute's enforcement, and not merely that he suffers in some indefinite way common with people generally." In a modern application of the prohibition against **taxpayer suits** the Court denied standing to a group of taxpayers challenging a transfer of federal property to a private Christian college (see *Valley Forge College v. Americans United for Separation of Church and State, Inc.* [1982]). Writing for a sharply divided Court, Justice William H. Rehnquist said:

> We simply cannot see that respondents have alleged an *injury of any kind*, economic or otherwise, sufficient to confer standing. Respondents complain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer from a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare.

In *Raines v. Byrd* (1997), the Supreme Court denied standing to six members of Congress who sought to challenge the constitutionality of an act of Congress providing

the president with line-item veto authority. Each of the plaintiffs had voted against the act, but the Court concluded that because the president had not yet exercised his line-item veto power, they could not show that they had been injured by the measure. By the end of 1997, President Bill Clinton had exercised the line-item veto a number of times, and several of these instances provoked affected parties to file suit. In *Clinton v. City of New York* (1998), the Court reached the merits of the dispute and declared the line-item veto law unconstitutional (see Chapter 3).

A more recent example of the Supreme Court's complex standing jurisprudence arose out of Michael Newdow's highly publicized First Amendment challenge of a local school board's requirement that the Pledge of Allegiance, with its reference to "one nation under God," be conducted at the beginning of each school day. Newdow was the noncustodial parent of a child who attended one of the schools covered by this policy. Sandra Banning, the child's mother, intervened in the lawsuit, contending that, as her daughter's sole legal custodian, she felt "that it was not in the child's interest to be a party to Newdow's lawsuit." In a 2004 decision the Supreme Court, in an opinion by Justice John Paul Stevens, denied standing to Mr. Newdow, concluding that it would be "improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when the prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing."

The issue of standing is far more than a mere technical aspect of the judicial process. The doctrine of standing determines who may challenge government policies and, to some extent, what types of policies may be challenged. Arguments over standing reflect different conceptions of the role of the federal courts in the political system.

Dissenting in *Warth v. Seldin* (1975), Justice William O. Douglas observed that "standing has become a barrier to access to the federal courts." Douglas insisted that "the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed." He concluded that the "technical barriers" should be lowered so that the courts could "serve that ancient need." A sharply contrasting position is offered by Justice Lewis Powell, concurring in *United States v. Richardson* (1975):

> Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me that allowing unrestricted . . . standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.

Mootness

A case is moot if the issues that gave rise to it have been resolved or have otherwise disappeared. Such a case is apt to be dismissed because a court decision would have no practical effect. An excellent example of a constitutional case being dismissed for **mootness** is *School District 241 v. Harris* (1995). In 1991, a group of students and parents, backed by the American Civil Liberties Union, filed suit to challenge two prayers and a hymn that were part of a graduation ceremony at an Idaho public high school.

The federal district court in Idaho rejected the challenge, but the Ninth Circuit Court of Appeals declared the practice unconstitutional under the Establishment Clause of the First Amendment. The Supreme Court remanded the case, instructing the Court of Appeals to dismiss it as moot because the students who filed the suit had graduated. This illustrates how the Court can use the mootness doctrine to avoid consideration of a controversial constitutional question.

If the federal courts strictly adhered to the mootness rule, certain inherently time-bound questions would never be addressed. Such issues are, in the Supreme Court's words, "capable of repetition, yet evading review." *Roe v. Wade* (1973), the landmark abortion case, provides a good illustration. The gestation period of the human fetus is nine months; the gestation period for constitutional litigation tends to be much longer! Thus, by the time the *Roe* case reached the Supreme Court, Jane Roe had given birth to her child. Explaining the Court's refusal to dismiss the case as moot, Justice Harry R. Blackmun's majority opinion stated:

> The usual rule . . . is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation will seldom survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness.

In *Roe,* the Court chose to relax the mootness rule to address an important issue. Had the Court been disinclined to deal with the divisive abortion question, however, the mootness doctrine would have provided a convenient "out."

Ripeness

A case that comes to court too late, like *School District 241 v. Harris,* may be dismissed as moot; one that comes to court too soon may be dismissed as "not ripe for review." The purpose of the **ripeness doctrine** is to prevent the courts from getting prematurely involved in issues that may ultimately be resolved through other means. Like the doctrines of standing and mootness, the ripeness doctrine is not merely a means of conserving judicial power, but can be used flexibly as part of the judicial agenda-setting process.

A classic example of the use of the ripeness doctrine to avoid an important constitutional issue occurred in *Poe v. Ullman* (1961). In this case, the Supreme Court dismissed a challenge to a nineteenth century Connecticut law that prohibited practicing birth control through artificial means. The Court said that since the law had not yet been enforced against the plaintiffs, the case was not ripe for judicial review. Eventually, the Court reviewed and struck down the Connecticut statute, but only after an individual was convicted and fined for violating the law (see *Griswold v. Connecticut* [1965], discussed and reprinted in Chapter 6, Volume II).

Exhaustion of Remedies

A close cousin of the ripeness doctrine is the **exhaustion of remedies** requirement. For a case to be ripe for judicial consideration, the parties must first have exhausted all nonjudicial remedies. This doctrine applies primarily to cases that involve decisions by administrative or regulatory agencies. Thus, for example, a corporation that has been denied a broadcasting license by the Federal Communications Commission must first exhaust all means of appeal within the FCC before taking the case to federal court. The exhaustion of remedies doctrine is designed to avoid unnecessary litigation and allows the courts to defer to agency "experts" in the resolution of what can be complex and technical issues.

In *Natural Gas Pipeline Company v. Slattery* (1937), the Supreme Court said that the exhaustion requirement had "especial force" when the case involved a state, as distinct from a federal, agency. In such cases the Court's customary deference to the executive branch is compounded with its traditional deference to state governments. Judicial intervention into state or federal agency decision making may be justified, however, in order to prevent "irreparable injury" from being inflicted on a citizen or company (see *Oklahoma Natural Gas Company v. Russell* [1923]).

The Doctrine of Abstention

Closely akin to exhaustion of remedies is the **doctrine of abstention.** Whereas the principal application of the exhaustion of remedies doctrine is to bureaucratic decision making, the primary application of abstention is to the state court systems. Essentially, the abstention doctrine prohibits the federal courts from intervening in state court proceedings until they have been finalized. Thus a person convicted of a crime in a state court normally must exhaust all means of appeal in the state judiciary before petitioning the U.S. Supreme Court for a writ of certiorari or a federal district court for a writ of habeas corpus.

Under the doctrine of abstention, federal judges normally abstain from issuing injunctions to prevent persons from being prosecuted under unconstitutional state statutes. For example, in *Younger v. Harris* (1971), the Supreme Court said it was improper for a federal court to enjoin a state prosecutor from trying a man under a state law virtually identical to one that had recently been declared unconstitutional. Writing for the Court, Justice Hugo Black stressed the notion of "comity," which entails mutual respect between the state and federal governments.

The Political Questions Doctrine

Even though a case may meet the formal prerequisites of jurisdiction, standing, ripeness, and exhaustion of remedies, the federal courts may still refuse to consider the merits of the dispute. Under the **political questions doctrine**, cases may be dismissed as nonjusticiable if the issues they present are regarded as extremely "political" and thus inappropriate for judicial resolution. Of course, in a broad sense, all constitutional cases that make their way into the federal courts are political in nature. The political questions doctrine really refers to those issues that are likely to draw the courts into a political battle with the executive or legislative branch, or that are simply more amenable to executive or legislative decision making.

The doctrine of political questions originated in *Luther v. Borden* (1849). In this case, the Supreme Court refused to take sides in a dispute between two rival governments in Rhode Island, one based on a popular referendum, the other based on an old royal charter. Writing for the Court, Chief Justice Roger B. Taney observed that the argument in the case "turned on political rights and political questions." Not insignificantly, President John Tyler had agreed to send in troops to support the charter government before the case ever went to the Supreme Court.

The best-established application of the political questions doctrine is the federal courts' unwillingness to enter the fields of international relations, military affairs, and foreign policy making. This was demonstrated in *Massachusetts v. Laird* (1970), in which the Supreme Court dismissed a suit challenging the constitutionality of the Vietnam War. This position was reaffirmed in *Goldwater v. Carter* (1979), in which the Court refused to entertain a lawsuit brought by a U.S. senator challenging President Carter's unilateral termination of a defense treaty with Taiwan.

For many years, the federal courts used the political questions doctrine to stay out of controversies involving the apportionment of legislative districts. In *Colegrove v. Green* (1946), Justice Felix Frankfurter warned of the dangers of entering the "political thicket" of reapportionment. But in *Baker v. Carr* (1962), the Supreme Court, in a lengthy opinion by Justice William Brennan, held that legislative malapportionment (that is, gross disparities in population among districts) was a justiciable question in federal court. This decision signaled a veritable revolution, in which federal courts directed the reapportionment of legislative districts at all levels of government, from the House of Representatives to local school boards, on the basis of "one person, one vote." In *Nixon v. United States* (1993) the Justices voted 9 to 0 to dismiss a suit challenging the Senate's current method for holding impeachment trials. Under this shortcut procedure, a committee of twelve senators hears testimony, reviews the evidence, and prepares a summary report to the full Senate. After hearing oral arguments from the accused and the "impeachment managers" from the House of Representatives, the full Senate votes on whether the accused should be removed from office. Former federal district judge Walter L. Nixon, who had been removed from office after being impeached, argued that the shortcut procedure violated Article I, Section 3, clause 6, which provides that the "Senate shall have the sole Power to try all Impeachments." The Supreme Court found the Senate's choice of the means for fulfilling its obligation under the Impeachment Trial Clause to be a nonjusticiable political question.

TO SUMMARIZE:

- Federal courts are not in the business of rendering advisory opinions on the meaning of the Constitution. Rather, their decisions are limited to real controversies between adverse parties.
- The Supreme Court has articulated several doctrines that limit access to judicial review. Chief among them are standing, ripeness, mootness, exhaustion of remedies, and the political questions doctrine.

THE SUPREME COURT'S DECISION MAKING PROCESS

The exclamation "I'll fight it all the way to the Supreme Court if I have to!" is a stock phrase in American political rhetoric. Yet it is extremely difficult to get one's case before the High Court. The Supreme Court uses its limited resources to address the most important questions in American law. The rectification of injustices in individual cases is usually accorded much lower priority.

Case Selection

There are three mechanisms by which the Supreme Court reviews lower court decisions. By far the rarest is **certification**, in which a federal appeals court formally asks the Supreme Court to certify or "make certain" a point of law. The second is on appeal by right in which, at least theoretically, the Court must rule on the merits of the appeal. As noted earlier, however, Congress has restricted such appeals to a few narrow categories of cases. By far the most common means by which the Court grants review is through the writ of certiorari.

One who loses an appeal in a state court of last resort or a federal court of appeals may file a petition for certiorari in the Supreme Court. The filing fee is currently $300, which may be waived for indigent litigants on the filing of a motion to proceed

in forma pauperis. About two-thirds of the cert petitions the Supreme Court receives are filed *in forma pauperis;* most of these come from prisoners seeking further review of their convictions or sentences.

The chances of the Supreme Court granting review in a given case are very slim. The odds are somewhat improved if the case originated in a federal court. The odds are much better still if the petitioner is the federal government, the most frequent litigator in the federal courts. Of the approximately 8,000 petitions for certiorari coming to it each year, the Court will normally grant review in only about a hundred, and even some of these cases will be dismissed later without a decision on the merits. Others will be disposed of through brief **memorandum decisions,** in which the Court does not provide its reasoning through the issuance of opinions. Over the last decade the Supreme Court has averaged about 85 full opinion decisions annually, in contrast to a yearly average of about 150 in the early 1980s. In the first Term of the Supreme Court under Chief Justice John Roberts, ending on June 29, 2006, the Court handed down only 71 such decisions.

The process of case selection actually begins with the justices' **law clerks** (staff attorneys) reading the numerous petitions for certiorari and preparing summary memoranda. With the assistance of clerks, the chief justice, who bears primary responsibility for Court administration, prepares a **discuss list** of cases to be considered for certiorari. The associate justices may add cases to the list. Unless at least one justice indicates that a petition should be discussed, review is automatically denied, which disposes of more than 70 percent of the petitions for certiorari.

The Court considers petitions on the discuss list in private conferences. A conference, usually lasting the better part of a week, is held immediately before the commencement of the Court's term in October. This **preterm conference** is devoted entirely to consideration of cert petitions. Regular conferences are held throughout the term, both for the purpose of reviewing cert petitions and for discussing and deciding the cases in which the Court has granted review.

At least four justices must vote to grant certiorari in order for the Court to accept a case from the discuss list. The **rule of four** permits a minority of justices to set the Court's agenda. There is evidence that this happens fairly routinely. In such situations, it would be possible for the five justices who voted against cert to vote subsequently to dismiss the case without reaching the merits. Yet institutional norms militate against this strategy, suggesting the collegiality of the Court as a decision making body.

Nearly 99 percent of the petitions for certiorari coming to the Supreme Court are denied. A denial of certiorari, just like the dismissal of an appeal, has the effect of sustaining the lower court decision under challenge. An important distinction is made, however, between denials of certiorari and dismissals of appeal. According to the Supreme Court's decision in *Hopfman v. Connolly* (1985), a denial of cert carries no weight as **precedent**, whereas dismissal of an appeal "for want of a substantial federal question" has binding precedential effect on lower courts. The fact that the Court has decided not to review a lower court decision does not mean that the Court necessarily approves of the way it was decided. There is nothing to prevent the Court from reaching the same issue in a future case and deciding it differently. Denial of certiorari thus may be as much a function of scarce judicial resources as it is an expression of approval of the lower court decision. Because it entails the authoritative allocation of values by government, the Court's case selection process must be viewed as inescapably political.

Summary Decisions

As noted previously, not all cases accepted by the Supreme Court are afforded **plenary review,** or "full-dress treatment." Some cases are decided summarily—that is, quickly,

without the benefit of full argumentation before the Court. These decisions are rendered in the form of a memorandum or *per curiam* (unsigned) opinion, usually with little discussion or justification. Although memorandum decisions are fully binding on the parties to the case, they are accorded little individual significance as precedents. The major function of **summary decisions** is **error correction;** they have little impact on constitutional lawmaking.

Submission of Briefs

In cases slated for plenary review, lawyers for both parties (the petitioner and the respondent or the appellant and the appellee) are requested to submit **briefs.** Briefs are written documents containing legal arguments in support of a party's position. By Court rule, the parties' briefs are limited to fifty pages. In addition to the briefs submitted by the parties to the litigation, the Court may permit outside parties to file ***amicus curiae*** ("friend of the court") briefs. *Amicus* briefs are often filed on behalf of organized groups that have an interest in the outcome of a case. Examples of interest groups that routinely file *amicus* briefs in the Supreme Court include the American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored People (NAACP), and Americans United for Separation of Church and State.

Oral Argument and Conference

After the briefs of parties and *amici* have been submitted, the case is scheduled for **oral argument** a public hearing where lawyers for both sides appear before the Court to make verbal presentations and, more importantly, answer questions from the bench. The oral argument is the only occasion on which lawyers in a case have any direct contact with the justices.

Oral arguments are normally held on Mondays, Tuesdays, and Wednesdays beginning on the first Monday in October and ending in late April. Oral argument on a given case is usually limited to one hour. Four cases will be argued before the Court on any given oral argument day. "Court watchers" (including representatives of interest groups, the media, and academia) often attend oral arguments hoping to learn something about the Court's predisposition with respect to the case under consideration or something about the general proclivities of the justices, especially the most recent appointees.

Within days after a case is orally argued, it is discussed in private **conference** among the justices. Conferences are usually held on Wednesdays, Thursdays, and Fridays. At conference, the chief justice opens the discussion by reviewing the essential facts of the case at hand, summarizing the history of the case in the lower courts, and stating his view as to the correct decision. This provides the chief with a chance to influence his colleagues, an opportunity that only a few occupants of the office have been able to exploit. It is well known, however, that Chief Justice Charles Evans Hughes was on occasion able to overwhelm other members of the Court by a photographic memory that gave him command of legal and factual details.

After the chief justice has presented the case, associate justices, speaking in order of seniority, present their views of the case and indicate their "votes" as to the proper judgment. This original vote on the merits is not binding, however, and justices have been known to change their votes prior to the announcement of the decision. The final vote is not recorded until the decision is formally announced.

Judgment and Opinion Assignment

In deciding a case that has been fully argued, the Court has several options. First, the Court may decide that it should not have granted review in the first place, whereupon the petition is dismissed as having been "improvidently granted." This occurs infrequently. Alternatively, the Court may instruct the parties to reargue the case, focusing on somewhat different issues. The case is then likely to be carried over to the Court's next term and not decided with finality until more than a year after the original argument. This is precisely what happened in two of the most significant cases of the twentieth century: *Brown v. Board of Education* (1954), the school desegregation case, and *Roe v. Wade* (1973), the abortion case. It is interesting to note that in the *Brown* case, the Court not only called for reargument of the issues, but, under the leadership of the newly appointed Chief Justice Earl Warren, delayed its decision until unanimity could be achieved.

If the Court decides to render judgment, it will **affirm** (uphold), **reverse** (overturn), or **vacate** (cancel or nullify) the decision of the lower court. Alternatively, it may modify the lower court's decision in some respect. Reversal or modification of a lower court decision requires a majority vote, a quorum being six justices. A tie vote (in cases where one or more justices do not participate) always results in the affirmance of the decision under review.

Once a judgment has been reached, it remains for the decision to be explained and justified in one or more written opinions. In the early days of the Court, opinions were issued *seriatim*—that is, each justice would produce an opinion reflecting his views of the case. John Marshall, who became chief justice in 1801, is generally credited with instituting the practice of issuing an Opinion of the Court, which reflects the views of at least a majority of the justices. It appears that this practice was actually begun a few years earlier by Marshall's immediate predecessor, Chief Justice Oliver Ellsworth. The **Opinion of the Court**, referred to as the **majority opinion** when the Court is not unanimous, has the great advantage of providing a coherent statement of the Court's position to the parties, the lower courts, and the larger legal and political communities.

It must be understood, however, that even a unanimous vote in support of a particular judgment does not guarantee that there will be an Opinion of the Court. Justices can and do differ on the rationales they adopt for voting a particular way. Every justice retains the right to produce an opinion in every case, either for or against the judgment of the Court. A **concurring opinion** is one written in support of the Court's decision; a **dissenting opinion** is one that disagrees with the decision. An **opinion concurring in the judgment** is one that supports the Court's decision, but disagrees with the rationale expressed in the majority opinion.

Dissenting opinions, indicative of intellectual conflict on the Court, are very important in the development of American constitutional law. It is often said that "yesterday's dissent is tomorrow's majority opinion." Usually, the time lag is much longer, but there are a number of examples of dissents being vindicated by later Court decisions. Nevertheless, it is more frequently the case that a dissenting vote is merely a defense of a dying position.

Since the 1930s the number of concurring and dissenting opinions has dramatically increased, reflecting both the growing complexity of the law and the demise of consensual norms in the Court itself. The modern Court appears to be less collegial in its decision making and to operate more like "nine separate law firms." When the Court fails to produce a majority opinion, typically one opinion announces the judgment of the Court and states the views of those justices who endorse that opinion. This is referred to as the plurality opinion if it garners the most signatures among

those justices who support the Court's decision. Note that, because it does not express the views of a majority of justices, the plurality opinion has no official weight as precedent.

Alternatively, the judgment of the Court may be expressed in a ***per curiam*** opinion, which is not attributed to any particular justice. Thus, the maximum number of opinions that may be produced in one decision is ten: one *per curiam* opinion announcing the decision of the Court followed by nine individual concurring or dissenting opinions. This occurred in the famous Pentagon papers case of 1971. The Court voted 6 to 3 to permit the *New York Times* and the *Washington Post* to publish the Pentagon papers despite an attempt by the Nixon administration to prevent the newspapers from doing so. The decision was announced in a three-paragraph *per curiam* opinion. Six justices (namely, Black, Douglas, Brennan, Stewart, Marshall, and White) authored concurring opinions. Three of their colleagues (Chief Justice Burger and Justices Blackmun and Harlan) wrote dissenting opinions (see *New York Times Company v. United States* [1971], discussed and reprinted in Chapter 3, Volume II).

Persistent criticism of the Court's failure to produce majority opinions in a number of important constitutional cases, especially in the 1970s and 1980s, may have contributed to a moderate reversal of this trend in the 1990s. It is understandable that judicial scholars as well as lower court judges and others responsible for implementing Supreme Court decisions would attach great value to the Opinion of the Court. Of course, the agreement of at least five justices on a coherent rationale in support of virtually any constitutional decision is not easily achieved. It requires both a high degree of collegiality among the justices and leadership from the chief justice. The many complex issues coming before the Court allow for a wide range of responses from individual justices, compounding the difficulty of forging a majority opinion.

In an effort to obtain this level of agreement, the chief justice, assuming he is in the majority, will either prepare a draft opinion himself or assign the task to one of his colleagues in the majority. If the chief is in dissent, the responsibility of opinion assignment falls on the senior associate justice in the majority. Sometimes, in a 5-to-4 decision, a majority opinion may be "rescued" by assigning it to the swing voter—that is, the justice who was most likely to dissent. On the modern Court, the task of writing majority opinions is more or less evenly distributed among the nine justices. However, majority opinions in important decisions are more apt to be authored by the chief justice or a senior member of the Court.

After the opinion has been assigned to one of the justices, work begins on a rough draft. At this stage the law clerks play an important role by performing legal research and assisting the justice in the writing of the opinion. When a draft is ready, it is circulated among those justices in the majority for their suggestions and, ultimately, their signatures. A draft opinion that fails to receive the approval of a majority of justices participating in a given decision cannot be characterized as the Opinion of the Court. Accordingly, a draft may be subject to considerable revision before it attains the status of majority opinion.

The Supreme Court announces most of its plenary decisions in open court, often late in the term. A decision is announced by the author of the majority or plurality opinion, who may even read excerpts from that opinion. In important and controversial cases, concurring and dissenting justices will read excerpts from their opinions as well. When several decisions are to be announced, the justices making the announcements will speak in reverse order of their seniority on the Court. After decisions are announced, summaries are released to the media by the Court's public information office. Today, the nation is informed of an important Supreme Court decision within minutes of its being handed down.

Publication of Supreme Court Decisions

The decisions of the Supreme Court, indeed of all appellate courts in this country, are published in books known as **case reporters.** The official reporter, published by the U.S. Government Printing Office, is titled the *United States Reports* (abbreviated U.S. in legal citations). West Publishing Company publishes a commercial edition entitled *Supreme Court Reporter* (abbreviated S.Ct.). Finally, the LexisNexis publishes the *United States Supreme Court Reports, Lawyers' Edition* (abbreviated L.Ed. or, for volumes since the mid-1950s, L.Ed. 2d). Lawyers, judges, academics, and students wishing to read the decisions of the Supreme Court may utilize any of these reporters, and references to the Court's decisions usually cite all three.

For example, the Pentagon papers case, *New York Times v. United States,* is cited as 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed. 2d 822 (1971). This indicates that the case can be located in Volume 403 of the *United States Reports,* beginning on page 713, or Volume 91, page 2140, and Volume 29, page 822, of the *Supreme Court Reporter* and *Lawyers' Edition,* respectively.

In the last several years, the Court has made its decisions available to the public on the Internet, a boon to students and scholars. One of the easiest ways to access these decisions is to go to www.findlaw.com, which is a very comprehensive legal resources Web site. The Supreme Court's official Web site, located at www.supremecourtus.gov, not only provides the Court's opinions, but also its docket, calendar for oral arguments, briefs of counsel, and the Court's rules of procedure.

TO SUMMARIZE:

- The Supreme Court hands down both plenary and summary decisions. Summary dispositions are made without the benefit of full argumentation before the Court. The major function of summary decisions is error correction, as opposed to legal policy making.
- Plenary decisions are characterized by the submission of briefs by the parties, oral argument, and the issuance of full opinions from the Court.
- The justices reach their decisions in private conferences in which votes are taken and opinion assignments are made.
- Decisions and their accompanying opinions are published in the *United States Reports,* the *Supreme Court Reporter,* and the *Lawyers' Edition*. The Court also makes electronic versions of its decisions available to the public via the Internet.

THE DEVELOPMENT OF JUDICIAL REVIEW

As we have noted, judicial review is the cornerstone of American constitutional law. In American constitutional law, judicial review denotes the power of a court of law to review a policy of government (usually a legislative act) and to invalidate that policy if it is found to be contrary to constitutional principles. In effect, a court of law has the power to nullify an action of the people's elected representatives, if what they have done is determined to be unconstitutional.

Judicial review is a uniquely American invention. Although **English common law** courts exercised the power to make law in some instances, no English court claimed the authority to nullify an act of Parliament. However, in *Dr. Bonham's Case* (1610), the great English jurist Sir Edward Coke recognized that parliamentary enactments were subordinate to the fundamental principles of the common law. Although this was not

an outright endorsement of judicial review as we know it today, Coke's holding was important in recognizing that legislative acts must conform to some higher law.

While judicial review is normally associated with the U.S. Supreme Court, it is a power possessed by most courts of law in this country. In fact, a nascent form of judicial review had already been exercised by a few state courts prior to the adoption of the U.S. Constitution (see, for example, *Trevett v. Wheeden,* Rhode Island [1786]). The Framers of the Constitution, however, did not explicitly resolve the question of whether the newly created federal courts should have this power. Article III is silent on the subject. It remained for the Supreme Court, in a bold stroke of legal and political genius, to assert this power.

Marbury v. Madison

The Supreme Court assumed the power to review legislation as early as 1796, when it upheld a federal tax on carriages as a valid exercise of the congressional taxing power (see *Hylton v. United States*). It is interesting to note that Alexander Hamilton, who, as a co-author of the *Federalist Papers,* had strongly endorsed judicial review, argued this case before the Supreme Court on behalf of the government. Although the *Hylton* decision approving congressional action implied the power of judicial review, it did not establish it; to do that the Court would have to strike down an act of Congress. The opportunity to do so came in 1803. The decision in *Marbury v. Madison* became the single most important ruling in Supreme Court history.

The *Marbury* case arose out of what may be fairly described as a bizarre set of circumstances. After the national election of 1800, in which the Federalists lost the presidency and both houses of Congress to the Jeffersonian Republicans, the Federalists sought to preserve their influence within the national government by enlarging their control over the federal courts. The lame duck Congress, in which the Federalists held a majority, quickly passed the Judiciary Act of 1801, which was signed into law by the lame duck president, John Adams. This Act reorganized the federal judiciary by creating six new federal circuits to be presided over by sixteen newly appointed judges, which under the Constitution President Adams would be able to fill with good Federalists, of course. This innovative Act formally abolished the burdensome duties of circuit-riding, a major source of complaint among Supreme Court justices. The incoming Jefferson Administration regarded this reform as a blatant political power play and engineered the repeal of the Act in 1802. Circuit-riding duties were reinstituted and, as previously noted, were not fully terminated until 1891.

The lame duck Federalist Congress also adopted legislation creating a number of minor judicial positions for the newly established District of Columbia. Here again, the power to fill these posts lay primarily with the president. William Marbury was one of the many Federalist politicians appointed to judicial office in the waning days of the Adams administration. Marbury's commission as justice of the peace for the District of Columbia had been signed by the president following Senate confirmation on March 3, 1801, President Adams's last full day in office. Everything was in order, and after Secretary of State John Marshall placed the seal of the United States on the letter of commission, it was ready to be delivered to Mr. Marbury. But for some reason, yet to be fully explained, the delivery, which was entrusted to John Marshall's brother James, never took place. Marbury's commission was returned to John Marshall's office on the evening of March 3 or the morning of March 4, along with several other justice of the peace commissions that James Marshall also failed to deliver. These commissions simply disappeared in the last-minute confusion of moving records and other papers from the office of the outgoing secretary of state, who was moving from the cabinet to his new post—chief justice of the United States.

Thomas Jefferson was sworn in as the nation's third president on March 4, 1801. The new secretary of state, James Madison, fully supported by the president, declined to deliver copies of the commissions to Marbury and the other Federalists who had failed to get their judgeships. After Marbury and others began to press the issue, Jefferson mounted an effort to repeal the Judiciary Act of 1801. A willing Congress, now dominated by Jeffersonian Republicans, was happy to oblige. Not only did Congress repeal the Judiciary Act, but it abolished the Supreme Court term of 1802! (Whether Congress could take such a bold step today is highly unlikely, since the annual Supreme Court term has become an institution in itself.)

Although having to wait until 1803 for a decision, Marbury and three other frustrated appointees filed suit against James Madison in the Supreme Court, invoking the Court's original jurisdiction. Marbury asked the Court to issue a writ of mandamus, an order directing Madison to deliver the disputed judicial commission to him. The stage was now set for a head-on collision between the Court, staffed entirely by Federalists, and the Jefferson administration.

It seems not to have occurred to the new chief justice that he should have recused himself (abstained) in the *Marbury* case. By today's standards of professional responsibility, Marshall's impartiality would have been doubted, to say the least. At the time of Marbury's appointment, John Marshall was a leader in the Federalist Party. He was central to the planning of the Judiciary Act of 1801 that had so enraged the Jeffersonians. Moreover, it was Marshall's failure as secretary of state to deliver Marbury's commission that necessitated the lawsuit!

John Marshall and his Federalist brethren on the Supreme Court found themselves in a dilemma. On the one hand they could issue the writ of mandamus and risk the very real possibility that the Jefferson administration would refuse to obey the Court, in which case the Court would suffer a serious blow to its prestige. To make matters worse, President Jefferson had strongly intimated that if the Court were to issue the mandamus, he would seek to have several members of the Court, including his distant cousin John Marshall, brought before Congress on articles of impeachment! On the other hand, if the Court were to deny Marbury his commission, it would have been widely perceived as an admission of weakness and would have damaged the prestige of the Court, not to mention that of the Federalist Party. While Chief Justice Marshall, a longtime opponent of Thomas Jefferson, did not back away from an opportunity to confront the new administration, neither of the aforementioned alternatives seemed palatable.

Marshall was an imposing figure—a man of great intellect and forceful personality who dominated the Court during his thirty-four-year tenure as chief justice. He spoke for an undivided Court in solving the *Marbury* puzzle. His solution, announced in an 11,000-word opinion that required four hours for him to read from the bench on February 24, 1803, emphasized the following conclusions: William Marbury had a legal right to his commission; by implication, the Jefferson administration was legally and morally wrong to deny it to him. The writ of mandamus afforded an appropriate remedy. However, the Court would not issue the writ of mandamus. The reason it would not do so, said John Marshall, was that the Court had no authority to issue the writ.

The Supreme Court's presumed authority to issue the writ of mandamus had been based on Section 13 of the Judiciary Act of 1789. Section 13 granted the Court the authority to "issue . . . writs of mandamus, in cases warranted by the principles and usages of law." According to John Marshall's opinion in *Marbury,* however, the Court could not issue the writ because the relevant provision of Section 13 was unconstitutional. It was invalid, according to Marshall, because it expanded the Court's original jurisdiction.

Article III, Section 2, of the Constitution expressly provides that Congress has authority to regulate the appellate jurisdiction of the Supreme Court. The implication is that Congress has no such authority with respect to the Court's original jurisdiction. In Marshall's view, Section 13 was invalid insofar as it permitted the Court to issue a writ of mandamus in a case under the Court's original jurisdiction. The Court had held for the first time that an act of Congress was null and void.

Many legal scholars have questioned John Marshall's reasoning. One can argue that all that Congress had done in crafting Section 13 of the Judiciary Act was to recognize the Court's power to issue certain kinds of writs in cases appropriately before it. In other words, Congress had not expanded the Court's jurisdiction at all, but merely recognized a legal remedy that the Court might have possessed even in the absence of the statute! More recent research conducted by legal historian Thomas Y. Davies seriously questions whether the distinction between original and appellate jurisdiction was even applicable to the "prerogative writ" of mandamus. Rather, in 1803, mandamus power was still regarded as an inherent feature of the superintending authority of a supreme court. Thus, mandamus was implicit in the mandate for "one supreme Court" at the beginning of Article III of the Constitution. At that time, however, Marshall's reasoning on this issue was not seriously challenged.

A much larger question is posed in *Marbury v. Madison* than the validity of Section 13 of the Judiciary Act of 1789. Even assuming the invalidity of the act, where does the Supreme Court get the power to strike down the law? After all, the Constitution does not explicitly recognize judicial review. In support of this assumption of power, John Marshall reasoned that, because the Constitution is the "supreme law of the land," and it is the duty of the judiciary to interpret the law, judicial review is both necessary and inevitable. Perhaps because the Supremacy Clause of Article VI focuses on the subordinate relationship of state to federal law, Marshall relied more heavily on Article III, which established and broadly defined federal judicial power. It was in this context that Marshall made his frequently quoted assertion that "[i]t is emphatically the province and duty of the judicial department, to say what the law is." In reaching this conclusion, Marshall stressed the fact that judges take an oath to support and defend the Constitution. Marshall ended his landmark opinion with the question: "Why does a judge swear to discharge the duties agreeable to the Constitution of the United States, if that Constitution forms no rule for his government?"

Rejoinder to John Marshall

One of the most effective refutations of Marshall's position was offered by Justice John B. Gibson of the Pennsylvania Supreme Court. In a dissenting opinion in an otherwise unremarkable decision, *Eakin v. Raub* (1825), Gibson contended that the courts had no more authority to strike down legislative acts than the legislatures had to strike down judicial decisions. In Gibson's view, each branch of the government is ultimately responsible to the people for the constitutionality of its own acts. In support of this argument, Gibson noted that "[t]he oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government." Although Justice Gibson's position might still have some appeal in theory, judicial review has long been accepted as an essential power of American courts and an important feature of the system of checks and balances. Indeed, one can argue that without judicial review the system of checks and balances is incomplete, since judicial review is the only significant check that the courts have on the actions of the legislative and executive branches.

Early Development of Judicial Review

The Supreme Court's assertion of judicial review in *Marbury v. Madison* went largely unchallenged for two reasons. First, although claiming the right to review legislation, the Court avoided a confrontation with the president and Congress. Second, the provision invalidated by the Court was not a major element of public policy. Rather it was a minor provision of a law dealing with the judicial process itself, an area in which the Supreme Court might be presumed to have greater expertise and hence a greater claim to exercise judicial review. Some scholars have contended that the significance of *Marbury* as a precedent for the broad exercise of judicial review was not fully recognized until roughly the end of the nineteenth century. However, according to research by the authors, American courts cited *Marbury v. Madison* more than one hundred times prior to 1850.

Marbury v. Madison was the only instance in which the Supreme Court under John Marshall struck down an act of Congress. The Marshall Court did, however, use its power of judicial review to strike down a number of state laws in some very important cases. The Court's first clear exercise of this power came in 1810, in the highly politicized case of *Fletcher v. Peck,* in which the Court invalidated a Georgia law interfering with private property rights (see Chapter 2, Volume II).

Perhaps the most important of these state cases was *M'Culloch v. Maryland* (1819), in which the Court declared unconstitutional an attempt by a state to tax a branch of the Bank of the United States (see Chapter 2). Nearly as important was *Gibbons v. Ogden* (1824), in which the Court invalidated a New York law granting a monopoly to a steamboat company in contravention of a federal law granting a license to another company (see Chapter 2). Not only were the decisions in *M'Culloch v. Maryland* and *Gibbons v. Ogden* important as assertions of power by the Supreme Court, they were instrumental in enlarging the powers of Congress vis-à-vis the states.

In addition to asserting the power to invalidate state laws, the Marshall Court established its authority to overrule decisions of the highest state appellate courts on questions of federal law, both constitutional and statutory. Article VI provides that the Constitution, laws, and treaties of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Section 25 of the Judiciary Act of 1789 provided that appeals could be brought to the Supreme Court from certain decisions of the highest state courts. Against the strenuous objections of states' rights advocates, led by Judge Spencer Roane of Virginia, the Marshall Court successfully asserted federal judicial authority over the states with respect to the interpretation of federal law. Judge Roane conceded that state judges were bound by federal law, but asserted that state court decisions ought to be final in regard to the interpretation of federal law, including the U.S. Constitution.

When the Supreme Court invalidated Virginia's alien-inheritance and confiscation laws in 1813, the Virginia Supreme Court responded with an opinion by Chief Judge Roane declaring Section 25 of the Judiciary Act of 1789 unconstitutional. This action brought the case back to the U.S. Supreme Court. In a detailed opinion by Justice Joseph Story (John Marshall having recused himself due to earlier participation in this litigation, which had begun in the 1780s), the Supreme Court affirmed its power to review state court decisions on matters of federal law (*Martin v. Hunter's Lessee* [1816]).

States' rights advocates continued to assail Supreme Court authority to review the decisions of state courts on matters of federal law. The issue reached the Supreme Court once again in *Cohens v. Virginia* (1821). P. J. and M. J. Cohen had been convicted in a Virginia court of violating that state's law prohibiting the sale of lottery tickets.

The Cohens had been selling tickets in Norfolk for the Washington, D.C. lottery, which had been authorized by Congress to finance civic improvements in the capital.

The Cohens challenged their convictions in the Supreme Court, arguing that the federal law authorizing the lottery took precedence over the Virginia law criminalizing the sale of lottery tickets. On this point the Cohens ultimately lost, the Supreme Court concluding that Congress had not authorized the sale of lottery tickets outside the District of Columbia. From a technical standpoint this was a minor criminal case involving a fine of only $100. However, the competing forces of states' rights and national supremacy converted it into a major constitutional battle. Responding to Virginia's denial of the Supreme Court's authority to hear the Cohens' appeal, Chief Justice Marshall forcefully asserted the Supreme Court's jurisdiction over state court decisions "which may contravene the Constitution or the laws of the United States."

The *Dred Scott* Case

Although the Supreme Court under John Marshall succeeded in establishing and expanding the scope of judicial review, under Marshall's successor the Court damaged its credibility and prestige by an impolitic use of this power. The case was *Scott v. Sandford* (1857), the first Supreme Court decision after *Marbury v. Madison* to declare an act of Congress unconstitutional.

Slavery had been a divisive political issue as early as the Constitutional Convention of 1787. By the early nineteenth century it was clear that slavery threatened to disunite the United States. Congress responded by adopting a series of compromises on the issue. Perhaps the most important of these was the Missouri Compromise of 1820. Under this act of Congress, Missouri was admitted to the Union as a slave state—that is, one in which slavery would be legal. However, slavery would be prohibited in the remaining western territories north of 36 degrees 30 minutes latitude, a line corresponding to the southern boundary of Missouri.

The *Scott* case began when Dred Scott, a slave backed by Abolitionist forces, brought suit seeking emancipation from his owner, John Sandford. Scott was formerly owned by a Dr. Emerson, a surgeon in the U.S. Army. In 1834 Emerson had taken Scott from Missouri, where he had long resided, into the free state of Illinois and from there to Fort Snelling in the Wisconsin territory, which was also free under the Missouri Compromise. After several years Emerson and Dred Scott returned to Missouri. Within a short time, Emerson died, and title to Scott ultimately passed to John Sandford, a New Yorker. In 1846 Scott brought suit against Sandford in the Missouri courts to obtain his freedom, arguing that his several-year residency on free soil had nullified his status as a slave.

After a favorable decision for Scott at the lower court level, the Missouri Supreme Court rejected his claim. Dred Scott then initiated a federal lawsuit on the jurisdictional ground that he and Sandford were citizens of different states. In response to Scott's claim, Sandford contended that since Scott was a Negro, he was not a citizen of Missouri and that, accordingly, the federal courts had no jurisdiction in his case. Scott filed a demurrer in answer to this plea, arguing that Sandford's contention had no legal effect. Although the federal trial court sustained Scott's demurrer, thus possibly conceding his citizenship, it ruled against Scott's claim that his residency in a free territory entitled him to freedom. Scott appealed to the Supreme Court, and the case soon became the focal point of the intensifying conflict over slavery.

Both sides in the slavery controversy looked to the Court for a constitutional ruling vindicating their divergent views on the legal status of blacks and the power of Congress to regulate slavery in the territories. In 1857 five members of the Court, Chief Justice Roger B. Taney and four southern colleagues (Justices Campbell, Catron,

Daniel, and Wayne) supported the institution of slavery without reservation. Two of the four northerners on the Court, Justices Nelson and Grier, if not supporters of slavery, were at least anti-Abolitionist in their sentiments. These seven justices comprised the majority in the *Dred Scott* decision. Justices Curtis and McLean wrote strong dissenting opinions.

The *Dred Scott* decision was rendered in an atmosphere of intense emotion and political partisanship. Chief Justice Taney's impassioned majority opinion went far beyond the jurisdictional question presented in the case. The opinion held that blacks, not just slaves but free blacks as well, were not citizens of the United States and could "therefore claim none of the rights and privileges which [the Constitution] provides." Indeed, in Taney's view, blacks "had no rights or privileges except such as those who held the power and the Government might choose to grant them." The Court further ruled that the Missouri Compromise was an arbitrary deprivation of the property rights of slaveholders and, as such, offended the provision of the Fifth Amendment that prohibits government from depriving persons of property without "due process of law." The *Dred Scott* opinion embraces the doctrine of **substantive due process,** under which courts examine the *reasonableness* of governmental policies. The more conventional interpretation of the Due Process Clause is that government must follow certain procedures before taking a person's life, liberty, or property. In *Dred Scott* the Court used the Due Process Clause not to scrutinize government procedures, but to condemn the very substance of a government policy. This controversial doctrine would later be used by the Supreme Court in very different contexts from slavery.

The *Dred Scott* decision is also an extreme form of **judicial activism.** The decision was activist in the sense that the Court invalidated an act of Congress by invoking a novel, some would say dubious, constitutional doctrine. More fundamentally, it was activist in that the Court inserted itself into the slavery controversy, a deeply divisive issue that it could well have avoided. Far from resolving the slavery issue, the Court's decision greatly intensified the sectional conflict. A large and growing segment of the public simply rejected the legitimacy of the Court's constitutional theorizing on the slavery question. The *Dred Scott* decision and Chief Justice Taney soon became objects of ridicule in Abolitionist circles. The Court's intemperate decision thus not only hastened the arrival of the Civil War, but severely damaged the Court's prestige and credibility.

The *Dred Scott* decision itself was eventually nullified by the ratification of the Thirteenth Amendment, which outlawed slavery, and the Fourteenth Amendment, which provides that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside."

Judicial Review in the Latter Part of the Nineteenth Century

In light of the furor produced by the *Dred Scott* decision, it is significant that the institution of judicial review survived the Civil War intact. While the Supreme Court conspicuously avoided conflict with Congress and the president during the Civil War era (see, in particular, the later discussion of *Ex parte McCardle*), the Court soon reasserted its authority to invalidate acts of Congress. In the decades to follow, it would exercise the power of judicial review much more frequently than it did in the early nineteenth century. Yet it managed to avoid the great issues of public debate, and, accordingly, avoided the conflict that had characterized the *Dred Scott* decision. The period from 1865 to 1890 was thus one in which the Court quietly went about the task of rebuilding its prestige and credibility.

Judicial review again became a subject of political controversy near the end of the nineteenth century as the Supreme Court exercised its power to limit government

activity in the economic realm (see Chapter 2). A tendency to insulate laissez-faire capitalism from government intervention brought the Court, and its power of judicial review, under an increasing barrage of criticism from Populists and Progressives.

The Income Tax Case In *Pollock v. Farmer's Loan and Trust Company* (1895), the Court invalidated a federal law that imposed a 2 percent tax on incomes of more than $4,000 a year. Fourteen years earlier, in *Springer v. United States* (1881), the Court had upheld an income tax measure adopted by Congress during the Civil War. Article I of the Constitution requires that "direct Taxes shall be apportioned among the several States . . . according to their respective Numbers." In *Springer,* the Court had concluded that the income tax was an indirect tax not subject to the apportionment requirement. But in *Pollock* the Court, by a 5-to-4 margin, changed direction. The Court held that the new income tax was a direct tax insofar as it was based on incomes derived from land and, as such, had to be apportioned among the states. Since the law did not provide for apportionment, it was unconstitutional.

Nationally prominent corporate attorneys, including Joseph H. Choate, submitted elaborate briefs in opposition to the income tax. They branded the income tax as a populist assault on the institutions of capitalism. Choate condemned the tax as part of the "Communist march," which if not blocked would lead to further incursions on private property, "the very keystone of the arch upon which all civilized government rests." The Court majority was heavily influenced by this point of view, as evidenced by the following passage from a concurring opinion by Justice Stephen J. Field:

> The present assault upon capital is but the beginning. It will be a stepping stone to others larger and more sweeping till our political contests will become a war of the poor against the rich, a war constantly growing in intensity and bitterness.

The *Pollock* decision was assailed by numerous critics as proof that the Court was aligning itself with business interests and in opposition to a moderate tax broadly supported by the American people. The Court itself had exhibited deep internal division in reaching final disposition of the case. With Justice Howell Jackson not participating due to illness, the Court was evenly split when the case was first argued. Prior to reargument before a full Court later in the year, one of the justices changed his position, underscoring the shakiness of the majority. Consequently, *Pollock* was regarded as a dubious precedent.

Some observers believed that if Congress enacted another income tax measure, the Court would return to the *Springer* rationale and uphold the tax. This view was furthered by the replacement of several members of the *Pollock* majority in the late 1890s, Justice Field among them. In 1900 the Court upheld a graduated inheritance tax in *Knowlton v. Moore*. Then, in *Flint v. Stone Tracy Company* (1911), the Court sustained a tax levied on corporations as an excise tax on the privilege of doing business, even though the tax was measured by income. Before this ruling, however, Congress had proposed the Sixteenth Amendment, specifically authorizing taxation of income from any source without the requirement of apportionment among the states. By early 1913 the requisite three-fourths of the states had ratified the amendment, thus formally overruling the *Pollock* decision. As in the case of *Dred Scott v. Sandford,* a controversial Supreme Court decision had been nullified through constitutional amendment.

Judicial Review in the Twentieth Century

One of the most controversial decisions of the early twentieth century was *Lochner v. New York* (1905), in which the Supreme Court struck down a state law regulating working hours in bakeries. In the Court's view, the law was an unjustified interference with

"the right to labor, and with the 'liberty of contract' on the part of the individual, either as employer or employee." In an oft-quoted dissent, Justice Oliver Wendell Holmes, Jr., argued for judicial restraint:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question of whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.

In Justice Holmes's view, the Court in *Lochner* had transcended the proper judicial role and usurped the function of the legislature. *Lochner,* like *Dred Scott,* is an example of judicial activism in support of a politically conservative result. It is important to recognize that the term *activism* alone carries no ideological connotation. It may be applied to liberal and conservative decisions alike.

Throughout the early twentieth century the Supreme Court continued to use its power of judicial review to frustrate state and federal attempts at economic regulation. In *Hammer v. Dagenhart* (1918), for example, the Court struck down an act of Congress that sought to discourage the industrial exploitation of child labor. Relying on its earlier decision in *United States v. E. C. Knight* (1895), the Court found that the federal law went beyond the regulation of interstate commerce and invaded the legislative realm reserved to the states under the Tenth Amendment.

The Constitutional Battle over the New Deal The age of laissez-faire activism entered its final phase in a constitutional showdown between the Supreme Court and President Franklin D. Roosevelt. In 1932, in the depths of the Great Depression, Roosevelt was elected in a landslide over the Republican incumbent, Herbert Hoover. FDR promised the American people a "New Deal." A bold departure from the traditional theory of laissez-faire capitalism, the New Deal greatly expanded the role of the federal government in the economic life of the nation. Inevitably, the New Deal would face a serious challenge in the Supreme Court, which in the 1930s was still dominated by justices with conservative views on economic matters.

The first New Deal program to be struck down was the National Recovery Administration (NRA). In *Schechter Poultry Corporation v. United States* (1935), the Supreme Court held that Congress had exceeded its authority under the Commerce Clause and had gone too far in delegating legislative power to the executive branch (see Chapter 4). In 1935 and 1936 a host of New Deal programs were declared unconstitutional by the Supreme Court (see Table 1.1).

President Roosevelt responded to the adverse judicial decisions by trying to enlarge the Court and change its direction through new appointments. Although the infamous Court-packing plan ultimately failed to win approval in Congress, the Supreme Court may have gotten the message. In an abrupt turnabout, the Court approved two key New Deal measures, the National Labor Relations Act and the Social Security Act, as well as a state minimum wage law (see Chapter 2).

The Constitutional Revolution of 1937

The Court's sudden turnabout signaled the beginning of a constitutional revolution. For decades to come, the Court would cease to interpret the Constitution as a barrier to social and economic legislation. After 1937 the Court consistently upheld even more sweeping federal legislation affecting labor relations, agricultural production, and social welfare. The Court exercised similar restraint with respect to state laws regulating economic activity.

TABLE 1.1 SUPREME COURT DECISIONS INVALIDATING NEW DEAL PROGRAMS

Case	Year	Law Invalidated
Schechter Corp. v. United States	1935	National Industrial Recovery Act of 1933 (48 Stat. 195)
Hopkins Savings Assoc. v. Cleary	1935	Provision, Home Owners' Loan Act of 1933 (48 Stat. 646, Sec. 6)
Railroad Retirement Board v. Alton	1935	Railroad Retirement Act of 1934 (48 Stat. 1283)
Louisville Bank v. Radford	1935	Frazier-Lemke Act of 1934, Amending the Bankruptcy Act (48 Stat. 1289, Ch. 869)
United States v. Butler	1936	Agricultural Adjustment Act of 1933 (48 Stat. 31)
Rickert Rice Mills v. Fontenot	1936	1935 Amendments to the Agricultural Adjustment Act of 1933 (49 Stat. 750)
Carter v. Carter Coal Company	1936	Bituminous Coal Act of 1935 (49 Stat. 991)
Ashton v. Cameron County District	1936	Act of May 24, 1934, Amending Bankruptcy Act (48 Stat. 798)

Notes: 1. Other federal statutes were invalidated by the Court during the period 1935 to 1937, but these laws were enacted prior to the New Deal. 2. Stat. refers to U.S. Statutes-at-Large.

The Supreme Court's post-1937 restraint in the area of economic regulation was counterbalanced by a heightened concern for civil rights and liberties. This concern was foreshadowed in a footnote in Justice Harlan Fiske Stone's majority opinion in *United States v. Carolene Products* (1938), upholding a federal regulation of the content of milk sold to the public. In footnote 4, Justice Stone maintained that "[t]here may be a narrower scope for the . . . presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." In essence, Justice Stone was suggesting that the traditional **presumption of validity** accorded to legislation ought to be reversed when that legislation touches on freedoms protected by the Bill of Rights. Stone's footnote also expressed the Court's willingness to be especially solicitous to the claims of minorities, saying that "prejudice against ***discrete and insular minorities*** [emphasis added] may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and . . . may call for a more searching judicial scrutiny."

The Impact of the Warren Court

Supreme Court activity in the modern era, at least up until the 1980s, tended to follow the philosophy stated in *Carolene Products*. This was especially the case under the leadership of Chief Justice Earl Warren from 1953 to 1969. The Warren Court had an enormous impact on civil rights and liberties. Its most notable decision was *Brown v. Board of Education* (1954), where the Court declared racially segregated public schools unconstitutional. In *Brown* and numerous other decisions, the Warren Court expressed its commitment to ending discrimination against African Americans.

The Warren Court used its power of judicial review liberally to expand the rights not only of racial minorities but of persons accused of crimes, members of unpopular political groups, and the poor. Moreover, the Court revolutionized American politics by entering the "political thicket" of legislative reapportionment in *Baker v. Carr* (1962)

and subsequent cases. Without question, the Warren era represents the most significant period of liberal judicial activism in Supreme Court history. The Warren Court was praised as heroic and idealistic; it was also denounced as lawless and accused of "moral imperialism."

The Burger and Rehnquist Courts

President Richard Nixon's appointment of Chief Justice Warren E. Burger and three associate justices (Harry Blackmun, Lewis Powell, and William Rehnquist) had the effect of tempering somewhat the liberal activism of the Warren Court. Yet it was the Burger Court that handed down the blockbuster decision in *Roe v. Wade* (1973), effectively legalizing abortion throughout the United States.

In the 1980s the Supreme Court became increasingly conservative as older members retired and were replaced with appointments made by Presidents Ronald Reagan and George H. W. Bush. In 1986, Associate Justice William Rehnquist was elevated to chief justice when Warren Burger resigned to work on the national celebration of the bicentennial of the Constitution. The Rehnquist Court continued the Burger Court's movement to the right, although it did not dismantle most of what was accomplished by the Warren Court in the realm of civil rights and liberties. Indeed, the Court's 5-to-4 decision in *Texas v. Johnson* (1989), invalidating a state law making it a crime to desecrate the American flag, was surprisingly reminiscent of the Warren Era.

Two of President Ronald Reagan's three Supreme Court appointees, Justices Sandra Day O'Connor and Anthony Kennedy, emerged as leading moderates on the Rehnquist Court. President George H. W. Bush's first Supreme Court appointee, David Souter, came to occupy a position slightly left of the Court's center, while Clarence Thomas, Bush's second appointee, joined Chief Justice Rehnquist and Reagan appointee Antonin Scalia to form the Court's conservative bloc. President Bill Clinton's appointments of Ruth Bader Ginsburg in 1993 and Stephen Breyer in 1994 had the general effect of preventing the conservative bloc from gaining a position of dominance. The votes of O'Connor and Kennedy came to be more critical in determining the Court's response to major constitutional questions in the 1990s. These two justices sided with the conservatives to place outer limits on the congressional power under the Commerce Clause (see *United States v. Lopez* [1995] and *United States v. Morrison* [2000]) and in striking down a provision of the Brady Gun Control Act in 1997 (see Chapter 2). The same five-member majority expanded the scope of state sovereign immunity under the Eleventh Amendment, striking down significant federal legislation including provisions of the Age Discrimination in Employment Act and the Americans with Disabilities Act (see *Kimel v. Florida* [2000] and *Board of Trustees of the University of Alabama v. Garrett* [2001], both of which are discussed in Chapter 5). On the other hand, Justice O'Connor joined the more liberal justices, Stevens, Souter, Ginsburg, and Breyer, in holding that a private individual can successfully sue a state under Title II of the Americans with Disabilities Act for violation of the right of access to courts. The majority ruled that this right is protected by the Due Process Clause of the Fourteenth Amendment (see *Tennessee v. Lane* [2004], discussed and reprinted in Chapter 5). Further illustrating the critical role of the moderates on the Rehnquist Court, Justice Kennedy cast a key vote siding with the more liberal wing in blocking the effort to impose term limits on members of the U.S. House of Representatives (see *U.S. Term Limits, Inc. v. Thornton* [1995], discussed and reprinted in Chapter 2).

In *Bush v. Gore* (2000), Justices Kennedy and O'Connor joined with the conservatives in ruling in favor of candidate George W. Bush in a sensational case stemming from the disputed presidential election of 2000. Yet in several important cases involving social issues, Kennedy and/or O'Connor joined with the Court's liberal bloc,

thus producing a majority. Most notably, in *Lawrence v. Texas* (2003), both Kennedy and O'Connor joined with the liberals as the Court split 6–3 in striking down a Texas law criminalizing homosexual conduct. In *Roper v. Simmons* (2005), Kennedy sided with the liberals as the Court split 5–4 in striking down the death penalty for juvenile offenders. And in *McCreary County v. ACLU* (2005), O'Connor sided with the liberal bloc in a 5–4 decision invalidating a public display of the Ten Commandments inside a Kentucky courthouse. These and similar decisions produced outrage among social conservatives and demonstrated that, contrary to the hyperbolic claims of some liberal commentators, the Rehnquist Court was, on the whole, anything but reactionary.

Whither the Roberts Court?

The membership of the Supreme Court did not change for eleven years after the appointment of Justice Stephen Breyer. Then, in the fall of 2005, the Court changed dramatically as the result of one death and one retirement, neither of which was unexpected. In July 2005, Justice Sandra Day O'Connor announced that she would step down as soon as a successor could be confirmed. To succeed her, President George W. Bush nominated Judge John G. Roberts, Jr., of the U.S. Court of Appeals for the D.C. Circuit. But shortly before the Roberts confirmation hearing was to begin, Chief Justice Rehnquist died in office on September 3, 2005. President Bush decided to nominate Roberts for the vacant chief justiceship. Widely praised for his legal acumen and judicial temperament, Roberts was easily confirmed by the Senate on September 29, 2005. To replace Justice O'Connor, President Bush first nominated White House counsel Harriet Myers, but the nomination was withdrawn after a barrage of criticism focusing on, among other things, her relative lack of qualifications for the position. Instead, Bush nominated Judge Samuel Alito of the third federal circuit. Judge Alito's nomination proved to be far more contentious than that of John Roberts. Despite opposition by most Democrats, who were concerned above all about Alito's propensities with respect to the abortion issue, the newest justice was confirmed by a 58–42 vote.

At this writing (August 2006) it is too early to assess the impact of the two most recent appointees with respect to the competing perspectives on the Court. Chief Justice John Roberts and Associate Justice Samuel Alito have been labeled "conservatives" by most Court watchers, but historical experience counsels against placing much reliance on such labels as applied to new members of the Court. The examples of Justices Kennedy and Souter come to mind. Both were initially characterized as "conservatives," yet Kennedy has proved difficult to classify and Souter has been identified more often with the "liberal" wing of the Court.

TO SUMMARIZE:

- Judicial review is the power of a court of law to invalidate governmental policies that are contrary to constitutional principles.
- The Framers of the Constitution did not explicitly provide for the power of judicial review. The Supreme Court asserted this authority in *Marbury v. Madison* (1803), although the full reach of the power of judicial review was not realized until the twentieth century.
- In *Scott v. Sandford* (1857), the Court damaged its credibility and prestige by invalidating a legislative compromise on the divisive issue of slavery.
- Judicial review again became a subject of political controversy in the late nineteenth and early twentieth centuries as the Supreme Court exercised its power to limit government activity in the economic realm. This age of laissez-faire activism

entered its final phase in a showdown between the Supreme Court and President Franklin D. Roosevelt over the constitutionality of the New Deal.
- From 1937 until the mid-1990s, the Court consistently upheld sweeping federal legislation affecting commerce. The Court exercised similar restraint with respect to state laws regulating economic activity.
- The modern Court has shown heightened concern for civil rights and liberties. This concern was especially pronounced during the Warren era (1953–1969). The Burger Court (1969–1986) and the Rehnquist Court (1986–2005) attenuated somewhat the scope of civil rights and liberties. At this writing (August 2006) it is too early to determine the future direction of the emerging Roberts Court.

THE ART OF CONSTITUTIONAL INTERPRETATION

As the foregoing historical sketch indicates, the Supreme Court's power of judicial review may be used boldly or with caution. To some extent, the approach the Court adopts in a given case depends on the nature of the issue and the complexion of political forces surrounding the case. It also depends, however, on the philosophies of the justices who happen to be on the Court at a given time. The justices have varying views about the role of the Court in the political system and the conditions under which judicial review ought to be exercised. They also differ in their understandings of the Constitution and their theories as to how the Constitution should be interpreted.

Interpretivism and Originalism

The most orthodox judicial philosophy is known as **interpretivism,** so called because of its insistence that the proper judicial function is interpretation, as opposed to law-making. Interpretivism holds that judicial review is legitimate only insofar as judges base their decisions squarely on the Constitution. Interpretivists argue that judges must be guided by the plain meaning of the constitutional text when it is clear. In the absence of plain textual meaning, judges should attempt to determine the original meaning of the language of the Framers. This element of the interpretivist perspective is often referred to as **originalism** or the **doctrine of original intent.**

In a letter to Wilson Nicholas, President Thomas Jefferson wrote in 1803, "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." Similarly, in an 1824 letter to Henry Lee, James Madison appeared to endorse the doctrine of original intent by arguing that if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, [nor] for a faithful exercise of its powers." Likewise, Chief Justice John Marshall, in *Marbury v. Madison* and other opinions, stressed the need for judicial fidelity to the original understanding of the Constitution. It should be noted, however, that Marshall often disagreed with Jefferson and Madison as to the intentions of the Framers, just as judges, legislators, presidents and scholars have often disagreed on original intent in the more than two centuries since the Constitution was framed.

The doctrine of original intent took on a distinctly political aspect during the 1980s. It was very much a part of the Reagan administration's judicial philosophy. Attorney General Edwin Meese made a series of public speeches in 1985 in which he castigated the modern Court for allegedly ignoring original intent. In a highly publicized speech at Georgetown University, Justice William Brennan rebutted Meese, saying, "It is arrogant to pretend that from our vantage point we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." Brennan

argued that judges must "read the Constitution the only way we can: as twentieth century Americans" (*Newsweek*, October 28, 1985, pp. 97–98).

The doctrine of original intent also played an important role in the Reagan administration's attempt to reshape the federal judiciary. It was in large measure due to his adherence to this doctrine that Robert Bork was nominated to the Supreme Court when Justice Powell retired in 1987. Bork's defense of strict originalism was one of several factors contributing to his rejection by the Senate following a heated confirmation battle.

In recent years, however, the emphasis has shifted from "original intent" to "original meaning," influenced most significantly by the views of Justice Antonin Scalia. In addition to its emphasis on original meaning, interpretivism stresses the need for judges to respect history and tradition and, in particular, legal precedent. Essentially, interpretivism calls for judges to maintain as best they can the original Constitution, with a minimum of judicial modification.

Noninterpretivism

Many judges and constitutional scholars do not accept the interpretivist view. They raise serious questions about the practicability and desirability of interpretivism, especially on the issue of original intent. It is often argued that the "intent of the Framers" is impossible to discern on many issues. Justice Scalia's reliance on original meaning underscores acknowledgment of the perceived shortcomings of the search for original intent. Many would argue that original intent, even if knowable, should not control contemporary constitutional decision making. These commentators tend to view the Constitution as a living document, the meaning of which evolves according to what Justice Oliver Wendell Holmes called the "felt necessities" of the times.

Numerous noninterpretive theories have been developed, drawing on a number of schools of legal thought. Some have suggested that the Court should strive to reflect societal consensus. Others have urged that the Court adopt an explicit position of moral leadership, striving to elevate and enlighten society rather than merely reflect prevailing norms. Noninterpretivists, whatever their particular philosophies, are united in their rejection of the idea that the meaning of the Constitution is rigid and static. A contemporary example of this dynamic view of the Constitution is provided by Justice Stephen G. Breyer in his book *Active Liberty: Interpreting Our Democratic Constitution* (2005).

Natural Law

Another perspective, not easily identified with either interpretivism or noninterpretivism, is one that argues for judicial reliance on **natural law.** Natural law is a complex term with many connotations, but it generally refers to a set of principles transcending human authority that may be discovered through reason. Natural law is often associated with religion and, in particular, the moral and ethical values of the Judeo-Christian tradition. Although occasionally invoked by individual justices, the natural law perspective has, for the most part, been eschewed by the modern Supreme Court. Students should recall, however, that natural law and the related concept of natural rights, with its emphasis on inalienable freedoms, contributed significantly to the intellectual foundations of the American republic.

An Ongoing Dialogue

The Supreme Court has never wed itself to any one judicial philosophy or theory of constitutional interpretation. Rather, the Court's numerous constitutional decisions reflect an ongoing philosophical and theoretical dialogue, both from within and

without the Court. The Court's opinions are rife with arguments about fidelity to the "intent of the Framers" or the "original meaning" of the Constitution versus the need to keep the Constitution "in tune with the times." These debates are fundamentally about the proper role of a powerful, life-tenured, black-robed elite within a democratic polity, and about the duty of that elite to ensure that our eighteenth century Constitution is both meaningful and relevant in the twenty-first century.

TO SUMMARIZE:

- Interpretivism holds that in interpreting the Constitution, judges must be guided by the plain meaning of the text when it is clear. In the absence of plain textual meaning, judges should attempt to determine the original intentions of the Framers or the original meaning of constitutional language. Interpretivism also stresses history and tradition and, in particular, legal precedent. Essentially, interpretivism calls for judges to maintain as best they can the original Constitution, with a minimum of judicial modification.
- Noninterpretivists argue that original intent, even if knowable, should not control contemporary constitutional decision making. They view the Constitution as a living document, the meaning of which evolves according to what Justice Oliver Wendell Holmes called the "felt necessities" of the times.
- The Supreme Court has never adhered to any one judicial philosophy or theory of constitutional interpretation. Rather, the Court's numerous constitutional decisions reflect an ongoing philosophical and theoretical dialogue, both from within and without the Court.

JUDICIAL ACTIVISM AND RESTRAINT

Scholarly commentary on the Supreme Court often uses the terms *activism* and *restraint*—sometimes referred to as *maximalism* and *minimalism*—to describe particular decisions, doctrines, or justices' approaches. These terms denote opposing philosophies regarding the exercise of judicial power. Under the philosophy of **judicial restraint**, federal courts are viewed as performing a circumscribed role in the political system. Judges are not seen as Platonic Guardians or "philosopher kings." They are not the primary custodians of the general welfare, since that role belongs to Congress and the state legislatures. Doctrines like standing, mootness, ripeness, and the like are reflections of judicial restraint in that they serve to limit judicial inquiry into constitutional matters.

The countervailing philosophy to judicial restraint is judicial activism. Activist judges tend to see the courts as coequal participants, along with the legislative and executive branches, in the process of public policy making. Activists are thus impatient with self-imposed limitations on judicial review, and tend to brush aside doctrinal restraints. A jurist of activist views, Justice William O. Douglas once remarked that "[i]t is far more important to be respectful to the Constitution than to a coordinate branch of government" (*Massachusetts v. Laird* [1970], dissenting opinion). Dissenting in *Paul v. Davis* (1976), Justice Brennan expressed similar sentiments regarding the role of the Supreme Court:

> I had always thought that one of this court's most important roles was to provide a bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and a sense of worth.

One should remember that judicial power can be used for liberal or conservative policy goals. The debate over judicial activism is a long-standing one, and can be traced to decisions like *Scott v. Sandford* (1857), in which a conservative Supreme Court actively defended the institution of slavery on dubious constitutional grounds. Along the same lines, in *Lochner v. New York* (1905), a conservative Court used its power without restraint to frustrate the implementation of progressive economic legislation.

Much of American constitutional law can be seen as an ongoing debate between judicial activism and judicial restraint. In a system committed both to representative democracy and avoidance of the tyranny of the majority, it is inevitable that the courts will wrestle with the problem of defining the proper judicial role. This dynamic tension is most visible in the Supreme Court's exercise of the power of judicial review.

The *Ashwander* Rules

The philosophy of judicial restraint counsels judges to avoid broad or dramatic constitutional pronouncements. Accordingly, various doctrines limit the exercise of judicial review, even after a federal court has reached the merits of a case. Some of these rules are codified in Justice Louis Brandeis's oft-cited concurring opinion in *Ashwander v. Tennessee Valley Authority* (1936). In *Ashwander,* the Supreme Court upheld the federal government's program of building dams to generate electrical power in the Tennessee Valley region. Justice Brandeis's concurring opinion has become a classic statement of the principles of judicial restraint. The *Ashwander* rules, as they have come to be known, seek to protect judicial power not only by deflecting constitutional questions but by making narrow rulings when constitutional pronouncements cannot be avoided. According to Justice Brandeis:

The *Ashwander* Rules: Principles of Judicial Restraint

- The court will not pass upon the constitutionality of legislation in a friendly, nonadversary proceeding, declining because to decide such questions is legitimate only in the last resort, and as a necessity in the determination of a real, earnest, and vital controversy between individuals.
- The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.
- It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.
- 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.
- 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.
- The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.
- The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.
- When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

The Doctrine of Strict Necessity

Under the **doctrine of strict necessity**, federal courts will attempt to avoid a constitutional question if a case can be decided on nonconstitutional grounds. For example, in *Communist Party of the United States v. Subversive Activities Control Board* (1956), the Supreme Court remanded a case to a government agency for further proceedings rather than reach the sensitive political issue of whether the Communist Party enjoyed constitutional protection. Similarly, in *Hurd v. Hodge* (1948), the Court addressed the issue of "restrictive covenants," private agreements prohibiting the sale and rental of housing to blacks and other minorities. The Court held that enforcement of restrictive covenants by federal courts in the District of Columbia would violate national public policy, but it did not reach the question of whether such enforcement would violate the Constitution. The Court said: "It is a well settled principle that this court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case." The Court chose not to avoid this constitutional issue in a similar case arising in a state court, however, ruling that state judicial enforcement violates the Equal Protection Clause of the Fourteenth Amendment (see *Shelley v. Kraemer* [1948], discussed in Chapter 7, Volume II).

The Doctrine of Saving Construction

Before a court can determine the constitutionality of a statute, it must first determine its exact meaning. This is known as **statutory construction.** In construing statutes, courts often look beyond the language of the law to the intent of the legislature. Sometimes, the intent is clearly revealed in the legislative debate surrounding the adoption of the law. Often, however, legislative intent is not clear, and courts must exercise discretion in deciding what the law means. Sometimes, the judicial interpretation of the statute may determine its constitutionality. Where a challenged law is subject to different interpretations, judicial restraint demands that a court choose an interpretation that preserves the constitutionality of the law. This is known as the **doctrine of saving construction.** In *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937), the Supreme Court upheld the Wagner Act of 1935, a controversial federal statute regulating labor management relations in major industries (see Chapter 2). The Jones & Laughlin Steel Corporation argued that the act was a thinly disguised attempt to regulate all industries, rather than merely those that affected interstate commerce. This point was crucial, because Congress's power in this field is limited to the regulation of interstate commerce. Given the choice between two interpretations of the act, the Court chose the narrower one, leading to a conclusion that the act was valid. Writing for the majority, Chief Justice Charles Evans Hughes observed:

> The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996. One of the provisions of this statute curtails second habeas corpus petitions by state prisoners who have already filed such petitions in federal court. Under the new statute, any second or subsequent habeas petition must meet a particularly high standard and must pass through a gatekeeping function exercised by the U.S. Courts of Appeals. A circuit court must grant a motion giving the inmate permission to file the petition in a district court; denial of this motion is not appealable to the Supreme Court. A prisoner on death row in Georgia challenged the

constitutionality of this provision, posing two constitutional objections: (1) that the new law amounted to an unconstitutional suspension of the writ of habeas corpus; and (2) that the prohibition against Supreme Court review of a circuit court's denial of permission to file a subsequent habeas petition is an unconstitutional interference with the Supreme Court's jurisdiction as defined in Article III of the Constitution. In *Felker v. Turpin* (1996), the Supreme Court unanimously rejected these challenges to the statute. In a saving construction, the Court interpreted the statute in such a way as to preserve the right of state prisoners to file habeas petitions directly in the Supreme Court. The Court stated, however, that it would exercise this jurisdiction only in "exceptional circumstances."

The Presumption of Constitutionality

Perhaps the most fundamental self-imposed limitation on the exercise of judicial review is the **presumption of constitutionality.** Under this doctrine, courts will presume a challenged statute is valid until it is demonstrated otherwise. In other words, the party attacking the validity of the law carries the burden of persuasion. This doctrine is based on an appreciation for the countermajoritarian character of judicial review and a fundamental respect for the legislative bodies in a democratic system.

The modern Supreme Court has modified the doctrine of presumptive constitutionality with respect to laws discriminating against citizens on grounds such as race, religion, and national origin. Such laws are now seen as inherently suspect and are subjected to **strict scrutiny.** Similarly, laws abridging **fundamental rights** are not afforded the traditional presumption of validity.

The Narrowness Doctrine

When a federal court invalidates a statute, it usually does so on fairly narrow grounds. The **narrowness doctrine** counsels courts to avoid broad pronouncements that might carry unforeseen implications for future cases. A narrowly grounded decision accomplishes the desired result, striking down an unconstitutional statute, while preserving future judicial and legislative options.

In *Bowsher v. Synar* (1986), the Supreme Court struck down a provision of the Gramm-Rudman-Hollings Act, a law designed to reduce the federal deficit through automatic spending cuts. The plaintiff, Congressman Mike Synar, asked the Court to invalidate the statute on the grounds that it unconstitutionally delegated Congress's lawmaking power to the comptroller general, an appointed official. Instead, the Court held that Congress could not exercise removal powers over the comptroller general since he performed executive functions under the act. Thus the Court avoided the issue of congressional delegation of legislative power altogether. The delegation issue is potentially explosive because so many of the regulations promulgated by the federal bureaucracy are based on authority delegated by Congress to the executive branch (see Chapter 4).

Avoiding the Creation of New Principles

A variation on the narrowness doctrine is that courts should not create a new principle if a case may be decided on the basis of an existing one. Thus, in *Stanley v. Georgia* (1969), the Supreme Court struck down a state law making it a crime to possess obscene material in the home. Stretching the boundaries of the First Amendment, the Court held that this law was a violation of the freedom of expression. Alternatively, the Court

could have created a right of privacy to engage in certain activities in the home that might be subject to arrest outside the home. This, however, would have required the Court to consider the constitutionality of numerous criminal prohibitions, including laws governing possession and use of "recreational" drugs.

The federal appellate courts are not bound to address constitutional issues precisely as they have been framed by the litigants. In its grant of certiorari, the Supreme Court may direct the parties to address certain issues, and then refuse to decide these issues. For example, in *Illinois v. Gates* (1983), the Supreme Court directed the parties to argue the so-called "good faith exception" to the Fourth Amendment exclusionary rule (see Chapter 5, Volume II). In its final decision in *Gates,* the Court did not address the highly controversial good faith exception, but decided the case on other grounds, thus postponing for one year the creation of a new principle of constitutional law.

Stare Decisis The term ***stare decisis*** ("stand by decided matters") refers to the doctrine of precedent. It is axiomatic that American courts of law should follow precedent whenever possible, thus maintaining stability and continuity in the law. As Justice Louis Brandeis once remarked, "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right" (*Burnett v. Coronado Oil Company* [1932], dissenting opinion).

Devotion to precedent is considered a hallmark of judicial restraint. Obviously, following precedent limits a judge's ability to determine the outcome of a case in a way that he or she might choose if it were a matter of first impression. The decision in *Roe v. Wade* poses an interesting problem for new Supreme Court justices who believe the decision legalizing abortion was incorrect. Should a new justice who believes *Roe* was wrongly decided vote to overrule it, or should *stare decisis* be observed?

Although the doctrine of *stare decisis* applies to American constitutional law, it is not uncommon for the Court to depart from precedent. Perhaps the most famous reversal is *Brown v. Board of Education* (1954), in which the Supreme Court repudiated the separate but equal doctrine of *Plessy v. Ferguson* (1896). The separate but equal doctrine had legitimized racial segregation in this country for nearly six decades. Beginning with the *Brown* decision, official segregation was invalidated as a denial of the equal protection of the laws.

The Severability Doctrine

Under the doctrine of **severability,** federal courts will generally attempt to excise the unconstitutional elements of a statute while leaving the rest of the law intact. In *Champlin Refining Company v. Corporation Commission of Oklahoma* (1932), the Supreme Court said that invalid provisions of a law are to be severed "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." The severability doctrine is consistent with the philosophy of judicial restraint, in that judicial review is employed with a minimum of "damage" to the work of the legislature.

In *Immigration and Naturalization Service v. Chadha* (1983), for example, the Supreme Court invalidated Section 244(c)(2) of the Immigration and Nationality Act. This specific provision permitted one house of Congress to veto decisions of the executive branch regarding deportation of aliens. The Court found this "legislative veto" to be an unconstitutional exercise of power by Congress (see Chapter 4). The remainder of the Immigration and Nationality Act, a very important statute from the standpoint of immigration policy, was left intact.

Frequently Congress will attach a severability clause to a piece of legislation, indicating its desire that any unconstitutional provisions be severed from the rest of the

statute. Absent a severability clause, federal courts may presume an enactment was intended to be judged as a whole.

Related to the concept of severability is the inclusion of a "saving" clause in many statutes. In attempting to keep pace with social change and current demands on government, Congress routinely enacts legislation repealing earlier statutes. Logically, a repeal would set aside or bring to an end all pending matters governed by the repealed statute. The saving clause simply indicates that repeal of the earlier statute is subject to certain exceptions. For example, in repealing criminal statutes, Congress often provides that prosecutions initiated prior to repeal may be pursued under repealed provisions.

Although serious constitutional questions may be raised with respect to such clauses, the Supreme Court generally recognizes their validity. The point is well illustrated by the decision in *Bradley v. United States* (1973). Bradley was convicted in 1971 of conspiring to sell cocaine in violation of a federal statute that imposed a mandatory five-year prison term on offenders. The statute under which he was prosecuted was repealed five days before his conviction and sentencing. The new law contained less punitive sentencing requirements. Nevertheless, Bradley was sentenced to the mandatory five-year term under the original statute. The Supreme Court affirmed his conviction and sentence, upholding the validity of the saving clause contained in the act of repeal.

"Unconstitutional as Applied"

The severability clause from the Immigration and Nationality Act just discussed distinguishes between judicial invalidation of a law as inherently unconstitutional and invalidation of a law as applied to particular persons or circumstances. The philosophy of judicial restraint suggests that, if possible, courts refrain from making declarations that a challenged statute is invalid "on its face." Whether a federal court will invalidate a statute on its face or as applied depends on the language of the law and the facts of the case in which the law is challenged.

By way of illustration, consider the Supreme Court's decision in *Cohen v. California* (1971). There, the Supreme Court held that a state "offensive conduct" law was **unconstitutional as applied** to a case where a man was prosecuted for wearing a jacket bearing the slogan "Fuck the Draft." The Court held that to punish Cohen's "immature antic" as offensive conduct would be to deny his right of free speech guaranteed by the First Amendment. On the other hand, in *Brandenburg v. Ohio* (1969), the Court struck down a state criminal syndicalism law as inherently unconstitutional under the First Amendment, because the law prohibited the "mere advocacy" of violence. (Both *Cohen and Brandenburg* are discussed in Chapter 3, Volume II.)

It must be noted that all of the **limiting doctrines** are subject to a degree of manipulation to achieve desired outcomes. The doctrines are sufficiently complex and imprecise to permit two judges to reach opposite conclusions about their application to a given case. Nevertheless, the creation and continuance of these doctrines suggest sensitivity on the part of the federal judiciary to the inherent tensions surrounding the exercise of judicial review in a democratic polity.

TO SUMMARIZE:

- Constitutional lawmaking involves an ongoing debate between judicial activism and judicial restraint. Today, these perspectives are sometimes labeled *maximalism* and *minimalism*.
- Under the philosophy of judicial restraint, federal courts are viewed as performing a circumscribed role in the political system. Activist judges tend to see the courts as

coequal participants, along with the legislative and executive branches, in the process of public policy making.
- The philosophy of judicial restraint counsels judges to avoid broad or dramatic constitutional pronouncements. Accordingly, various doctrines limit the exercise of judicial review, even after a federal court has reached the merits of a case. Some of these rules are codified in Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority* (1936).
- The most important principles of judicial restraint are the doctrine of strict necessity, the doctrine of saving construction, the narrowness doctrine, the presumption of constitutionality, the severability doctrine, and *stare decisis*.

EXTERNAL CONSTRAINTS ON JUDICIAL POWER

Although the federal courts, and the Supreme Court in particular, are often characterized as guardians of the Constitution, the judicial branch is by no means immune to the abuse of power. Accordingly, the federal judiciary is subject to constraints imposed by Congress and the president. In a constitutional system that seeks to prevent any agency of government from exercising unchecked power, even the Supreme Court is subject to checks and balances.

Judicial Dependency on Congress

Article III of the Constitution recognizes the judiciary as a separate branch of government, but it also requires the courts to depend on Congress in a number of ways. The federal courts, including the Supreme Court, depend on Congress for their budgets, although Congress is prohibited from reducing the salaries of federal judges. The organization and jurisdiction, indeed the very existence, of the lower federal courts are left entirely to Congress by Article III. It is quite conceivable that Congress might have chosen not to create a system of lower federal courts at all. It could have granted existing state tribunals original jurisdiction in federal cases, although it certainly would have been required to provide some degree of appellate review by the U.S. Supreme Court, the one federal tribunal recognized by the Constitution. Rather quickly, however, Congress passed the Judiciary Act of 1789, which provided the basis for the contemporary system of lower federal courts.

Restriction of the Supreme Court's Jurisdiction

The Supreme Court's original jurisdiction is fixed by Article III of the Constitution. *Marbury v. Madison* made clear that Congress may not alter the Court's original jurisdiction. Congress may, however, authorize lower federal courts to share this jurisdiction. The Supreme Court's appellate jurisdiction is another matter. Article III indicates that the Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." On only one occasion since 1789 has Congress significantly limited the appellate jurisdiction of the Supreme Court. It happened during the turbulent Reconstruction period. After the Civil War, Congress passed the Reconstruction Acts, which, among other things, imposed military rule on most of the southern states formerly comprising the Confederacy. As part of this program, military tribunals were authorized to try civilians who interfered with Reconstruction. William H. McCardle, editor of the *Vicksburg Times,* published a series of editorials highly critical of Reconstruction. Consequently, he was arrested by the military and held for trial by a military tribunal. McCardle

sought release from custody through a petition for habeas corpus in federal court. Congress in 1867 had extended federal habeas corpus jurisdiction to cover state prisoners. Since McCardle was in the custody of the military government of Mississippi, the 1867 act applied to him. It also provided a right of appeal to the Supreme Court. Having lost his bid for relief in the lower court, McCardle exercised his right to appeal.

After *Ex parte McCardle* was argued in the Supreme Court, Congress enacted legislation, over President Andrew Johnson's veto, withdrawing the Supreme Court's appellate jurisdiction in habeas corpus cases. The legislation went so far as to deny the Court's authority to decide a case already argued. The obvious motive was to prevent the Court from ruling on the constitutionality of the Reconstruction Acts, which McCardle had challenged in his appeal. The Court could have invalidated this blatant attempt to prevent it from exercising its power of judicial review. But the Court chose to capitulate. By acquiescing in the withdrawal of its jurisdiction in *McCardle,* the Court avoided a direct confrontation with Congress at a time when that institution was dominant in the national government. Shortly before *McCardle* was decided, the House of Representatives had impeached President Andrew Johnson, and he escaped conviction in the Senate by only one vote. It is likely that the Court's decision to back down was somewhat influenced by the Johnson impeachment.

Does *Ex parte McCardle* imply that Congress could completely abolish the Court's appellate jurisdiction? Whatever the answer might have been at the time, the answer today would certainly be no. It is highly unlikely that Congress would ever undertake such a radical measure, but if it did the Supreme Court would almost certainly declare the act invalid. Since the Court's major decision making role is a function of its appellate jurisdiction, any serious curtailment of that jurisdiction would in effect deny the Court the ability to perform its essential function in the constitutional system.

There is even doubt that the *McCardle* decision would be reaffirmed if the contemporary Supreme Court were faced with a similar question. In *Glidden v. Zdanok* (1962), Justice William O. Douglas mused that "there is a serious question whether the *McCardle* case could command a majority today." One can argue that the Court would not, and should not, permit Congress to restrict its appellate jurisdiction if by so doing Congress would curtail the Court's ability to enforce constitutional principles or protect citizens' fundamental rights. In his dissenting opinion in *Hamdan v. Rumsfeld* (2006), Justice Scalia quoted approvingly from the *McCardle* case in asserting that Congress had removed the Supreme Court's jurisdiction in all pending habeas corpus cases involving detainees. The majority, however, speaking through Justice Stevens, rejected Scalia's attempt to revive the McCardle precedent.

Congress has, on many occasions, debated limitations on the Supreme Court's appellate jurisdiction. In the late 1950s, there was a movement in Congress to deny the Supreme Court appellate jurisdiction in cases involving national security, a reaction to Warren Court decisions protecting the rights of suspected Communists. Although the major legislative proposals were narrowly defeated, the Court retreated from the most controversial decisions of 1956 and 1957. In this regard, it is instructive to compare *Pennsylvania v. Nelson* (1956) and *Watkins v. United States* (1957) with *Uphaus v. Wyman* (1959) and *Barenblatt v. United States* (1959).

In the early 1980s, a flurry of activity in Congress was aimed at restricting Supreme Court jurisdiction to hear appeals in cases dealing with abortion and school prayer. A number of proposals surfaced, but none was adopted. The constitutionality of such proposals is open to question, in that they might be construed as undermining the Court's ability to protect fundamental constitutional rights. The question remains academic, however, because Congress has not enacted such a restriction on the Court.

Denial of jurisdiction as a limiting strategy depends greatly on the substantive issue area involved, what the Court has done in the area thus far, and what it is likely

to do in the future. As retaliation against the Court for one controversial decision, the curtailment of appellate jurisdiction is not likely to be an effective strategy.

Can Congress Override a Constitutional Law Decision via Statute?

Although it is generally conceded that the Supreme Court has final authority to interpret the Constitution, Congress persists in occasionally attempting to substitute its own collective judgment on controversial questions for that of the justices. This legislative revision of judicial interpretation is well illustrated by Congress's passage of the Religious Freedom Restoration Act of 1993 (RFRA). This statute was enacted in direct response to the Supreme Court's 1990 decision in *Employment Division v. Smith*.

In *Smith,* the Court upheld Oregon's prohibition on the use of peyote, even as applied to sacramental use by members of the Native American Church. In determining that Oregon had not violated the Free Exercise Clause, the Court departed from precedent in refusing to consider whether the challenged state policy "substantially burdened" religious practices and, if so, whether the burden could be justified by a "compelling governmental interest." Under *Smith,* no one can claim a religion-based exemption from a generally applicable criminal law.

Negative reaction to *Smith* convinced a majority in Congress to vote in favor of a law designed to reinstate the **compelling government interest** standard. In thus enacting RFRA, Congress challenged Justice Scalia's interpretation of constitutional history and of the requirements of the Free Exercise Clause of the First Amendment, as applied to the states by the Fourteenth Amendment.

In *City of Boerne v. Flores* (1997) (excerpted in Chapter 2), the Supreme Court, dividing 6 to 3, declared RFRA unconstitutional. While conceding that Congress has broad power to enforce the provisions of the Fourteenth Amendment, Justice Kennedy, writing for the majority, concluded that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." In this decision the Court stressed the primacy of its role as interpreter of the Constitution. It was firm and unequivocal in rejecting, on broad institutional grounds, a direct congressional challenge of final judicial authority on a question of constitutional interpretation.

Constitutional Amendment

Without question, the only conclusive means of overruling a Supreme Court or any federal court decision is through adoption of a constitutional amendment. If Congress disapproves of a particular judicial decision, it may be able to override that decision through a simple statute, but only if the decision was based on statutory interpretation.

It is much more difficult to override a federal court decision that is based on the U.S. Constitution. Congress alone cannot do so. Our system of government concedes to the courts the power to interpret authoritatively the nation's charter. A Supreme Court decision interpreting the Constitution is therefore final unless and until one of two things occurs. First, the Court may overrule itself in a later case. This has happened numerous times historically. The only other way to overturn a constitutional decision of the Supreme Court is through constitutional amendment. This is not easily done, because Article V of the Constitution prescribes a two-thirds majority in both houses of Congress followed by ratification by three-fourths of the states.

Yet on several occasions in our history, specific Supreme Court decisions have been overturned in this manner.

The Eleventh Amendment The first ten amendments to the Constitution were proposed simultaneously in 1789 (ratified in 1791) and are known collectively as the Bill of Rights. These amendments were not responses to judicial decisions, but rather to a perception that the original Constitution was incomplete. The Eleventh Amendment, however, was added to the Constitution in the aftermath of the Supreme Court's first major decision—*Chisholm v. Georgia* (1793).

Alexander Chisholm brought suit against the state of Georgia in the Supreme Court to recover a sum of money owed to an estate of which he was executor. Chisholm was a citizen of South Carolina, and since he was suing the state of Georgia, he maintained that the Supreme Court had original jurisdiction under Article III of the Constitution. The state of Georgia denied that the Supreme Court had jurisdiction, claiming sovereign immunity. The state relied on statements made by James Madison, John Marshall, and Alexander Hamilton during the debates over ratification of the Constitution that states could not be made parties to federal cases against their consent. Indeed, Georgia failed to send a legal representative to defend its position when *Chisholm v. Georgia* came up for oral argument in the Supreme Court. Dividing 4 to 1, the Supreme Court decided that the state of Georgia was subject to the lawsuit, sovereign immunity notwithstanding. This decision precipitated considerable outrage in the state legislatures, which feared an explosion of federal litigation at their expense. One newspaper, the *Independent Chronicle,* predicted that "refugees, Tories, etc. . . . will introduce such a series of litigations as will throw every State in the Union into the greatest confusion." Five years later, in 1798, the Eleventh Amendment was ratified. It reads: "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 States."

The adoption of the Eleventh Amendment assuaged widespread fears of the new national government, and of the federal courts in particular. The amendment also demonstrated that an unpopular Supreme Court decision was reversible, given sufficient political consensus. (For a discussion of the Eleventh Amendment, see Chapter 5).

The Civil War Amendments As previously noted, the *Dred Scott* decision was effectively overruled by adoption of the Thirteenth Amendment, abolishing slavery, and the Fourteenth Amendment, granting citizenship to all persons born or naturalized in the United States.

The Sixteenth Amendment Recall also that the Sixteenth Amendment, granting Congress the power to "lay and collect" income taxes, overruled the *Pollock* decision of 1895 in which the Court had declared a federal income tax law unconstitutional.

The Twenty-sixth Amendment In 1970 Congress enacted a statute lowering the voting age to 18 in both state and federal elections. The states of Oregon and Texas filed suit under the original jurisdiction of the Supreme Court seeking an injunction preventing the attorney general from enforcing the statute with respect to the states. In *Oregon v. Mitchell* (1970), the Supreme Court ruled that Congress had no power to regulate the voting age in state elections. The Twenty-sixth amendment, ratified in 1971, accomplished what Congress was not permitted to do through statute. The amendment provides: "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."

Other Proposed Constitutional Amendments Over the years numerous unsuccessful attempts have been made to overrule Supreme Court decisions through constitutional amendments. In 1983, an amendment providing that "[t]he right to an abortion is not secured by this Constitution," obviously aimed at *Roe v. Wade,* failed to pass the Senate by only one vote. In November 1971, a proposal designed to overrule the Supreme Court's school prayer decisions (see, for example, *Abington Township v. Schempp* [1963]) fell twenty-eight votes short of the necessary two-thirds majority in the House of Representatives. In his 1980 presidential campaign, Ronald Reagan called on Congress to resurrect the school prayer amendment, but Congress proved unwilling to give the measure serious consideration. In the mid-1960s, a widely publicized effort to overrule the Supreme Court's reapportionment decisions (for example, *Reynolds v. Sims,* [1964]) was spearheaded by Senate minority leader Everett Dirksen (R–Ill.). Despite auspicious beginnings, the Dirksen amendment ultimately proved to be a flash in the pan.

The most recent example of a proposed constitutional amendment aimed at a Supreme Court decision dealt with the emotional public issue of flag burning. In *Texas v. Johnson* (1989), the Court held that burning the American flag as part of a public protest was a form of symbolic speech protected by the First Amendment. Many, including President Bush, called on Congress to overrule the Court. Congress considered an amendment that read: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." Votes were taken in both houses, but neither achieved the necessary two-thirds majority. In the wake of the failed constitutional amendment, Congress adopted a statute making flag desecration a federal offense. Like the state law struck down in *Texas v. Johnson,* this measure was declared unconstitutional by the Supreme Court (see *United States v. Eichman,* 1990). As recently as July 2005, the U.S. House of Representatives passed another proposed constitutional amendment designed to overrule the Court's flag burning decisions. The Senate has not yet approved such an Amendment, although it fell only one vote short of doing so in June 2006.

The Appointment Power

All federal judges (including justices of the Supreme Court) are appointed by the president subject to the consent of the Senate. Normally, the Senate consents to presidential judicial appointments with a minimum of controversy. However, senatorial approval is by no means pro forma, especially when the opposing political party controls the Senate. In fact, historically the Senate has rejected about 20 percent of presidential nominations to the Supreme Court.

Article III, Section 1, of the Constitution states that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour." This grant of life tenure to federal judges was intended to make the federal courts independent of partisan forces and transitory public passions so that they could dispense justice impartially, according to the law. In *The Federalist,* No. 78, Alexander Hamilton argued that:

> The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws.

Hamilton's views on the need for a life-tenured, appointed federal judiciary were not universally accepted in 1788 nor are they today. In a democratic nation that extols the "will of the people," such sentiments are apt to be viewed as elitist, even aristocratic.

While the states vary widely in their mechanisms for judicial selection, only in Rhode Island are judges given life tenure. From time to time proposals have surfaced to impose limitations on the terms of federal judges, but no such effort has ever gained serious political momentum. Life tenure for federal judges, like most of the elements of our eighteenth century Constitution, remains a firmly established principle of the political order.

The shared presidential–senatorial power of appointing federal judges is an important means of influencing the judiciary. For example, President Richard Nixon made a significant impact on the Supreme Court and on American constitutional law through his appointment of four justices. During the 1968 presidential campaign, Nixon criticized the Warren Court's decisions, especially in the criminal law area, and promised to appoint "strict constructionists" (widely interpreted to mean "conservatives") to the bench. President Nixon's first appointment came in 1969, when Warren Earl Burger was selected to succeed Earl Warren as chief justice. In 1970, after the abortive nominations of Clement Haynsworth and G. Harold Carswell, Harry Blackmun was appointed to succeed Justice Abe Fortas, who had resigned from the Court amid scandal in 1969. Then, in 1972, President Nixon appointed Lewis Powell to fill the vacancy left by Hugo Black's retirement and William Rehnquist to succeed John M. Harlan, who had also retired. The four Nixon appointments had a definite impact on the Supreme Court, although the resulting swing to the right was less dramatic than many observers had predicted.

FDR's Court-Packing Plan Unquestionably, the most dramatic attempt by a president to control the Supreme Court through the appointment power was launched by Franklin D. Roosevelt in 1937. The Court, as previously mentioned, had invalidated a number of key elements of FDR's New Deal program, beginning in 1935 with the National Industrial Recovery Act. FDR criticized the Court for being out of touch with the realities of an industrialized economy and holding to a "horse-and-buggy definition of interstate commerce." Privately, FDR, who referred to the justices as the "nine old men," began to plan a strategy to curb the Court. His resolve was strengthened by his landslide reelection in 1936 and by the Court's continuing willingness to invalidate New Deal legislation. Finally, in early 1937 Roosevelt unveiled his court-packing plan, which called for Congress to increase the number of justices by allowing the president to nominate a new justice for each incumbent beyond the age of 70 who refused to retire. This could have given Roosevelt the opportunity to appoint as many as six additional justices, raising the membership of the Court to fifteen.

FDR initially attempted to sell his plan to Congress and the American people by portraying it merely as a measure to enhance the efficiency of the Supreme Court. He suggested that some of the incumbent justices were too old or infirm to stay abreast of their caseloads. Roosevelt soon admitted in one of his famous "fireside chats" that his motivation was to produce a Supreme Court that would "not undertake to override the judgment of Congress on legislative policy." Responding to the president's assault on the Court, Chief Justice Charles Evans Hughes sent a carefully timed letter to Senator Burton K. Wheeler, chairman of the Senate Judiciary Committee, stating that the Court was fully abreast of its docket and implying that the court-packing plan might be unconstitutional. Senator Wheeler read this letter aloud at a session of the Judiciary Committee that was being broadcast by radio into millions of homes around the country.

FDR's court-packing plan was denounced by the Senate Judiciary Committee as "needless, futile and utterly dangerous." The plan failed to win approval by Congress. In the meantime, however, the Supreme Court manifested a dramatic about-face in the spring of 1937 when it upheld the National Labor Relations Act, another important element of New Deal policy (see *National Labor Relations Board v. Jones & Laughlin Steel Corporation*). The Court's famous "switch in time that saved nine" obviated the need for FDR to pack the Court. Within five years, seven of the "nine old men" had retired or died in office, and Roosevelt was able to "pack" the Court through normal procedures. The Roosevelt Court, as it came to be known, brought about a revolution in American constitutional law.

Without question, the shared presidential–senatorial power to appoint judges and justices is the most effective means of controlling the federal judiciary. Congress and the president may not be able to achieve immediate results using the appointment power, but they can bring about long-term changes in the Court's direction. The appointment power ensures that the Supreme Court and the other federal courts may not continue for very long to defy a clear national consensus.

Impeachment

The only means of removing a federal judge or Supreme Court justice is through the **impeachment** process provided in the Constitution. First, the House of Representatives must approve one or more articles of impeachment by at least a majority vote. Then, a trial is held in the Senate. To be removed from office, a judge must be convicted by a vote of at least two-thirds of the Senate.

Since 1789 the House of Representatives has impeached fewer than twenty federal judges, and fewer than ten of these were convicted in the Senate. Only once has a Supreme Court Justice been impeached by the House. In 1804, Justice Samuel Chase fell victim to President Jefferson's attempt to control a federal judiciary largely comprised of Washington and Adams appointees. Justice Chase had irritated the Jeffersonians by his haughty and arrogant personality and his extreme partisanship. Nevertheless, there was no evidence that he was guilty of any crime. Consequently, Chase narrowly escaped conviction in the Senate.

The Chase affair set an important precedent: A federal judge may not be removed simply for reasons of partisanship, ideology, or personality. Thus, despite strong support in ultraconservative quarters for the impeachment of Chief Justice Earl Warren during the 1960s, there was never any real prospect of Warren's removal. Barring criminal conduct or serious breaches of judicial ethics, federal judges do not have to worry that their decisions might cost them their jobs.

Enforcement of Judicial Decisions

Courts generally have adequate means of enforcing their decisions on the parties directly involved in litigation. Any party who fails to comply with a court order, such as a **subpoena** or an injunction, may be held in **contempt.** The Supreme Court's decisions interpreting the federal Constitution are typically nationwide in scope. As such they automatically elicit the compliance of state and federal judges. Occasionally one hears of a recalcitrant judge who, for one reason or another, defies a Supreme Court decision, but this phenomenon, while not uncommon in the early days of the republic, is an eccentric curiosity today.

On the other hand, courts have greater difficulty enlisting the compliance of the general public, especially when they render unpopular decisions. Despite the Supreme Court's repeated rulings against officially sponsored prayer in the public

schools, such activities continue at the present time in some parts of the country. The school prayer decisions, even after more than four decades, have failed to generate public acceptance (see Chapter 4, Volume II). Without the assistance of local school officials, there is little the Court can do to effect compliance with its mandates regarding school prayer unless and until an unhappy parent files a lawsuit.

Sometimes the Supreme Court must depend on congressional and/or presidential cooperation to secure compliance with its decisions. This is particularly true when such decisions are actively resisted by state and local officials. For example, the efforts of Arkansas governor Orval Faubus to block the court-ordered desegregation of Central High School in Little Rock in 1957 resulted in President Dwight D. Eisenhower's commitment of federal troops to enforce the court order. A year later, in *Cooper v. Aaron* (1958), the Supreme Court issued a stern rebuke to Governor Faubus, reminding him of his duty to uphold the Constitution of the United States. Would the Court have been able to take the constitutional high ground if Eisenhower, who had reservations about court-ordered desegregation, had decided not to send the troops to Little Rock? In using military force to implement a Supreme Court decision about which he had doubts, Eisenhower was recognizing the authority of the Court to speak with finality on matters of constitutional interpretation. However, the ultimate decision to enforce the Court's authority belonged to the president. Accordingly, *Cooper v. Aaron* is more a testament to judicial dependency on the executive than an assertion of judicial power.

Unlike the president, Congress is seldom in a position to enforce a decision of the Supreme Court. On the other hand, Congress has often enacted legislation without which the broad objectives of the Court's decisions could not have been fully realized. This was certainly true during the 1960s in the field of civil rights. The Supreme Court in a series of decisions had stated the general policy objective of eradicating racial discrimination. It remained for Congress to adopt sweeping legislation in pursuit of this goal—namely, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.

The Supreme Court often depends on the president to enforce and the Congress to "flesh out" its decisions. But the Court cannot force either of the coordinate branches of the national government to do anything. This limitation is perhaps best encapsulated in a famous comment attributed to President Andrew Jackson: "Well, John Marshall has made his decision. Now let him enforce it." In *Worcester v. Georgia* (1832), the Court had held that the state of Georgia's attempt to regulate the Cherokee Indian nation violated the Constitution and certain treaties. The decision required Georgia to release missionaries whom it had prosecuted for ministering to the Cherokees in violation of state law. Georgia's refusal to comply with the decision of the Supreme Court led to President Jackson's alleged remark.

The Supreme Court's lack of enforcement power is an inherent limitation on the power of the Court, but one that makes sense in terms of the principle of separation of powers. Law enforcement, after all, is an aspect of executive power. To permit a court of law to mobilize law enforcement authorities *without the consent of the chief executive* would be to concentrate governmental powers in a manner flatly inconsistent with the Framers' plan. As James Madison observed in *The Federalist,* No. 47, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."

TO SUMMARIZE:

- Like the other branches, the judiciary is subject to checks and balances. The organization and jurisdiction of the lower federal courts are left entirely to Congress by

Article III. Congress may regulate the appellate jurisdiction of the Supreme Court, but it is unclear how far Congress may go in this regard.

- Supreme Court decisions based on statutory interpretation may be overridden by Congress through the ordinary legislative process. Court decisions based on constitutional interpretation may be overridden only by the Court itself, or by constitutional amendment. Historically, at least four Supreme Court decisions have been overturned by constitutional amendments.
- Because impeachment of federal judges is limited to cases of criminal misconduct, the most significant control over the personnel on the Supreme Court is the appointment power shared by the president and the Senate. Presidents have used the appointment power to change the direction of the Court.
- The Court often depends on the other branches of government to enforce and implement its decisions. Ultimately, the Court relies on the public's willingness to comply.

EXPLAINING THE COURT'S BEHAVIOR

Since *Marbury v. Madison* (1803), commentators have sought to explain and predict, as well as evaluate, Supreme Court decision making. Traditional legal commentary relied almost exclusively on legal factors—principles, provisions, procedures, and precedents. Modern analysis tends to look beyond the law to explain judicial decision making. Political scientists in particular are interested in the political factors that influence **judicial behavior.** Indeed, the study of judicial behavior is a subfield of the public law field of contemporary political science.

The law is complex, rich, and subtle. Judicial decision making, especially at the level of the Supreme Court, is hardly a mechanical process. Legal reasoning is certainly important, but it is inevitably colored by extralegal factors as well (see Figure 1.4). It is

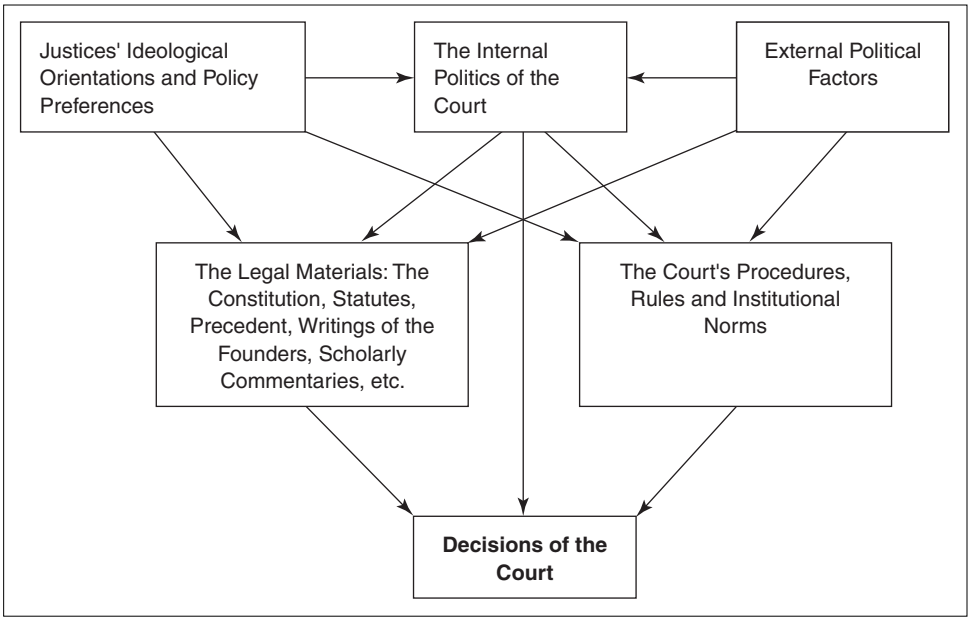

FIGURE 1.4
A Model of Supreme Court Decision Making

not unlikely that two judges, equally well trained and capable in legal research, will reach different conclusions about what the law requires in a given case.

The fluidity of judicial choice is most apparent when the Supreme Court is called on to interpret the many open-ended clauses of the Constitution. Although the Court's constitutional decisions are rendered in a legal context, they cannot be fully explained by legalistic analysis. To believe otherwise is to subscribe to the **myth of legality**, the idea that judicial decisions are wholly a function of legal rules, procedures, and precedents.

Ideologies of the Justices

Political scientists who have studied Supreme Court decision making have amassed considerable evidence that the Court's decisions are influenced by the ideologies of the justices. To a great extent, this is inferred from regularities in the voting behavior of the justices, mainly the tendency of certain groups of justices to form **voting blocs.** During the period 1994–2005, for example, Chief Justice Rehnquist and Justices Scalia and Thomas comprised a conservative bloc, often opposed by a liberal bloc consisting of Justices Stevens, Souter, Ginsburg, and Breyer. Justices O'Connor and Kennedy occupied a commanding position in the middle, sometimes joining Rehnquist, Scalia, and Thomas to form a conservative majority, and sometimes, either individually or in tandem, joining the other four justices in support of a more liberal result. Following Justice O'Connor's retirement in January 2006, and the appointment of Justice Samuel Alito as her successor, Justice Kennedy alone held a key position between the liberal and conservative blocs on the Court. His vote was critical in determining the outcomes of several important decisions during the remainder of the 2005–2006 Term.

Although many observers characterize Supreme Court decisions and voting patterns in simplistic liberal–conservative terms, judicial ideology may well include more than general political attitudes or views on specific issues of public policy (for example, school prayer or abortion). It may also embrace philosophies regarding the proper role of courts in a democratic society. There is reason to believe that, at least for some justices, considerations of judicial activism versus restraint ("maximalism" versus "minimalism") weigh as heavily as policy preferences in determining how the vote will be cast in a given case. Justices inclined toward activism, or maximalism, are more likely to support expansion of the Court's jurisdiction and powers and more likely to embrace innovative constitutional doctrines and policy choices. These justices are less likely than restraintists, or minimalists, to follow precedent or defer to the judgment of elected officials.

The Political Environment

In addition to the ideologies of the justices, research has pointed to a number of political factors that appear to influence Supreme Court decision making. While the Court is often characterized as a counter-majoritarian institution, there is reason to believe that public opinion does influence the Court. Extensive evidence indicates that the actions, or threatened actions, of Congress and the president can have an impact on its decisions. And in a constitutional system emphasizing checks and balances, one should not expect that it would be otherwise! The political environment, in short, strongly influences Supreme Court decision making.

The Internal Politics of the Court

Finally, the Court's decision making is intensely political in the sense that the internal dynamics of the Court are characterized by conflict, bargaining, and compromise—the

very essence of politics. Such activities are difficult to observe because they occur behind the "purple curtain" that separates the Court from its attentive public.

Conferences are held in private, votes on certiorari are not routinely made public, and the justices tend to be tight-lipped about what goes on behind the scenes in the "marble temple." Yet from time to time evidence of the Court's internal politics appears—in the form of memoirs, autobiographies, posthumously opened papers, other writings of the justices, and in the occasional interviews the justices and their clerks give to journalists and academicians. Some may be offended at the attempt of journalists and scholars to penetrate the purple curtain, to examine the political realities lurking behind the veil of law and mythology in which the Supreme Court is shrouded. However, in a democratic society it is the right, and arguably the duty, of citizens to have a realistic understanding of the institutions of their government. Armed with such an understanding of the Supreme Court, one can begin to make reasonable judgments about its decisions. Realism does not lead inexorably to cynicism.

Some observers believe that the Supreme Court is nothing more than a miniature legislature and that the justices are nothing more than "politicians in black robes." The Court's enormously controversial decision in *Bush v. Gore* (2000) may be cited in support of this perspective. However, it is important to bear in mind that the Supreme Court is at once a legal and a political institution, which makes it unique in the scheme of American government. As a legal entity, the Court's decisions are usually characterized by reason and principle, characteristics not regarded as essential to the legislative process. This distinctive character may also account for the reverence with which the American people (even the most jaded political scientists) tend to regard the Court.

TO SUMMARIZE:

- The Supreme Court is at once a legal and a political institution. Therefore its decisions are affected both by legal and political factors.
- The political factors include the justices' own philosophical orientations and policy preferences, the internal politics of the Court, and the external political environment.
- The relative privacy in which the Court's key business is conducted makes it more difficult to observe the interplay of political factors.

CONCLUSION

The Supreme Court has evolved considerably over two centuries. It began as a vaguely conceived tribunal, with no cases to decide, and no permanent home. Over the years, the Court's caseload increased, as did its prominence in national affairs. The Court assumed increasing power and managed to hold its own against the legislative and executive branches of government. Eventually, the Court found a home in the Capitol, although its chambers were less than spectacular. In 1935 the Court moved into its own building. The majestic "marble temple" across the street from the Capitol houses not only a coequal branch of the national government, but the most powerful and prestigious judicial body in the world.

The tremendous growth in the power and prestige of the Supreme Court was the inevitable consequence of the constitutional design that created the judiciary as a separate branch of the federal government. It is also a function of the Court's institutional development, which was accomplished through numerous assertions of power and equally numerous instances of prudent self-restraint. Throughout American

history, moreover, the elected branches of government have found it useful to permit the life-tenured Court to decide difficult and controversial issues. Perhaps most fundamentally, the growth in the Court's power and prestige can be attributed to the degree to which the American people and their elected representatives have accepted the political role that the Court has established for itself.

Students of American government must consider whether the power of judicial review is compatible, not only with the intentions of the Framers of the Constitution, but with our modern notions of democracy. Is judicial review an arrogation of power by the courts? Is it a vestige of aristocracy? Or is it a necessary and desirable element of constitutional democracy? Before reaching conclusions on these questions, one should examine the ways in which judicial review has been applied over the years since *Marbury v. Madison*. It is also important to take into account the constraints, both external and self-imposed, under which judicial review is exercised.

The concept of checks and balances is one of the fundamental principles of the American Constitution. Each branch of the national government is provided specific means of limiting the exercise of power by the other branches. For example, the president may veto acts of Congress, which will not become law unless the veto is overridden by a two-thirds vote in both Houses. Although the federal courts, and the Supreme Court in particular, are often characterized as guardians of the Constitution, the judicial branch is by no means immune to the abuse of power. Accordingly, the federal judiciary is subject to checks and balances imposed by Congress and the president. In a constitutional system that seeks to prevent any agency of government from exercising unchecked power, even the Supreme Court is subject to external limitations.

In *The Federalist,* No. 78, Alexander Hamilton sought to persuade his countrymen that the Supreme Court would be the "least dangerous" branch of the national government under the new Constitution, which had yet to be ratified. Hamilton observed that:

> [T]he judiciary . . . has no influence over either the sword or the purse; no direction of the strength or of the wealth of a society; and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment.

It is true that the Supreme Court's power of enforcement is limited; it is also true that the Court does not determine taxing and spending policies. Yet the almost hallowed character of the Court's "mere judgment" makes the Court as likely to secure compliance with its policy pronouncements as institutions having direct control over appropriations or law enforcement agencies. Clearly, the power of the federal courts, and of the Supreme Court in particular, to secure compliance goes far beyond the issuance of orders and decrees and the availability of a few federal marshals to enforce them.

The power and prestige of the Supreme Court, indeed of the entire federal judiciary, have grown tremendously during the past two centuries. Nevertheless, the Court works within a constitutional and political system that imposes significant constraints on its power.

The Supreme Court can, and occasionally does, speak with finality on important questions of constitutional law and public policy. But it must consider the probable responses of Congress, the president, and, ultimately, the American people. More than 200 years after the ratification of the Constitution, Alexander Hamilton's characterization of the federal judiciary as the "least dangerous" branch of the national government remains credible.

KEY TERMS

judicial review
trial courts
appellate courts
federal courts
jurisdiction
court of last resort
U.S. District Courts
U.S. Courts of Appeals
U.S. Supreme Court
Judiciary Act of 1789
federal question jurisdiction
diversity of citizenship jurisdiction
appeals by right
writ of certiorari
original jurisdiction
concurrent jurisdiction
appellate jurisdiction
rules of procedure
civil suits
criminal prosecutions
plaintiff
defendant
class action
respondent
sovereign immunity
actual damages
punitive damages
specific performance
declaratory judgment
injunction
demurrer
indictment
pretrial motion
writ of habeas corpus
standing
taxpayer suits
mootness
ripeness doctrine
exhaustion of remedies
doctrine of abstention
political questions doctrine
certification
in forma pauperis
memorandum decisions
law clerks
discuss list
preterm conference
rule of four
precedent
plenary review
summary decisions
error correction
briefs
amicus curiae
oral argument
conference
affirm
reverse
vacate
Opinion of the Court
majority opinion
concurring opinion
dissenting opinion
opinion concurring in the judgment
per curiam
case reporters
English common law
substantive due process
judicial activism
presumption of validity
discrete and insular minorities
interpretivism
originalism
doctrine of original intent
natural law
judicial restraint
doctrine of strict necessity
statutory construction
doctrine of saving construction
presumption of constitutionality
strict scrutiny
fundamental rights
narrowness doctrine
stare decisis
severability
unconstitutional as applied
limiting doctrines
compelling government interest
impeachment
subpoena
contempt
judicial behavior
myth of legality
voting blocs

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A Note on Briefing Cases

Each chapter in this book includes a number of excerpts from Supreme Court decisions. These excerpts have been chosen to illustrate some of the important concepts and principles described in the chapters. Some instructors may wish to have their students "brief" some or all of these cases. Whether or not the instructor requires case briefs, students may find briefing cases useful for learning material and preparing for examinations.

A case brief is simply a summary of a court decision, usually in outline format. Typically, a case brief contains the following elements:

- The name of the case and the date of the decision
- The essential facts of the case
- The key issue(s) of law involved (or those applicable to a point of law being considered)
- The holding of the Court
- A brief summary of the Court's opinion, especially as it relates to the key issue(s) in the case
- Summaries of concurring and dissenting opinions, if any
- A statement commenting on the significance of the decision and/or stating the student's view as to the correctness of the decision.

Here is a sample case brief:

***PLESSY V. FERGUSON* (1896)**

Issue: Is a state law requiring "equal but separate" facilities for whites and blacks a violation of the Thirteenth or Fourteenth Amendment?

Facts: Homer Plessy, who was seven-eighths white and one-eighth black, was arrested after refusing to vacate a seat in a railroad car reserved for whites. He was convicted under a Louisiana statute mandating "equal but separate" accommodations on railroads. After unsuccessfully attacking the statute in the Louisiana state courts, Plessy appealed to the U.S. Supreme Court.

Supreme Court Decision: Judgment of state court affirmed; conviction and statute upheld. Vote: 7–1 (Justice Brewer not participating).

Opinions:

Majority (Brown): Segregation is a reasonable exercise of the state's police power in that it is conducive to the maintenance of public order and peace. Segregation is not per se a "badge of slavery" and is therefore not a violation of the Thirteenth Amendment. The compulsory segregation of the races is permissible under the Equal Protection Clause of the Fourteenth Amendment as long as equal accommodations are provided. The Fourteenth Amendment was not intended to abolish all distinctions based on color, nor was it intended to enforce social as distinct from political equality.

Dissenting (Harlan): Compulsory segregation is an infringement on the personal liberties of persons of African descent. The Constitution is color-blind; therefore, government is prohibited from treating people differently merely on account of their race. Forcible segregation is a

badge of inferiority, a vestige of slavery, and therefore a violation of the Thirteenth Amendment.

Comment:
The "separate but equal" doctrine propounded in *Plessy* provided a justification for the entire regime of Jim Crow laws enacted in the late nineteenth century. The Supreme Court eventually repudiated this doctrine, beginning with *Brown v. Board of Education* (1954).

Case

MARBURY V. MADISON

1 Cranch (5 U.S.) 137; 2 L.Ed. 60 (1803)
Vote: 4–0

In this, the most significant opinion in American constitutional law, Chief Justice John Marshall asserts the power of the federal judiciary to invalidate acts of Congress that are determined to be unconstitutional. The facts of the case are discussed in some detail on pages 36–38. It is interesting to note that, in order to accommodate Justice Samuel Chase, who was ill at the time, Chief Justice Marshall read the Opinion of the Court not in the Court's chamber located in the Capitol but before an attentive audience in the living room of Stelle's Hotel, located on the present site of the Library of Congress. For a fascinating account of the details surrounding Marbury v. Madison, *see Jean Edward Smith,* John Marshall: Definer of a Nation, *New York: Henry Holt, 1996, chapter 13.*

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

It is . . . the opinion of the Court that by signing the commission of Mr. Marbury, the President . . . appointed him a justice of peace . . . in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

. . . [H]aving this legal title to the office, [Marbury] has a consequent right to the commission; a refusal to deliver which is a plain violation of the right, for which the laws of his country afford him a remedy.

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

[After a lengthy discussion of the nature of the writ of mandamus and its historical basis, Marshall continues:]

. . . The act [the Judiciary Act of 1789] to establish the judicial courts of the United States authorizes the Supreme Court, "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States" [Section 13].

The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional and, therefore, absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

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

In the distribution of this power, it is declared that "the Supreme Court shall have original jurisdiction, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction." . . .

To enable this Court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction; or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar, that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire, whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

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

Between these alternatives, there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this Court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

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

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the Constitution; or conformable to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then, the courts are to regard the Constitution, and the constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which,

according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be given to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. . . .

The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say, that in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey? . . .

. . . [I]t is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

. . . Why does a judge swear to discharge his duties agreeable to the Constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

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

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

[***Justice Cushing*** and ***Justice Moore*** did not participate in this decision.]

Case

EAKIN V. RAUB

12 Sergeant & Rawle (Pennsylvania Supreme Court) 330 (1825)

Although the specific issue before the Pennsylvania Supreme Court is of little interest today, Justice Gibson's dissenting opinion is still considered to be the most effective rejoinder to Chief Justice Marshall's argument in support of judicial review.

Gibson, J. [dissenting].

. . . I am aware, that a right to declare all unconstitutional acts void . . . is generally held as a professional dogma; but, I apprehend rather as a matter of faith than of reason. I admit that I once embraced the same doctrine, but without examination, and I shall therefore state the arguments that impelled me to abandon it, with great respect for those by whom it is still maintained. . . .

. . . The Constitution and the right of the legislature to pass the act, may be in collision. But is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ, to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the Constitution are we to look for this proud preeminence? Viewing the matter in the opposite direction, what would be thought of an act of assembly in which it should be declared that the Supreme Court had, in a particular case, put a wrong construction on the Constitution of the *United States,* and that the judgment should therefore be reversed? It would doubtless be thought a usurpation of judicial power. But it is by no means clear, that to declare a law void which has been enacted according to the forms prescribed in the Constitution, is not a usurpation of legislative power. . . .

. . . But it has been said to be emphatically the business of the judiciary, to ascertain and pronounce what the law is; and that this necessarily involves a consideration of the Constitution. It does so: but how far? If the judiciary will inquire into any thing beside the form of enactment, where shall it stop? There must be some point of limitation to such an inquiry; for no one will pretend that a

judge would be justifiable in calling for the election returns, or scrutinizing the qualifications of those who composed the legislature. . . .

But the judges are sworn to support the Constitution, and are they not bound by it as the law of the land? In some respects they are. In the very few cases in which the judiciary, and not the legislature, is the immediate organ to execute its provisions, they are bound by it in preference to any act of assembly to the contrary. In such cases, the Constitution is a rule to the courts. But what I have in view in this inquiry, is the supposed right of the judiciary, to interfere, in cases where the Constitution is to be carried into effect through the instrumentality of the legislature, and where that organ must necessarily first decide on the constitutionality of its own act. The oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty; otherwise it were difficult to determine what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the Constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still it must be understood in reference to supporting the Constitution, *only as far as that may be involved in his official duty;* and consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath. . . .

But do not the judges do *a positive act* in violation of the Constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the Constitution. The fallacy of the question is in supposing that the judiciary adopts the acts of the legislature as its own; whereas the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the Constitution which may be the consequence of the enactment; the fault is imputable to the legislature, and on it the responsibility exclusively rests. In this respect, the judges are in the predicament of jurors who are bound to serve in capital cases, although unable, under any circumstance, to reconcile it to their duty to deprive a human being of life. To one of these, who applied to be discharged from the panel, I once heard it remarked, by an eminent and humane judge, "You do not deprive a prisoner of life by finding him guilty of a capital crime; you but pronounce his case to be within the law, and it is, therefore, those who declare the law, and not you, who deprive him of life."

. . . But it has been said that this construction would deprive the citizen of the advantages which are peculiar to written constitution, by at once declaring the power of the legislature, in practice, to be illimitable. I ask, what are those advantages? The principles of a written constitution are more fixed and certain, and more apparent to the apprehension of the people, than principles which depend on tradition and the vague comprehension of the individuals who compose the nation, and who cannot all be expected to receive the same impressions or entertain the same notions on any given subject. But there is no magic or inherent power in parchment and ink, to command respect and protect principles from violation. In the business of government, a recurrence to first principles answers the end of an observation at sea with a view to correct the dead reckoning; and, for this purpose, a written constitution is an instrument of inestimable value. It is of inestimable value, also, in rendering its principles familiar to the mass of the people; for, after all, there is no effectual guard against legislative usurpation but public opinion, the force of which, in this country, is inconceivably great. Happily this is proved, by experience, to be a sufficient guard against palpable infractions. The Constitution of this state has withstood the shocks of strong party excitement for thirty years, during which no act of the legislature has been declared unconstitutional, although the judiciary has constantly asserted a right to do so in clear cases. But it would be absurd to say, that this remarkable observance of the Constitution has been produced, not by the responsibility of the legislature to the people, but by an apprehension of control by the judiciary. Once let public opinion be so corrupt as to sanction every misconstruction of the Constitution and abuse of power which the temptation of the moment may dictate, and the party which may happen to be predominant, will laugh at the puny effort of a dependent power to arrest it in its course.

For these reasons, I am of the opinion that it rests with the people, in whom full and absolute sovereign power resides to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act. What is wanting to plenary power in the government, is reserved by the people for their own immediate use; and to redress an infringement of their rights in this respect, would seem to be an accessory of the power thus reserved. It might, perhaps, have been better to vest the power in the judiciary; as it might be expected that its habits of deliberation, and the aid derived from the arguments of counsel, would more frequently lead to accurate conclusions. On the other hand, the judiciary is not infallible; and an error by it would admit of no remedy but a more distinct expression of the public will, through the extraordinary medium of a convention; whereas, an error by the legislature admits of a remedy by an exertion of the same will, in the ordinary exercise of the right of suffrage—a mode better

calculated to attain the end, without popular excitement. It may be said, the people would probably not notice an error of their representatives. But they would as probably do so, as notice an error of the judiciary; and, beside, it is a postulate in the theory of our government, and the very basis of the superstructure, that the people are wise, virtuous, and competent to manage their own affairs; and if they are not so, in fact, still every question of this sort must be determined according to the principles of the Constitution, as it came from the hands of its framers, and the existence of a defect which was not foreseen, would not justify those who administer the government, in applying a corrective in practice, which can be provided only by a convention. . . .

Case

SCOTT V. SANDFORD (THE DRED SCOTT CASE)

19 Howard (60 U.S.) 393; 15 L.Ed. 691 (1857)
Vote: 7–2

Dred Scott was a slave belonging to a surgeon in the U.S. Army. He was taken by his master into territories in which slavery was forbidden by the Missouri Compromise of 1820. Several years after his return to Missouri, Dred Scott brought suit to obtain his freedom, arguing that his temporary residence in a "free" territory had abolished his servitude. After an adverse ruling in the U.S. Circuit Court, Scott took the case to the Supreme Court on a writ of error.

The U.S. Supreme Court first heard oral arguments in Scott v. Sandford *in February 1856. By this time, the case had achieved notoriety in the stormy sectional controversy over slavery. Reluctant to announce its decision during what promised to be a bitterly fought presidential election campaign, the Court ordered that the case be reargued at the beginning of its next term, in December 1856. One of the most controversial questions addressed on reargument was whether Congress had acted constitutionally in passing the Missouri Compromise of 1820, thereby asserting the power to regulate slavery in the territories.*

President-Elect James Buchanan, whose position on the territorial issue had been equivocal, stated that the "great object" of his administration would be "to destroy the dangerous slavery agitation and thus restore peace to our distracted country." He ardently hoped that through its anticipated decision in the Dred Scott case, the Supreme Court would help him achieve this objective.

*Acting on this hope, Buchanan wrote his old friend, Justice John Catron, on February 3, 1857, wanting to know whether the Court would deliver its decision before March 4, Inauguration Day, so that he could take it into account in preparing his inaugural address. In responding to this highly unusual inquiry, Catron said that the Court had not yet taken action on the case, but that he would try to obtain this information, since he believed Buchanan was entitled to it. Professor Don E. Fehrenbacher, in his authoritative study of the Dred Scott case (*The Dred Scott Case: Its Significance in American Law and Politics*), has argued convincingly that only a decision on the constitutionality of the Missouri Compromise would have been important to Buchanan in preparing his inauguration speech.*

On February 10, Catron wrote Buchanan, advising him that the case would be decided in conference on February 14 but that the justices probably would not rule on the power of Congress over slavery in the territories. This prediction seemed to be confirmed when the majority opinion was assigned to Justice Samuel Nelson, a northern centrist on the Taney Court. In his narrowly focused draft opinion, Nelson maintained that there was no need to consider the constitutionality of the Missouri Compromise's restriction on slavery in the territories. In a sudden about-face, a Court majority decided to take on the territorial issue as well as all other constitutional questions raised in the case. The formidable task of writing a new majority opinion was assigned to Chief Justice Taney. On February 19, Catron again wrote to Buchanan, informing him of the dramatic change in the Court's plans and suggesting that Buchanan's inaugural address might include a passage leaving the territorial matter with the "appropriate tribunal" and declining to "express any opinion on the subject." In the same letter, Catron urged Buchanan to help persuade his fellow Pennsylvanian, Justice Robert C. Grier, to support the broad approach taken by Taney and his four southern colleagues. Buchanan immediately wrote to Grier urging him to fall into line. Grier then conferred with Taney and wrote to Buchanan on February 23, indicating that he would support Taney's opinion, which would hold the Missouri Compromise "to be of non-effect." He and his colleague Justice James M. Wayne would try "to get Brothers Daniel and Campbell and Catron to do the same." After informing Buchanan that the decision would not be delivered before March 6, Grier concluded

his lengthy letter with the following revealing comments: "We will not let any others of our brethren know anything about the cause of our anxiety to produce this result [a majority opinion supported by six or possibly seven justices], and though contrary to our usual practice, we have thought due to you to state to you in candor and confidence the real state of the matter." It is clear from this selective summary of events leading up to Buchanan's inauguration that the president-elect was fully informed by two members of the Supreme Court—each initially unaware of the other's actions—of the substance of the forthcoming Dred Scott decision.

On March 4, 1857, Chief Justice Taney administered the oath of office to President-Elect Buchanan. During a pause in the ceremonies, the two men had a brief conversation, a fact accorded grave significance by some of Buchanan's critics as they listened to his inaugural address. He noted with approval that Congress, through the Kansas-Nebraska Act, had left the people free to deal with the institution of slavery as they saw fit, subject only to the Constitution. Admittedly, a minor problem remained unresolved: "A difference of opinion has arisen in regard to the point of time when the people of a territory shall decide this question for themselves. This is, happily, a matter of but little practical importance. Besides, it is a judicial question which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be." A more disingenuous statement has seldom appeared in an inaugural address. Buchanan not only knew what the Court was about to decide in the Dred Scott case, but it is fair to say that he had a hand in forging the Court majority that endorsed that decision.

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

. . . The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution. . . .

We think . . . [that Negroes] . . . are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted. . . .

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endow him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court thinks the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts. . . .

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. . . .

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to

dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion. . . .

The only two provisions [of the Constitution] which point to them [slaves] and include them [Article I, Section 9, and Article IV, Section 2], treat them as property, and make it the duty of the Government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a Government of special, delegated, powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion of the day. . . .

What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "People." . . .

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the . . . inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.

. . . The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can

exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved. . . .

. . . [A]n Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It would confer no power on any local Government, established by its authority, to violate provisions of the Constitution. . . .

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident. . . .

Mr. Justice Curtis, joined by ***Mr. Justice McLean,*** dissenting.

I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case. . . .

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens. . . .

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri Compromise act, and the grounds and conclusions announced in their opinion.

Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had no jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appear on the trial before the court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court. . . .

Case

Ex Parte McCardle

7 Wall. (74 U.S.) 506; 19 L.Ed. 264 (1869)
Vote: 8–0

In the wake of the Civil War, Congress chose to rely on military rule as the most effective means to "reconstruct" the South. As part of this regime, the Reconstruction Acts authorized military commissions to try civilians who interfered with the program. William H. McCardle, editor of the Vicksburg Times, published a series of editorials that was highly critical of Reconstruction and of the military government that ruled Mississippi. He was subsequently arrested and held for trial by a military commission on the charge of sedition. McCardle sought release by filing a habeas corpus petition in federal circuit court. Shortly before McCardle's case arose, the Congress had authorized the circuit

courts to hear habeas corpus cases involving anyone held by state authorities in violation of the U.S. Constitution or federal statutes. The act included the right to appeal a circuit court denial of habeas corpus to the Supreme Court. McCardle lost his bid for release in the circuit court and exercised his option to appeal. After the case was argued in the Supreme Court, but before a decision on the constitutionality of the Reconstruction Acts was reached, the Congress amended the law to remove the Supreme Court's appellate jurisdiction in habeas corpus cases. Quite obviously, Congress was attempting to prevent the Supreme Court from ruling on the constitutionality of the Reconstruction Acts.

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

This cause came here by appeal from the Circuit Court for the Southern District of Mississippi. A Petition for the writ of habeas corpus was preferred in that court by [McCardle], alleging unlawful restraint by military force.

The writ was issued and a return was made by the military commander, admitting the restraint, but denying that it was unlawful.

It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority, for trial before a military commission, upon charges founded upon the publication of articles alleged to be incendiary and libelous, in a newspaper of which he was editor.

Upon the hearing, [McCardle] was remanded to military custody; but upon his prayer, an appeal was allowed him to this court, and upon filing the usual appeal bond for costs, he was admitted to bail. . . .

Subsequently . . . the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was held, and before conference in regard to the decision proper to be made, an act was passed by Congress, . . . returned, with objections by the President, and repassed by the constitutional majority, which, it is insisted, takes from this court jurisdiction of the appeal.

The second section of this act was as follows: "And be it further enacted, that so much of the Act approved February 5, 1867, . . . as authorized an appeal from the judgment of the circuit court to the Supreme Court of the United States, . . . is hereby repealed."

The attention of the court was directed to this statute at the last term, but counsel having expressed a desire to be heard in argument upon its effect, and the Chief Justice being detained from his place here by his duties in the Court of Impeachment, the cause was continued under advisement.

At this term we have heard arguments upon the effect of the repealing act, and will now dispose of the case.

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

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

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

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

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

Several cases were cited by the counsel for [McCardle] in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction. . . .

On the other hand, the general rule, supported by the best elementary writers . . . is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court . . .

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised. . . .

The appeal of [McCardle] must be dismissed for want of jurisdiction.

Case

COOPER V. AARON

358 U.S. 1; 78 S.Ct. 1401; 3 L.Ed. 2d 5 (1958)
Vote: 9–0

In this case the Supreme Court responds to the efforts of state officials to block the court-ordered desegregation of Central High School in Little Rock, Arkansas, in 1957.

Opinion of the Court by ***The Chief Justice, Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas, Mr. Justice Burton, Mr. Justice Clark, Mr. Justice Harlan, Mr. Justice Brennan,*** and ***Mr. Justice Whittaker.***

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education* [1954]. . . . That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the courts. We reject these contentions. . . .

While the School Board was . . . going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment. . . .

The School Board and the Superintendent of Schools nevertheless continued with preparations to carry out the first stage of the desegregation program. Nine Negro children were scheduled for admission in September 1957 to Central High School. . . .

On September 2, 1957, the day before these Negro students were to enter Central High, the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High school grounds and placed the school "off limits" to colored students. As found by the District Court in subsequent proceedings, the Governor's action had not been requested by the school authorities, and was entirely unheralded. . . .

The Governor's action caused the School Board to request the Negro students on September 2 not to attend the high school "until the legal dilemma was solved." The next day, September 3, 1957, the Board petitioned the District Court for instructions, and the court, after a hearing, found that the Board's request of the Negro students to stay away from the high school had been made because of the stationing of the military guards by the state authorities. The court determined that this was not a reason for departing from the approved plan, and ordered the School Board and Superintendent to proceed with it.

On the morning of the next day, September 4, 1957, the Negro children attempted to enter the high school but . . . [the] National Guard "acting pursuant to the Governor's order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students . . . from entering," as they continued to do every school day during the following three weeks. . . .

. . . After hearings, . . . the District Court found that the School Board's plan had been obstructed by the Governor through the use of National Guard troops, and granted a preliminary injunction . . . enjoining the Governor and the officers of the Guard from preventing the attendance of Negro children at Central High School, and from otherwise obstructing or interfering with the orders of the court in connection with the plan. . . . The National Guard was then withdrawn from the school.

The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high school. . . . On September 25, however, the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. . . .

We come now to the aspect of the proceedings presently before us. . . . [T]he School Board and the Superintendent of Schools filed a petition in the District Court seeking a postponement of their program for desegregation. Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and

the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible. The Board therefore proposed that the Negro students already admitted to the school be withdrawn and sent to segregated schools, and that all further steps to carry out the Board's desegregation program be postponed for a period later suggested by the Board to be two and one half years. . . .

One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights were rendered difficult or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. . . . Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly established that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. . . .

The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. . . . [T]he prohibitions of the Fourteenth Amendment extend to all actions of the State denying equal protection of the laws; whatever the agency of the State taking the action. . . . In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." . . .

What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." . . . Chief Justice Marshall . . . declared in *Marbury v. Madison:* . . . "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* Case is the supreme law of the land, and Art VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art VI, cl 3, "to support this Constitution." . . .

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery. . . ." . . . A Governor who asserts a power to nullify a federal court order is similarly restrained. . . .

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. . . . State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. . . . The basic decision in *Brown* was unanimously reached by this Court. . . . Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

Mr. Justice Frankfurter, concurring. . . .

Case

BAKER V. CARR

369 U.S. 186; 82 S.Ct. 691; 7 L.Ed. 2d 663 (1962)
Vote: 6–2

The term "apportionment" refers to the way in which legislative districts are drawn. Malapportionment exists to the extent that numbers of voters are unequal across legislative districts. In a malapportioned system, voters in the more populous districts are underrepresented, while voters in the less populous districts are overrepresented in the legislature (see Chapter 8, Volume II for a discussion of the apportionment issue). In the middle of the twentieth century, critics of malapportionment turned to the courts for relief. In Colegrove v. Green (1946) the Supreme Court dismissed a lawsuit directed against the malapportionment of congressional districts in Illinois. In his plurality opinion, Justice Felix Frankfurter argued that "due regard for the Constitution as a viable system precludes judicial correction" of the problem. In Frankfurter's view, "[t]he remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." In what became the most frequently quoted language from the opinion, Frankfurter admonished courts not to enter the "political thicket" of reapportionment.

Sixteen years after Colegrove v. Green, *the Supreme Court reconsidered Justice Frankfurter's admonition in the landmark case of* Baker v. Carr. *The case began when voters residing in Chattanooga, Knoxville, Memphis, and Nashville brought a federal class action challenging the apportionment of the Tennessee General Assembly. The general assembly had not been reapportioned since 1901 and, as a result of population growth in the cities, had become badly malapportioned. Plaintiffs argued that they were being "denied the equal protection of the laws accorded them by the Fourteenth Amendment . . . by virtue of the debasement of their votes." As expected, the federal district court dismissed the case on the authority of Colegrove v. Green. The plaintiffs appealed.*

Mr. Justice Brennan delivered the opinion of the Court.

. . . [Baker et al.] seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 [Tennessee apportionment] statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties. . . .

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove v. Green*. . . . We understand the District Court to have read the . . . case as compelling the conclusion that since [Baker] sought to have a legislative apportionment held unconstitutional, [his] suit presented a "political question" and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable "political question." . . .

We have said that "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.". . . The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.

[Justice Brennan discusses several categories of cases in which the Court has labeled particular controversies as "political." He concludes:]

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent

resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

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

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

This case does, in one sense, involve the allocation of political power within a State, and [Baker] might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because my reliance on the Guaranty Clause could not have succeeded it does not follow that [Baker] may not be heard on the equal protection claim which in fact [he tenders]. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here. . . .

. . . [I]n *Gomillion v. Lightfoot* [1960] . . . we applied the Fifteenth Amendment to strike down a redrafting of municipal boundaries which effected a discriminatory impairment of voting rights, in face of what a majority of the Court of Appeals thought to be a sweeping commitment to state legislatures of the power to draw and redraw such boundaries. . . .

. . . [To the argument] that *Colegrove v. Green* . . . was a barrier to hearing the merits of the case, the Court responded that *Gomillion* was lifted "out of the so-called 'political' arena and into the conventional sphere of constitutional litigation" because here was discriminatory treatment of a racial minority violating the Fifteenth Amendment. . . .

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

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

Reversed and remanded.

Mr. Justice Whittaker did not participate in the decision of this case.

Mr. Justice Douglas, concurring. . . .

Mr. Justice Clark, concurring. . . .

Mr. Justice Stewart, concurring. . . .

Mr. Justice Frankfurter, whom ***Mr. Justice Harlan*** joins, dissenting.

The Court today reverses a uniform course of decision established by a dozen cases. . . . The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion, or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce.

Dissenting opinion of ***Mr. Justice Harlan,*** whom ***Mr. Justice Frankfurter*** joins. . . .

Case

RASUL V. BUSH

542 U.S. 466; 124 S.Ct. 2686; 159 L.Ed. 2d 548 (2004)
Vote: 6–3

On November 13, 2001, President George W. Bush signed an executive order authorizing the creation of military tribunals for the detention and trial of foreign nationals apprehended in the "war against terrorism." The government subsequently incarcerated more than seven hundred "enemy aliens" captured in Afghanistan and elsewhere at the American Naval Base at Guantanamo Bay, Cuba. Most were held in solitary confinement, restricted to 6 by 8 foot cells for more than twenty-three hours a day. Inmates were not permitted to have contact with anyone outside the camp, including lawyers and family members, nor were they afforded any sort of judicial or administrative process to review their status.

In 2002, relatives of twelve Kuwaiti nationals detained at Guantanamo Bay filed petitions for habeas corpus in the federal district court for the District of Columbia. Their petitions asserted that these detainees were not enemy combatants and that they were being detained without due process of law. Plaintiffs sought an injunction ordering that these detainees be informed of any charges against them and requiring that they be permitted to consult with counsel and meet with their families.

The federal district court dismissed the case, ruling that it did not have jurisdiction to issue writs of habeas corpus for aliens detained outside the sovereign territory of the United States. The U.S. Court of Appeals for the D.C. Circuit affirmed. It based its decision primarily on Eisentrager v. United States (1950), in which the Supreme Court held that nonresident enemy aliens have no access to American courts during wartime.

Justice Stevens delivered the opinion of the Court.

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba. . . .

Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." The statute traces its ancestry to the first grant of federal court jurisdiction: Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners "in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same." In 1867, Congress extended the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." . . .

Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte Milligan* (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin* (1942), and its insular possessions, *In re Yamashita* (1946).

The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty." . . .

Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager.* In that case, we held that a Federal District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U.S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany. . . .

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. . . .

In *Braden v. 30th Judicial Circuit Court of Ky.* (1973), this Court held . . . that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in

what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of . . . as long as "the custodian can be reached by service of process." . . .

. . . [R]espondents contend that . . . congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority. . . .

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown."

In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. [The habeas corpus statute] by its terms, requires nothing more. We therefore hold that [it] confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base. . . .

Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims. . . .

Justice Kennedy, concurring in the judgment.

The Court is correct, in my view, to conclude that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo Bay Naval Base in Cuba. While I reach the same conclusion, my analysis follows a different course. . . . In my view, the correct course is to follow the framework of *Eisentrager.* . . .

The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager,* then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented. A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated.

The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities.

The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status.

In *Eisentrager,* the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. Having already been subject to procedures establishing their status, they could not justify "a limited opening of our courts" to show that they were "of friendly personal disposition" and not enemy aliens. Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager.* . . .

Justice Scalia, with whom the ***Chief Justice*** and ***Justice Thomas*** join, dissenting.

The Court today holds that the habeas [corpus] statute extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied. The Court's contention that *Eisentrager* was somehow negated by *Braden*—a decision that dealt with a different issue and did not so much as mention *Eisentrager*—is implausible in the extreme. This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change [the law], and dissent from the Court's unprecedented holding. . . .

. . . Today's opinion, and today's opinion alone, overrules *Eisentrager;* today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. By spurious reliance on *Braden* the Court evades explaining why *stare decisis* can be disregarded, and why *Eisentrager* was wrong. Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees. . . .

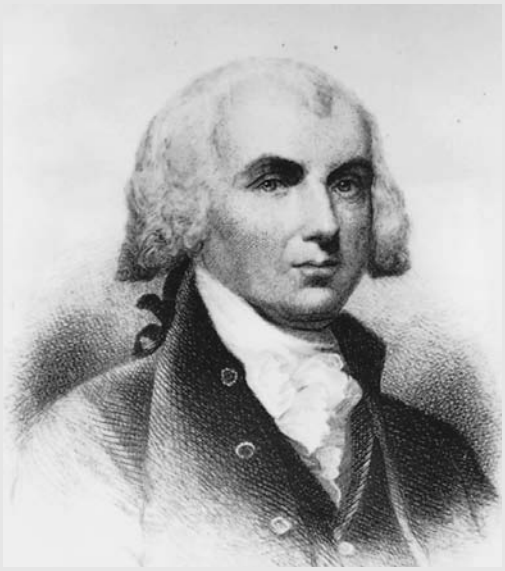
Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs.

2 Congress and the Development of National Power

Chapter Outline

"In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments, by still further precautions."

—James Madison, *The Federalist* No. 51



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James Madison: The principal architect of the Constitution

INTRODUCTION

The first three articles of the Constitution are known as the **distributive articles,** because they deal with the three branches of the national government and distribute powers among them. It is no accident that the first article deals with Congress, because the legislature is the most basic institution of republican government. Under the Articles of Confederation, the national government consisted exclusively of the Congress and a few administrators. There was no executive branch and no system of federal courts. Thus it is not surprising that the Framers of the Constitution placed the legislative article before the articles dealing with the executive and judicial branches.

Over the years, as government at all levels has expanded in size and responsibility, the power of the executive and judicial branches has grown more dramatically than that of Congress. In attempting to address ever more complicated social and economic problems, Congress has created and delegated extensive authority to numerous administrative and regulatory agencies. As a result of this transformation of American government, Congress, once recognized as preeminent, now shares essentially coequal status with the presidency and the judiciary. Indeed, many observers would contend that today all three constitutional branches of the national government are overmatched by a mammoth bureaucracy that has emerged as a virtual fourth branch of government. (Constitutional issues relative to the bureaucracy are addressed in Chapter 4). Nevertheless, Congress, through its vast legislative powers, has been dominant in establishing and defining the authority of executive departments, federal courts, and regulatory agencies. Congress also continues to play a key role in the formulation of public policy. Accordingly, the legislative branch merits primary attention in any study of constitutional law.

STRUCTURAL ASPECTS OF CONGRESS

Article I, Section 1, of the Constitution states: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Article I delineates the composition of both houses of Congress, indicates minimal requirements for members, specifies how members are to be chosen, grants broad authority to each house to determine its own procedures, and extends certain privileges to members of Congress. Article I also defines the legislative powers of Congress, although grants of congressional authority are also found elsewhere in the Constitution.

Bicameralism

The most fundamental change in the institution of Congress brought about by the Constitution was to make it a bicameral, or two-house, body. Under the Articles of Confederation, the Congress was unicameral and each state delegation had only one vote. During the Constitutional Convention of 1787, there was near unanimity on the need for a bicameral Congress, although delegates were divided over the mechanisms of representation in the two houses. Eventually, they compromised on a plan calling for popular election of the members of the House and election of senators by the state legislatures. This plan remained in effect until 1913, when the Seventeenth Amendment was ratified, instituting direct popular election of senators.

Under the Constitution, each state is represented in the Senate by two senators. Thus the size of the Senate has grown from 26 members (two from each of the thirteen original states) to 100 members today. Each state, regardless of its population, is entitled to

at least one representative in the House. Beyond this threshold level of representation, House seats are allocated among the states on the basis of population.

Members of the House are elected from districts within their respective states. Originally, the House consisted of 65 members; today, that number is 435. Although the drawing of House district lines is left to the state legislatures, the Supreme Court held in *Wesberry v. Sanders* (1964) that House districts must be equal in population so that one person's vote in a congressional election is worth as much as another's. This ruling necessitates the redrawing of House district lines every ten years, after the census. This process, known as **reapportionment**, is fraught with political and legal implications (see Chapter 8, Volume II).

Bicameralism is an important part of the system of checks and balances established by the Constitution. Because majorities in both houses must agree on a bill before it can become law, it is more difficult for Congress to act precipitously. This is precisely what the Framers had in mind: They wanted to make the process of governance more deliberate in order to prevent transitory public passions from prompting the legislature to adopt ill-considered and unwise legislation.

Qualifications of Members of Congress

Article I specifies qualifications for members of the House and the Senate. All members of Congress must reside (at least officially) within the state they represent. Members of the House must be at least twenty-five years of age; members of the Senate must be at least thirty. Representatives must have been citizens of the United States for at least seven years; for senators, the citizenship requirement is nine years. No member of Congress may simultaneously hold a position in the executive branch, save for temporary diplomatic duties. According to Article I, Section 5, "Each house shall be the Judge of the . . . Qualifications of its own Members," but the Supreme Court has held that members may be denied seats only if they fail to meet the qualifications specified in Article I (see *Powell v. McCormack* [1969]).

Congressional Terms

The original constitutional provisions regarding congressional terms remain unchanged. Members of the House serve two-year terms; senators hold their offices for six-year terms. Unlike the president, who is limited to two consecutive terms in office by the Twenty-second Amendment, members of Congress may be reelected to an unlimited number of terms.

By the mid-1990s, a movement to limit the number of terms to which members of Congress could be elected had gained considerable momentum. Two basic alternatives were advanced. One called for states to act independently to limit the terms of their congressional delegations; the other provided for nationwide term limits through a federal constitutional amendment. In the pivotal case of *U.S. Term Limits, Inc. v. Thornton* (1995), a sharply divided Supreme Court struck down congressional term limits enacted by the state of Arkansas. In 1992, Arkansas voters had amended their state constitution to limit the number of elections in which one person could run for the U.S. Senate or House of Representatives. Arkansas defended the measure as an exercise of its constitutional authority to determine the "Times, Places and Manner of holding Elections" (U.S. Constitution, Article I, Section 4). The immediate effect of this decision was to invalidate term limits provisions previously adopted by twenty-three states.

Writing for a five-member majority, Justice John Paul Stevens concluded that the federal Constitution's enumeration of the qualifications of members of Congress was

exclusive. He observed that the Framers intended "that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in [Article I]." Stevens further observed that "[a]llowing individual states to craft their own qualifications for Congress would . . . erode the structure envisioned by the Framers." Justices Kennedy, Souter, Ginsburg, and Breyer joined this opinion.

In dissent, Justice Clarence Thomas, supported by Chief Justice Rehnquist and Justices O'Connor and Scalia, presented a lengthy argument in favor of state authority to prescribe eligibility requirements for congressional candidates beyond the basic requirements enumerated in the Constitution. Thomas sought to revive the long-abandoned notion that the states, rather than the "undifferentiated people of the nation as a whole," are the ultimate source of federal authority. He found "nothing in the Constitution [that] deprives the people of each state of the power to prescribe eligibility requirements for candidates who seek to represent them in Congress. . . . And where the Constitution is silent, it raises no bar to action by the states or the people." Immediately after the *Thornton* decision was announced, supporters of term limits pledged renewed efforts to adopt a constitutional amendment to limit the tenure of members of Congress. Subsequent efforts to achieve the requisite congressional support for such a measure have failed. By the end of the twentieth century, enthusiasm for term limits had waned. Regardless of what one thinks of the desirability of limiting congressional terms, as a practical matter a constitutional amendment to accomplish this end is highly unlikely.

Immunities of Members of Congress

The **Speech or Debate Clause** (Article I, Section 6) provides that members of Congress "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." These protections reflect the Framers' concern over possible harassment of legislators by executive officials, a concern inherited from the English political experience.

The Speech or Debate Clause provides a degree of **immunity** to members of Congress against criminal prosecution. In *United States v. Johnson* (1966), for example, the Court held that the Speech or Debate Clause insulated members from having their speeches in Congress used as evidence against them in criminal prosecutions. However, in *United States v. Brewster* (1972), the Court said that newsletters mailed to constituents were outside the sphere of legislative activity and could therefore be used as evidence in a criminal case. The Speech or Debate Clause also provides a degree of immunity from civil suits. In *Hutchinson v. Proxmire* (1979), the Supreme Court held that a senator could not be sued for libel for statements he made on the Senate floor. He could, however, be sued for allegedly libelous statements contained in press releases and newsletters to his constituents.

TO SUMMARIZE:

- Bicameralism, the division of the Congress into two chambers, contributes significantly to the system of checks and balances. This division makes it more difficult for lawmakers to rush to judgment on volatile public issues.
- The qualifications of members of Congress are spelled out in the Constitution in Article I, Sections 2 and 3. According to Article I, Section 5, "Each house shall be the Judge of the . . . Qualifications of its own Members," but the Supreme Court has

held that members may be denied seats only if they fail to meet the qualifications specified in Article I.
- Members of the House serve two-year terms; senators hold their offices for six-year terms. Unlike the president, who is limited to two consecutive terms in office by the Twenty-second Amendment, members of Congress may be reelected to an unlimited number of terms. The Supreme Court has ruled that states may not limit the terms of their congressional delegations. According to this interpretation, congressional term limits would require an amendment to the federal Constitution.
- The Speech or Debate Clause (Article I, Section 6) provides members of Congress with immunity from criminal prosecution for actions within the sphere of legislative activity. It also provides a degree of immunity from civil suits.

CONSTITUTIONAL SOURCES OF CONGRESSIONAL POWER

The enumerated powers of Congress are found in Article I and in provisions scattered throughout the Constitution. For example, Article I, Section 2, grants the House of Representatives the power to return articles of impeachment, and Section 3 gives the Senate the power to try impeachments and remove individuals from public office.

Under Senate Rule XI, a committee of senators hears the evidence against an individual who has been impeached and reports evidence to the full Senate, which then votes on the matter of conviction. In *Nixon v. United States* (1993), the Supreme Court dismissed a challenge to this procedure brought by a federal district judge who had been impeached and convicted. Writing for the Court, Chief Justice Rehnquist observed that "judicial involvement in impeachment proceedings . . . would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers."

Article I, Section 8

Most of the **enumerated powers** of Congress are located in **Article I, Section 8,** which consists of seventeen brief paragraphs enumerating specific powers followed by a general clause permitting Congress 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." The powers enumerated in Article I, Section 8, authorize Congress to lay and collect taxes; borrow money; regulate commerce among the states; control immigration and naturalization; regulate bankruptcy; coin money; fix standards of weights and measures; establish post offices and post roads; grant patents and copyrights; establish tribunals "inferior to the Supreme Court"; declare war; raise and support an army and a navy; regulate the militia when called into service; and perform other more restricted functions.

In reading Article I, Section 8, note that, although Congress is empowered to "provide for the common Defence and general Welfare of the United States," there is no explicit grant of **police power** to Congress. The power to make any and all laws deemed necessary for the protection of the public health, safety, welfare, and morals is thus reserved to the states under the Tenth Amendment. Yet Congress in fact exercises substantial police power by linking laws to the specific powers contained in Section 8. For example, Congress is not empowered to prohibit prostitution per se, but it may make it a crime to transport persons across state lines for "immoral purposes" by drawing on its broad power to regulate "commerce among the states" (see *Hoke v. United States* [1913]).

Other Enumerated Powers

Article I, Section 9 authorized Congress to abolish the importation of slaves into the United States, but only after 1808, in deference to the slave-trading states of the Deep South. Congress did act to ban the slave trade in 1808, although the institution of slavery remained legal until the Thirteenth Amendment was ratified in 1865.

Section 9 also permits Congress to suspend the writ of habeas corpus in cases of rebellion or national emergency. It is unclear whether this power is vested in Congress alone. At the outset of the Civil War, President Abraham Lincoln suspended habeas corpus in parts of the Union where secessionist sentiment was strong. Congress, which was not in session at the time, authorized presidential suspension of the writ two years later.

Article II confers on the Senate the power to participate in the treaty making process and to approve or reject presidential appointments of ambassadors, federal judges, and "all other Officers of the United States whose Appointments are not herein otherwise provided for" (Article II, Section 2, clause 2).

Article III authorizes Congress to define the jurisdiction of the lower federal courts and to regulate the appellate jurisdiction of the Supreme Court. As *Ex parte McCardle* (1869) demonstrates, this power is anything but trivial (see Chapter 1).

Article IV empowers Congress to implement uniform procedures under the clause providing that "[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State" (Article IV, Section 1). Section 3 of this article authorizes Congress to admit new states to the Union, provided that it respects the territorial integrity of existing states. The same section confers on Congress the power to regulate and dispose of "the Territory or other Property belonging to the United States." Article V grants Congress authority to propose constitutional amendments and specifies their mode of ratification—that is, by state legislatures or conventions. It is significant that neither the courts nor the executive branch plays a role in proposing constitutional amendments; this important function is vested solely in the Congress.

Several constitutional amendments confer additional powers on Congress. Of particular importance, the Sixteenth Amendment permits Congress to "lay and collect taxes on incomes from whatever source derived, without apportionment among the states." This amendment nullified an earlier Supreme Court decision striking down an income tax levied by Congress (see *Pollock v. Farmers' Loan and Trust Company* [1895], discussed in Chapter 1).

A number of constitutional amendments endow Congress with the power to legislate in support of civil rights and liberties. For example, the Civil War Amendments—Thirteen, Fourteen, and Fifteen—authorize Congress to enforce civil rights through "appropriate legislation." These rights include freedom from slavery and involuntary servitude (Amendment Thirteen); the enjoyment of the privileges and immunities of national citizenship (Amendment Fourteen); guarantees against state deprivation or denial of due process or equal protection of the laws (Amendment Fourteen); and prohibition of governmental interference with the right to vote "on account of race, color, or previous condition of servitude" (Amendment Fifteen, Section 1). The Nineteenth Amendment removes sex as a qualification for voting, and the Twenty-sixth Amendment lowers the voting age in state and federal elections to 18. Both amendments contain clauses authorizing Congress to enforce their terms by "appropriate legislation." The Twenty-third and Twenty-fourth Amendments, which, respectively, give the District of Columbia representation in the Electoral College and abolish poll taxes in federal elections, are likewise subject to congressional enforcement.

The Doctrine of Implied Powers

It is obvious that Congress today exercises far more powers than are specifically enumerated in the Constitution. Over the years, the American people have come to expect, even demand, as much. Yet one may argue that Congress has remained within the scope of powers delegated to it by the Constitution. The linchpin of this argument is the Necessary and Proper Clause (Article I, Section 8, Clause 18) and the related doctrine of **implied powers.** In fact, the Necessary and Proper Clause is today, along with the Commerce, Taxing, and Spending Clauses, one of the key sources of congressional power.

The theory of implied powers originated with Alexander Hamilton, an advocate of strong centralized government. In Hamilton's view, the term *necessary* in the Necessary and Proper Clause referred to powers that could be appropriately exercised by Congress. In constitutional law, Hamilton's interpretation first appeared in an opinion by Chief Justice John Marshall in the obscure case of *United States v. Fisher* (1805). But the doctrine was firmly established in the landmark case of *M'Culloch v. Maryland* (1819), which ranks second only to *Marbury v. Madison* (1803) in importance in American constitutional law. It is important not only in relation to the powers of Congress but also in terms of federalism, the division of power between the national and state governments (see Chapter 5).

M'Culloch v. Maryland This landmark case grew out of a conflict between national and state authority in the area of monetary policy. In 1791, Congress had granted a twenty-year charter to the Bank of the United States. In 1816, five years after the charter expired, Congress established the Second Bank of the United States, once again with a twenty-year charter. For a variety of reasons, including its heavy speculation and alleged fraudulent practices, the bank soon became the center of political controversy. Eight states passed legislation designed to prevent or discourage the bank from doing business within their jurisdictions. Maryland did so by levying an annual tax of $15,000 on any bank not chartered by the state (a tax that applied only to the Second Bank of the United States); a penalty of $500 was imposed for each violation of the tax measure. James W. M'Culloch, cashier of the Baltimore branch, violated the Maryland statute by refusing to pay the tax, and a judgment was rendered against him by the Baltimore County Court. Agreeing on a statement of facts, the Maryland attorney general and federal officials converted this legal action into a test case on the constitutionality of the state law and, ultimately, of the bank itself. Critics of the bank argued that Congress had no constitutional warrant to charter a national bank and that, in any event, the states were well within their authority to impose a tax on the bank's operations.

The Maryland Court of Appeals upheld the state's tax on the national bank, and the U.S. Supreme Court took the case at M'Culloch's behest. The greatest lawyers of their day, including Daniel Webster, argued the case for nine days before the Supreme Court. In a strong show of support for the national government, the Supreme Court unanimously reversed the Maryland Court of Appeals.

Chief Justice Marshall's Opinion of the Court in *M'Culloch* is widely regarded as a judicial tour de force not unlike *Marbury v. Madison*. In *M'Culloch,* Marshall asserted that although none of the enumerated powers of Congress explicitly authorized the incorporation of a bank, the Necessary and Proper Clause provided the textual basis for Congress's action. In keeping with his general view of the Constitution as an adaptable instrument of government, Marshall construed the Necessary and Proper Clause broadly, concluding that it was not confined merely to authority that was indispensable to the exercise of the enumerated powers. Rather, it was sufficient for

Congress to adopt "appropriate" means to carry out its legitimate objectives. Among these were the powers to tax, to coin and borrow money, and to regulate commerce. In Marshall's view, the establishment of a national bank was an appropriate means of achieving these broad objectives and was, accordingly, permissible under the Necessary and Proper Clause. Marshall provided a detailed exposition of the doctrine of implied powers, concluding with the following statement: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

"Strict constructionists" and proponents of states' rights were outraged by the *M'Culloch* decision. In an action uncharacteristic of a distinguished jurist, Judge Spencer Roane of Virginia went so far as to publish a series of newspaper columns attacking the *M'Culloch* decision. In his only public response to criticism of the Court during his chief justiceship, John Marshall wrote two essays that were published in the *Philadelphia Union* under the pseudonym "A Friend to the Union." In these essays, Marshall attacked his critics and defended his reasoning in the *M'Culloch* case. Unlike Roane's articles, Marshall's essays were not widely circulated and seemed to have had little effect on the controversy following *M'Culloch*.

In state legislatures around the country, there were calls for constitutional amendments to restrict the Supreme Court's power of judicial review and reverse the Court's decision in *M'Culloch v. Maryland*. None of these proposals, however, was taken seriously in Congress, which was preoccupied at that time with the slavery issue and the debate over the Missouri Compromise of 1820. Thus, the *M'Culloch* decision, with its expansive interpretation of congressional power, remained intact.

Implied Powers: Congress Unbound? Under the doctrine of implied powers, scarcely any area exists in which Congress is absolutely barred from acting, since most problems have a conceivable relationship to the broad powers and objectives contained in the Constitution. Thomas Jefferson, an opponent of the doctrine of implied powers, perceived as much in 1790 when, as secretary of state, he opposed the establishment of the First Bank of the United States. In a memorandum to President Washington, Jefferson wrote: "To take a single step beyond the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition." Today, the powers of Congress, while not exactly "boundless," are certainly far greater than most of the founders could have imagined. On the other hand, as we shall see later in this chapter, the conservative majority on the contemporary Supreme Court appears to be determined to reestablish limitations on congressional authority.

TO SUMMARIZE:

- The powers of Congress may be divided into two categories: enumerated and implied.
- Enumerated powers of Congress, such as the taxing and spending powers and the power to regulate interstate commerce, are set forth in Article I, Section 8, and other provisions of the Constitution.
- Implied powers are justified by the Necessary and Proper Clause of Article I, Section 8. The doctrine of implied powers was established by the Supreme Court in *M'Culloch v. Maryland* (1819).

THE POWER TO INVESTIGATE

Article I does not explicitly refer to the power of Congress to conduct investigations. Nevertheless, Congress has conducted hundreds of investigations over the years and called thousands of witnesses to testify. Sometimes these investigations have been great public events, such as the Watergate hearings of 1973 and 1974, which led to the demise of the Nixon presidency. More often, they have involved more mundane questions of public policy, such as consumer product safety or the regulation of the airline industry.

One of the important functions of legislative investigations is **oversight**—Congress serving as a watchdog over the actions of executive and regulatory agencies. This function has become increasingly important in the modern era, as Congress has created so many agencies and delegated to them broad powers within their areas of expertise. In a democracy, it is vital that the people's elected representatives keep tabs on the activities of a powerful, unelected government bureaucracy (for elaboration on this theme, see Chapter 4).

What is the source of Congress's **power to investigate?** There are several theories. The first is that Congress inherited this power from the English Parliament at the time of the Declaration of Independence in 1776. This theory views the power to investigate as inherent in any duly constituted legislature. Under this theory, Congress's power to investigate does not depend on any grant of authority in the Constitution (for a treatment of the general theme of inherited powers, see *United States v. Curtiss-Wright Export Corporation* [1936], reprinted and discussed in Chapter 3).

A second theory is that congressional investigations may be justified under the doctrine of implied powers. In this argument, the power to investigate is seen as both necessary and proper to the exercise of Congress's most basic function—crafting legislation.

Investigation is a necessary means of obtaining information about the issues and subjects around which Congress is considering legislation. In fact Professor (later President) Woodrow Wilson went so far as to assert that "[t]he informing function of Congress should be preferred even to its legislative function." Finally, Congress's power to conduct investigations may be justified under a theory of an evolving system of checks and balances. Under this theory, the system of checks and balances enumerated by the Framers was incomplete in that it failed to grant Congress the power to investigate, since investigation is an obvious means whereby Congress can check the other branches. In this argument, Congress was justified in asserting the power to investigate for the same reason that the Supreme Court was justified in assuming the power to rule on the constitutionality of legislation.

The Supreme Court Recognizes Congress's Power to Investigate

Congress conducted a number of important investigations during the early and mid-1800s. These included an inquiry into the Lewis and Clark exploration of the Louisiana Territory acquired during the Jefferson administration and an investigation of John Brown's abortive raid on the federal arsenal at Harper's Ferry in 1859. The Supreme Court did not, however, address the constitutionality of the investigative power until its decision in *Kilbourn v. Thompson* (1881).

The *Kilbourn* case involved a House of Representatives investigation into the collapse of the Jay Cooke banking firm, with which the United States had deposited funds. In the course of the investigation, Hallet Kilbourn was called to testify and bring with him documents pertaining to his "real estate pool" and its dealings with the Jay Cooke company. Kilbourn refused both to testify and to produce the records.

He was cited for contempt of Congress and was jailed for forty-five days. Upon his release from custody, Kilbourn sued John G. Thompson, the House sergeant-at-arms, for false imprisonment.

Reviewing a lower court decision in Thompson's favor, the Supreme Court held that, although Congress possessed the power to investigate, the power must be exercised in furtherance of the legislative function. Justice Samuel F. Miller wrote for a unanimous bench that Congress could not employ its power of investigation to accomplish functions that were reserved to the other branches of government. In this case, the House had no intent to legislate; its inquiry into the Jay Cooke company was entirely investigatory in nature. Thus, Kilbourn's contempt citation and imprisonment were invalid.

The *Kilbourn* decision established the basic policy of the Supreme Court toward legislative investigations: The power to investigate is a necessary auxiliary of the legislative function. Yet the implied power to investigate is not unlimited. It must be exercised only in relation to potential legislation. Of course, today, there are few areas in which Congress may not potentially legislate; thus, there are few areas off limits to congressional investigation. Still, an investigation purely for its own sake is subject to judicial challenge.

Compulsory Process

When a congressional committee wishes to obtain testimony, it issues a **subpoena** to an individual. If it wishes to obtain documents for its inspection, it issues a *subpoena duces tecum*. A subpoena is often referred to as a **compulsory process**, because the individual is compelled to comply or risk being held in **contempt of Congress.** The Supreme Court upheld Congress's power to enforce a subpoena in *McGrain v. Daugherty* (1927), a case stemming from a Senate investigation into the Teapot Dome scandal during the administration of President Warren G. Harding. There, the Court stated that "the power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function."

The Rights of Individuals Called before Congressional Committees

Congress's power to conduct investigations and compel witnesses to disclose information is generally regarded as both necessary and proper, but the power is certainly subject to abuse. Individuals who are called to testify before congressional committees may under certain circumstances legitimately refuse to answer questions. The Fifth Amendment protection against compulsory self-incrimination applies to legislative investigations, as well as to police interrogations and questioning in a court of law. An individual may legitimately refuse to answer questions if the answers to such questions might reveal criminal wrongdoing on his or her part. Yet, like a court of law, Congress may grant immunity to a witness to circumvent the Fifth Amendment.

A witness who is granted immunity from prosecution has no grounds to invoke the Fifth Amendment, since the danger of self-incrimination has been removed. This was the case during the Iran-Contra investigation, when Oliver North was granted immunity in exchange for his testimony before Congress. Under the grant of immunity, federal prosecutors were barred from using North's testimony before Congress as evidence against him in a subsequent criminal prosecution. Under the grant of immunity, North ultimately avoided criminal liability.

In addition to the protection against compulsory self-incrimination, a person called to testify before Congress enjoys certain protections under the Due Process

Clause of the Fifth Amendment. In particular, one is entitled to know the subject matter of the investigation. Moreover, questions must be pertinent to that subject (see *Watkins v. United States* [1957]).

Perhaps the best example of the abuse of the investigatory power occurred during the early days of the Cold War, when suspicions of Communist subversion verged on hysteria. In the 1950s, the House Un-American Activities Committee (HUAC) sought to expose Communist infiltration and corruption by subjecting suspected Communists to far-ranging and probing questions about their beliefs, affiliations, activities, and relationships. In the climate of near-hysteria over Communist subversion, the admonitions in *Kilbourn v. Thompson* about the proper scope and function of the investigatory power were all but forgotten. Individuals who invoked their constitutional immunity against compulsory self-incrimination in refusing to answer the committee's questions were branded "Fifth Amendment Communists." In *Watkins v. United States* (1957), the Supreme Court reversed a conviction for contempt of Congress in a case where a witness had refused to answer questions put to him by HUAC. John Watkins answered questions about his own beliefs and activities but refused to "name names" of other suspected Communists. The Supreme Court reversed Watkins's conviction primarily on procedural grounds, holding that he had been denied due process of law. The Court also expressed concern that First Amendment values were being threatened by HUAC's public hearings.

Critics of HUAC hoped the Court's decision in *Watkins* signaled a desire on the part of the Court to limit congressional investigations on First Amendment grounds. In Congress, however, critics of *Watkins* and similar Warren Court decisions introduced legislation to remove the Court's appellate jurisdiction in cases where persons are held in contempt of Congress. The Court evidently took note of these efforts and soon backed away from its First Amendment concerns regarding congressional investigations.

In *Barenblatt v. United States* (1959), the Court upheld a conviction for contempt of Congress, holding that the public interest in exposing Communist infiltration outweighed a witness's First Amendment rights in refusing to answer questions. The *Barenblatt* decision went a long way toward deflating Court-curbing efforts and rehabilitating the Court's standing in Congress. Since 1959, the Court has continued to show deference to congressional investigations and has generally refused to allow uncooperative witnesses to invoke the protections of the First Amendment (see, for example, *Wilkinson v. United States* [1961] and *Eastland v. U.S. Servicemen's Fund* [1975]).

TO SUMMARIZE:

- Although it is not explicitly provided for in the Constitution, Congress's power to investigate has been recognized by the Supreme Court as an essential auxiliary of the legislative process.
- Congress's power to investigate includes the power to issue subpoenas and to hold in contempt persons who refuse to cooperate with legitimate investigations.
- The Supreme Court has held that the power to investigate is not unlimited; investigations must be related to a legitimate legislative purpose.
- Investigations must conform to standards of procedural due process. Although witnesses called to testify before Congress may rely on their Fifth Amendment privilege against compulsory self-incrimination, Congress may compel testimony by granting immunity.

REGULATION OF INTERSTATE COMMERCE

The Articles of Confederation contained no provision granting Congress **power to regulate interstate commerce.** Thus Congress during this "critical period" could do nothing to control growing commercial rivalries among the thirteen largely independent states. This deficiency led the Framers of the Constitution to adopt Article I, Section 8, Clause 3, which provides that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Commerce Clause is important both as a source of national power and as an implicit restriction on state power.

Early Interpretation of the Commerce Clause

During the first century following adoption of the Constitution, Congress made little use of the Commerce Clause as a source of positive power. It is true that this clause served as partial authority for the creation of the Second Bank of the United States, as upheld in *M'Culloch v. Maryland* (1819). The range of potential congressional power was thus recognized at an early date. Nevertheless, during the nineteenth century the Commerce Clause served primarily as a barrier against state legislation. Neither the states nor the national government engaged in extensive regulation of commerce during this early period, but most of the governmental activity that did occur emanated from the states. It was in this setting that the first major Commerce Clause case, *Gibbons v. Ogden* (1824), reached the Supreme Court.

Gibbons v. Ogden Like many other areas of constitutional analysis, the starting point in the interpretation of the Commerce Clause is found in one of Chief Justice John Marshall's opinions. As in *Marbury v. Madison* (1803) and *M'Culloch v. Maryland* (1819), Marshall's opinion in the Gibbons case is one of those fundamental statements of constitutional jurisprudence that has grown in influence with the passage of time. Marshall and his colleagues on the Supreme Court of the early 1800s had the advantage of addressing major questions of constitutional law for the first time, unguided—but also unencumbered—by the weight of precedent. Marshall, far more than any other jurist of his era, displayed the ability to use this advantage effectively.

At issue in *Gibbons v. Ogden* was the constitutionality of New York's grant of a steamboat monopoly to Robert Fulton and Robert Livingston. Aaron Ogden succeeded to the ownership of the Fulton-Livingston interest, which extended to commercial steamboat traffic between New York and New Jersey. Thomas Gibbons challenged this exclusive grant on the ground that it interfered with the power of Congress to regulate commerce among the states. Gibbons was licensed under federal law to engage in the "coasting" trade-commerce and navigation in coastal waters—and he contended that this authorization gave him the right to transact business of an interstate nature within the boundaries of New York, irrespective of that state's monopoly grant to others. Marshall and his colleagues agreed with Gibbons.

In the course of declaring the New York steamboat monopoly unconstitutional, Marshall wrote expansively about the scope of congressional power embodied in the Commerce Clause. In this instance, an obvious conflict existed between the federal licensing provision and the state grant of monopoly. Invoking the Supremacy Clause of Article VI of the Constitution, Marshall resolved this conflict in favor of the national government. He went on to assert that the power of Congress over commerce among the states was plenary—that is, full and complete—and subject to no competing exercise of state power in the same area. The federal law under which Gibbons

operated was a modest exercise of that plenary power, but it was enough to warrant invalidation of the state law because the monopoly granted by the state interfered with the commercial privileges provided by the federal government.

It was clear from Marshall's perspective that Congress had acted well within its constitutional authority. In fact, Marshall defined the phrase "commerce among the several states" so broadly, and spoke in such sweeping terms about the power of Congress to regulate it, that his opinion came to be read as an endorsement of regulatory authority on a grand scale—far beyond anything dreamed of in the 1820s. Marshall acknowledged that commerce among the states was "restricted to that commerce which concerns more states than one." Nevertheless, it encompassed a vast range of relationships and transactions summed up in the phrase "commercial intercourse." When Marshall spoke of commerce as intercourse, he included more than the isolated movement of an article of trade from a point in one state to a point in another state. He had in mind commercial activity within and between states and maintained that realistic distinctions could not be automatically equated with state lines. Marshall recognized that some commerce might be altogether internal, or intrastate, in nature; but because that type of commerce was not at issue in this case, he did not elaborate on its precise meaning.

In asserting that the power of Congress under the Commerce Clause was plenary and superior to any competing state power, Marshall skirted one vitally important question: Would state legislation affecting commerce among the states be constitutional in the absence of any conflicting federal law? In a concurring opinion, Justice William Johnson answered this question in the negative. In his view, the power of Congress was not only plenary but also exclusive; he maintained that the states were absolutely barred from legislating in this broad area. Johnson was not supported in this view by other members of the Court, and his interpretation has never been adopted by a Court majority. However, the Court has generally recognized the exclusive power of Congress to regulate commerce "with foreign Nations . . . and with the Indian Tribes." Justice Johnson's statement endorsing exclusive congressional control of commerce among the states served to sharpen the underlying issue in *Gibbons v. Ogden* and in a long line of cases decided since that decision. The basic issue is this: If the power of Congress is plenary, as Marshall and his colleagues in *Gibbons* maintained, does the failure of Congress to regulate a particular aspect of commerce mean that this aspect is not to be regulated at all? And if the answer to this question is no (as the Court has subsequently indicated), then does it follow that the states are free to regulate commerce in any area not already covered by federal legislation? Broadly speaking, and with varying degrees of imprecision, the Supreme Court has also answered this question in the negative. As Chapter 5 will explain, the states may, in the absence of conflicting federal law, regulate certain **local aspects of interstate commerce.** But even when no conflict with federal law exists, those aspects of interstate commerce that require uniform nationwide regulation cannot be touched by the states. The problem that remains unresolved to the present day is where to draw the line between permissible and impermissible state regulation of commerce in specific cases. It was not necessary in *Gibbons v. Ogden* to explore that problem; but as demands for greater governmental regulation at state and national levels increased, the issue became more and more perplexing.

Gibbons v. Ogden furnished John Marshall with an opportunity to lay down an all encompassing definition of national power under the Commerce Clause. The decision was widely acclaimed by business leaders because it placed restrictions on state grants of commercial monopoly, thus encouraging competitive commercial and industrial activity at a time when the national government played no significant role in regulating business. To the advocate of private enterprise in the 1820s, it no doubt

seemed safe enough to talk in the abstract about broad national power to regulate commerce, especially if such discussion provided a justification for curbing state regulation. Until late in the nineteenth century, that is precisely what the national commerce power symbolized. During this period, the states, under an expanding definition of their police power, adopted an increasing number and variety of economic regulations, many of which were aimed at large corporations with growing political clout, especially in the post–Civil War era. Some of these laws came into conflict with the power of Congress to regulate commerce—not so much the actual exercise of that power but the potential power that, according to the Supreme Court, Congress alone could exert (see *Wabash, St. Louis & Pacific Railway Company v. Illinois* [1886]).

Congress Exercises the Commerce Power

As the popular demand for economic regulation increased and restrictions on state power multiplied, the national government came under greater pressure to limit the concentration of corporate influence and reduce what many Americans regarded as economic injustice and exploitation. Strong commercial interests countered this pressure to some extent, but ultimately Congress responded by passing the **Interstate Commerce Act of 1887** and the **Sherman Antitrust Act of 1890.** The first of these measures established the Interstate Commerce Commission (ICC), granting this independent agency limited authority to regulate railroads engaged in commerce among the states. The Sherman Act was aimed at controlling on a national scale the concentration of economic power in the form of monopolies or "combinations in restraint of trade," as the statute phrased it.

Both the ICC and the Sherman Act represented the beginning of a national counterpart to state police power. Both rested squarely on the Commerce Clause and both encountered rough sledding in the Supreme Court for a number of years. By 1890, the Court had come under the influence of an economic philosophy that stressed the values of individual and corporate freedom and minimized the legitimate sphere of governmental regulation. Although the Court never fully subscribed to the doctrine of laissez-faire, most of its members, including several former corporation lawyers, were sympathetic to this perspective. This view was reflected in changing interpretations of the Commerce Clause, the Tenth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments. Until the judicial revolution of 1937, the Court accorded great importance to the protection of property and other business-related rights against growing regulatory efforts at all levels of government. This subject is discussed more fully in Chapter 2, Volume II, but it is important to recognize at this point that the restrictive view of the Commerce Clause, characteristic of Supreme Court decisions of the late nineteenth and early twentieth centuries, was part of a larger pattern of constitutional interpretation.

The Supreme Court and the Commerce Clause: 1895–1937 The first major change in Commerce Clause interpretation as applied to the exercise of national power came in the 1895 case of *United States v. E. C. Knight Company*. The decision resulted from the federal government's effort to break up a powerful sugar monopoly by invoking the Sherman Antitrust Act. In this initial interpretation of the act, a Supreme Court majority held that its regulatory provisions, as applied to the manufacture of sugar, went beyond the proper scope of the commerce power.

Commerce Distinguished from Production By contrast with John Marshall's broad perspective in *Gibbons v. Ogden,* Chief Justice Melville Fuller, writing for the majority

in *E. C. Knight,* emphasized the boundaries of the commerce power. He acknowledged the "evils" of monopoly and conceded that the E. C. Knight Company was indeed engaged in monopolistic practices in the manufacture of refined sugar. He also recognized a connection between the control of the manufacture of "a given thing" and "control of its disposition." But he brushed aside the obvious relationship between commerce and manufacturing, maintaining that it was secondary, not primary, in nature. The connection, in his view, was incidental and indirect. Fuller did not clearly indicate why such a distinction should be made or precisely where the line should be drawn. He simply asserted that "commerce succeeds to manufacture and is not a part of it." Under their police power, states were free to regulate monopolies, but the national government had no general police power under the Commerce Clause. He thus accorded a narrow interpretation to the enumerated powers of Congress. Only if the business activity in question was itself a "monopoly of commerce" could the national government suppress it. This formal distinction between commerce and manufacturing, adopted over the strong dissent of Justice John M. Harlan (the elder), temporarily gutted the Sherman Act without rendering it unconstitutional per se. If the government could move only against the post-manufacturing phases of monopolistic activity, and not against the entire enterprise, its hands were effectively tied.

The Court followed similar reasoning in *Hammer v. Dagenhart* (1918), invalidating by a 5-to-4 margin federal restrictions on child labor. The manufacture of goods by children, even when those goods were clearly destined for shipment in interstate commerce, was not a part of commerce and could not be regulated by Congress. Here the Court, over the incisive dissent of Justice Oliver Wendell Holmes, added the observation that there was nothing harmful in the manufactured goods themselves, implying that such a showing would have been necessary to justify their prohibition in interstate commerce.

Interestingly, the Court had upheld several equally far-reaching exercises of congressional power under the Commerce Clause between the *E. C. Knight* and *Dagenhart* decisions. In fact, some of these statutes imposed severe criminal penalties in addition to the civil remedies exclusively applied in the latter case. For example, Congress enacted laws imposing fines and imprisonment for participation in lotteries and prostitution. Activities of this sort, unlike child labor and business monopoly, were widely regarded as immoral. And when it came to punishing what most people believed to be sinful behavior, the Commerce Clause was seen as an appropriate weapon (see, for example, *Champion v. Ames* [1903], upholding the federal antilottery statute, and *Hoke v. United States* [1913], sustaining a federal law penalizing the transportation of women across state lines for "immoral purposes"). Throughout this period, the Court was also willing to uphold national legislation designed to protect consumers against adulterated food and the improper processing, packaging, and branding of meat shipped across state lines (see *Hipolite Egg Company v. United States* [1911], in which the Court upheld the Pure Food and Drug Act).

Commerce and Transportation In the field of transportation, particularly the regulation of railroad freight rates, the scope of national power under the Commerce Clause developed in accordance with the broad language of *Gibbons v. Ogden*. Even intrastate rates might be regulated by the ICC if states created rate structures that discriminated against interstate carriers in favor of their local competitors. This was the situation in the Shreveport Rate Case (*Houston, East & West Texas Railway Company v. United States,* 1914). The Texas Railroad Commission permitted three railroads to charge lower rates for intrastate shipments in east Texas than for interstate shipments of comparable distances in the same geographical area. The impact of this arrangement was to generate business among east Texas cities at the expense of

Shreveport, Louisiana, a commercial center naturally linked to cities such as Dallas. The Louisiana Railroad Commission began administrative proceedings before the Interstate Commerce Commission, challenging the differential rate structures. The ICC established uniform maximum rates for interstate and intrastate movement of freight and ordered the three railroads to cease their discriminatory practices. In a 7-to-2 decision the Supreme Court affirmed the decree of a specialized and short-lived tribunal, the Commerce Court, upholding the ICC decision. In his opinion for the majority, Associate Justice (later Chief Justice) Charles Evans Hughes declared that Congress is authorized

> to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the government of that commerce. . . . Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action . . . which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

The "Stream of Commerce" Doctrine In spite of broad interpretation of the commerce power in the field of transportation, however, prior to the late 1930s the Court resisted congressional efforts to expand the Commerce Clause as a non-selective basis of national police power. Instead, the Court developed several concepts designed to assist it in defining the outer limits of the commerce power. We identify only two of the most prominent of these to illustrate the elusiveness and complexity of constitutional development in this field of congressional regulation. The first of these concepts, the **stream of commerce doctrine**, was first articulated by Justice Holmes in the 1905 decision of *Swift and Company v. United States*. There, the Court held that the power of the national government under the Sherman Act extended to "conspiracies in restraint of trade" among a combination of Chicago meatpackers. Even though the challenged activities—the buying and selling of cattle in Chicago—were local in nature, Holmes found that they were in the "current of commerce" among the states. The same rationale was applied by Chief Justice William Howard Taft seventeen years later in a decision upholding federal regulation under the Packers and Stockyards Act of 1921 (*Stafford v. Wallace* [1922]).

Direct versus Indirect Effects on Interstate Commerce The second concept is a presumed distinction between the direct and indirect effects of a particular regulation on commerce. In a number of cases during this period, the Court indicated that even though the activity in question might not be defined as commerce per se, it could still be regulated if it had a direct effect on interstate commerce. It followed that a mere indirect effect would not alone be sufficient to justify the exercise of congressional power. Although the **direct–indirect test** was usually applied in such a way as to sustain the regulation under review, the Court used this distinction as a means of indicating that congressional authority was subject to limitation. For example, when the National Industrial Recovery Act, a major piece of New Deal legislation, was declared unconstitutional in *Schechter Poultry Corporation v. United States* (1935), one of the principal conclusions reached by the Court was that what the government sought to regulate had only an indirect effect on interstate commerce. (The other principal constitutional basis of the decision, a violation of the rule against congressional delegation of authority, is discussed in Chapter 4.)

Expansion of Federal Regulatory Power: 1937 and Beyond

The **distinction between manufacturing and commerce** was reaffirmed in principle and extended to the differentiation between mining and commerce in the 1936 case of *Carter v. Carter Coal Company*. Thus a Supreme Court majority from the mid-1890s through the mid-1930s treated the commerce power of Congress as inherently limited in nature. Then came the confrontation between President Franklin D. Roosevelt and the "nine old men." In the aftermath of Roosevelt's effort to pack the Supreme Court in 1937, the Court moved away from a defense of private enterprise and toward an affirmation of broad regulatory power, both national and state. One very important aspect of this transition was a return to John Marshall's expansive definition of congressional power under the Commerce Clause. As a result, the Commerce Clause came to be recognized as a source of far-reaching national police power.

Under President Franklin Roosevelt's leadership, the Democratic Congress of the middle and late 1930s enacted sweeping legislation to replace, and in some instances amplify, measures that the Supreme Court had invalidated prior to 1937. Areas such as labor-management relations, agriculture, social insurance, and national resource development became focal points of national policy—and the Commerce Clause figured prominently as a constitutional source for most of the new legislation. Beginning with its decision upholding the National Labor Relations Act (*National Labor Relations Board v. Jones & Laughlin Steel Corporation* [1937]), the reoriented Supreme Court swept away distinctions between commerce and manufacturing, between direct and indirect burdens on commerce, and between activities that directly or indirectly affected commerce.

The post–New Deal perspective on the Commerce Clause is well illustrated by the case of *Wickard v. Filburn* (1942). At issue was the constitutionality of a federal acreage allotment for wheat. On their face, the questions might have seemed easy to resolve in light of the expanded power of Congress in the post–New Deal era. But the specific violation revolved around a farmer who had raised a wheat crop in excess of the prescribed allotment, not for sale or distribution in interstate commerce but for his own consumption. Writing for a unanimous Court, Justice Robert H. Jackson concluded:

> Even if appellant's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

A comparison between the sweeping language of *Wickard v. Filburn* and the restrictive view of Chief Justice Fuller in *E. C. Knight* illustrates the extent to which a single clause of the Constitution is subject to contrasting interpretations. Under the modern interpretation of the Commerce Clause, the federal government is permitted to play a very active role in the regulation of economic activity. This is seen in the enforcement of antitrust laws, the control over farm commodities, the supervision of financial markets, the oversight of labor–management relations, and the regulation of various transportation industries. It is also seen in areas of "commerce" that fall outside conventional regulation of business, such as civil rights legislation applicable to places of public accommodation.

The Commerce Clause and Civil Rights In the 1960s, Congress relied on the Commerce Clause as a basis for vast legislative undertakings, some of them well beyond the field of economic regulation. The most important illustration of the commerce power as a source of noncommercial legislation is within the area of race relations. In *Heart of Atlanta Motel v. United States* (1964), the Supreme Court unanimously upheld

the public accommodations section of the **Civil Rights Act of 1964** as a proper exercise of the commerce power. The motel in question did a substantial volume of business with persons from outside Georgia. The Court ruled that its racially restrictive practices could impede commerce among the states and could therefore be appropriately regulated by Congress. In the companion case of *Katzenbach v. McClung* (1964), the Court went even further by recognizing the power of Congress under the Commerce Clause to bar racial discrimination in a restaurant (Ollie's Barbecue in Birmingham, Alabama) patronized almost entirely by local customers. The Court found a connection with interstate commerce in the purchase of food and equipment from sources outside Alabama. Under such a broad definition, it is questionable whether any local enterprise that opens its doors to the public could remain outside the scope of the Commerce Clause. Today, few businesses attempt to challenge the applicability of the Civil Rights Act, because racial segregation in places of business has become socially, as well as legally, unacceptable.

Environmental Protection Since the 1960s, government at all levels has been under pressure to do more to protect natural resources and combat pollution. Relying to a great extent on its powers under the Commerce Clause, Congress has enacted sweeping laws designed to promote conservation and protect the natural environment and workers from the adverse effects of an industrialized economy. Some of the more important federal laws in this regard are the Clean Air Act, the Endangered Species Act, and the Occupational Safety and Health Act. These acts involve broad delegations of power from Congress to regulatory agencies, which raises a constitutional question in and of itself (see Chapter 4).

Federal environmental legislation has generally been favorably received in the Supreme Court. For example, in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.* (1981), the Supreme Court upheld a federal statute aimed at reducing the environmental impact of surface coal mining by establishing uniform national standards on the industry. The Court said that Congress could reasonably conclude that unregulated surface mining could "adversely affect the public welfare by destroying or diminishing the utility of land." Similarly, in *Federal Energy Regulatory Commission v. Mississippi* (1982), the Court upheld an act of Congress regulating local electric power transmissions, taking note of the impact of local electric power generation and transmission on the national supply of electrical power. Finally, in *Preseault v. Interstate Commerce Commission* (1990), the Court upheld a federal statute permitting local governments to convert abandoned railroad rights-of-way for purposes of recreation and conservation. The Court said that the law furthered a legitimate objective under the Commerce Clause—preservation of railroad rights-of-way for possible future reactivation.

The Supreme Court has gone so far as to hold that certain federal laws passed under the aegis of the Commerce Clause are so comprehensive and are of such overriding national importance as to preempt state and local legislation in a given area. By way of illustration, the Court has held that the federal Noise Control Act of 1972 preempts a city from adopting its own aircraft noise abatement ordinance (see *Burbank v. Lockheed Air Terminal* [1973]). Clearly, the Supreme Court has given Congress broad latitude to use the Commerce Clause as a basis for environmental legislation.

The Commerce Clause and Federal Criminal Law The expansive scope of the modern interpretation of the Commerce Clause has also facilitated increased federal activity in the enactment and enforcement of criminal law, an area traditionally left to the states. For example, in 1970, Congress enacted the Organized Crime Control Act, Title IX of which is titled "Racketeer Influenced and Corrupt Organizations" (RICO).

The **RICO Act**, as it is widely known, essentially prohibits infiltration of organized crime into organizations or enterprises engaged in interstate commerce. The act permits the Federal Bureau of Investigation and other federal law enforcement agencies to become more involved in the investigation of organized crime, even into activities that are ostensibly confined to local areas.

In *Perez v. United States* (1971), the Supreme Court upheld Title II of the Consumer Credit Protection Act, a federal statute aimed at loan-sharking. Even though loan-sharking is primarily a local activity, the Court held that Congress could reasonably have concluded that it is a major revenue source for organized crime, a national problem with a detrimental impact on interstate commerce. In a dissenting opinion, Justice Potter Stewart observed that the Framers of the Constitution never intended for the national government to define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws:

> [I]t is not enough to say that some loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting.

The interpretation of the Commerce Clause, like that of other constitutional provisions, is undertaken, in large part, to facilitate the achievement of practical political goals and to preserve the continuity of legal doctrine. Because substantial segments of the American public have demanded that the national government become increasingly active in such areas as economic regulation, civil rights, and environmental and crime control, the Commerce Clause has been stretched far beyond the intentions or expectations of the Framers of the Constitution.

The Rehnquist Court's Restriction of Congressional Powers under the Commerce Clause

In *United States v. Lopez* (1995), a closely divided Supreme Court invalidated the Gun-Free School Zones Act of 1990, a federal statute criminalizing the possession of a firearm in or within 1,000 feet of a school. As constitutional authority for this statute, Congress had relied on its power to regulate interstate commerce. Writing for the majority, Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, asserted that the Gun-Free School Zones Act was "a criminal statute that by its terms [had] nothing to do with 'commerce' or any sort of enterprise, however broadly one might define those terms." Rehnquist observed that "if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." Joined by three of his colleagues, Justice Breyer took sharp exception to the majority's characterization of the issue, insisting that the statute was "well within the scope of the commerce power as this Court has understood that power over the past half-century." Breyer cited numerous studies in support of his contention that Congress had a rational basis for concluding that gun-related violence in and near schools affected commerce.

In a concurring opinion, however, Justice Thomas commented that at oral argument, the government's lawyer was asked whether there are any limits to what Congress may regulate under the Commerce Clause. Thomas noted that "the government was at a loss for words." In taking Justice Breyer's dissent to task, Thomas further observed that "the principal dissent insists that there are limits, but it cannot even muster one example." Without question, the Court's decision in the *Lopez* case represents a sharp deviation from the familiar pattern of modern (post-1937) Commerce Clause decisions. Almost without exception, these decisions have reflected the

Court's expansive view of the clause as a source of far-reaching congressional power. Under modern interpretation, traditional constitutional distinctions between national and local responsibilities of government have largely disappeared. Chief Justice Rehnquist addressed this broad question in his *Lopez* opinion, reminding Congress that under the Constitution it exercises enumerated powers, and that enumeration implies limitation. Without suggesting that any of the Court's modern Commerce Clause decisions should be overruled, Rehnquist insisted that the Court in this instance go no further in approving congressional expansion of the commerce power. By recognizing the existence of outer limits on this power, he sought to preserve a meaningful distinction between national and local authority.

The *Lopez* ruling generated widespread commentary. One question posed by many scholars was whether *Lopez* represented a significant departure from the Court's long-established Commerce Clause jurisprudence. Some saw the decision as a sea change in the Court's jurisprudence; others saw the decision as an anomaly. The Court's controversial decision in *United States v. Morrison* (2000), striking down a provision of the Violence against Women Act of 1994, suggested that *Lopez* was not simply an aberration.

The same five-member majority that decided *Lopez* found that Congress had no power under the Commerce Clause (or the Fourteenth Amendment) to provide a federal civil remedy to victims of gender-motivated violence. Any such remedy, said the Court, must come from the states. Not surprisingly, the four dissenters were dismayed that the Court would circumscribe congressional power to deal with what many would characterize as a national epidemic of domestic violence.

Gonzalez v. Raich The degree to which the Rehnquist Court would restrict federal power under the Commerce Clause was marked by the 2005 decision in *Gonzales v. Raich*. The case involved two women who used marijuana for medical reasons based on the recommendation of their doctor as authorized by California's Compassionate Use Act of 1996. Under the federal Controlled Substances Act (CSA), the possession or use of marijuana is a crime and there is no exception for medicinal use (see *United States v. Oakland Cannabis Buyers' Cooperative* [2001]). When agents of the federal Drug Enforcement Administration learned that one of the women was cultivating marijuana in her home, they obtained a search warrant and seized and destroyed the plants. Subsequently, the women brought suit in federal court, claiming that Congress had no authority under the Commerce Clause to prohibit the possession and use of marijuana that is not intended for interstate distribution. Although the District Court rejected the claim, the Ninth Circuit Court of Appeals reversed on the basis of the *Lopez* and *Morrison* precedents. The Supreme Court reversed the Ninth Circuit, however, holding that Congress may criminalize the possession and medicinal use of marijuana. Writing for a majority of six justices, John Paul Stevens relied heavily on the rationale adopted in *Wickard v. Filburn* (1942):

> Like the farmer in *Wickard,* respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . . " and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard,* we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

In a forceful dissenting opinion joined by Chief Justice Rehnquist and Associate Justice Thomas, Justice O'Connor suggested that the Court had backtracked from the commitment to principles of federalism expressed in decisions like *Lopez* and *Morrison:*

> Relying on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.

In a solo dissenting opinion, Justice Thomas sought to amplify Justice O'Connor's concern for the preservation of federalism:

> Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. Further, the Government's rationale—that it may regulate the production or possession of any commodity for which there is an interstate market—threatens to remove the remaining vestiges of States' traditional police powers. This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a "pretext . . . for the accomplishment of objects not entrusted to the government."

Gonzales v. Raich suggests that despite the Rehnquist Court's decisions in *Lopez* and *Morrison,* Congress retains broad authority under the Commerce Clause to deal with social problems of national scope. Indeed, whether the Roberts Court will emulate the Rehnquist Court's approach in *Lopez* and *Morrison* is very much in doubt.

The Tenth Amendment and the Commerce Clause

The **Tenth Amendment** reserves to the states those powers not delegated to the national government. With the decision in *United States v. Darby* (1941), the Tenth Amendment for all intents and purposes vanished as a significant restraint on the commerce power. In *Darby,* the Court unanimously upheld the Fair Labor Standards Act of 1938. The *Darby* decision explicitly overruled *Hammer v. Dagenhart,* rejecting the former ruling's narrow interpretation of the Commerce Clause, as well as its reliance on the Tenth Amendment.

In the 1976 case of *National League of Cities v. Usery,* the Court appeared to resurrect the Tenth Amendment as it struck down provisions of the 1974 amendments to the Fair Labor Standards Act extending minimum wage coverage to most state and local government employees. Writing for the Court, Justice William Rehnquist concluded that the national commerce power must yield to the Tenth Amendment when the former infringes on "traditional aspects of state sovereignty." In a sharp dissent, Justice Brennan assailed the *Usery* ruling as an irresponsible departure from modern views regarding the national commerce power and federal–state relations. A number of legal scholars endorsed this view, but others praised the decision as a welcome reassertion of the principle of federalism.

Controversy over *Usery* continued into the 1980s, until the decision was overruled in *Garcia v. San Antonio Metropolitan Transit Authority* (1985). Again the court was divided 5 to 4. Justice Harry A. Blackmun, who had concurred in the *Usery* ruling, switched sides and delivered the majority opinion in *Garcia*. Supported by Justices Brennan, White, Marshall, and Stevens, he concluded that the attempt to draw the boundaries of state

regulatory immunity in terms of "traditional governmental function" is not only unworkable but is "inconsistent with established principles of federalism." In a lengthy dissent, Justice Lewis Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, deplored what he characterized as the Court's abrupt departure from precedent and its reduction of the Tenth Amendment to "meaningless rhetoric when Congress acts pursuant to the Commerce Clause." He maintained that this decision "reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of the Constitution." (The *Darby, Usery,* and *Garcia* cases are further discussed and reprinted in Chapter 5.)

In 1997 the Supreme Court gave new life to the Tenth Amendment in striking down a controversial piece of legislation based on the Commerce Clause. In *Printz v. United States,* the Court invalidated a key provision of the Brady Bill, which required the attorney general to establish a national system to conduct instant background checks on prospective gun buyers. The popular name of the statute was a reference to Jim Brady, President Ronald Reagan's press secretary who was disabled after being shot by John Hinckley in the 1981 assassination attempt on the president. The disputed provision required local law enforcement officers to perform background checks on prospective handgun purchasers.

According to Justice Scalia's opinion for the sharply divided Court, this provision violated "the very principle of separate state sovereignty," which Scalia characterized as "one of the Constitution's structural protections of liberty." Scalia observed that "the power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States." Despite the Rehnquist Court's decisions in *Printz, Morrison,* and *Lopez,* however, the Commerce Clause remains a deep reservoir of legislative power. The expansive scope of the Commerce Clause under modern interpretation might surprise, even shock, many of the Framers of the Constitution. Until recently, however, it had become an accepted feature of the contemporary constitutional order. Recent decisions by the Rehnquist Court show that very little in constitutional law should be considered to be settled with finality.

TO SUMMARIZE:

- During the nineteenth century, the Commerce Clause served primarily as a barrier against state legislation, such as the monopoly invalidated by the Supreme Court in *Gibbons v. Ogden* (1824).
- In *Gibbons v. Ogden,* Chief Justice John Marshall took a broad view of congressional power under the Commerce Clause, but stopped short of concluding that this power belongs exclusively to the national government.
- In the late nineteenth and early twentieth centuries, a conservative Supreme Court adopted a restrictive view of the Commerce Clause and invalidated or limited a number of federal laws regulating various aspects of the economy.
- The Commerce Clause figured prominently in the confrontation between the Court and President Franklin Roosevelt over the constitutionality of the New Deal.
- With its sudden turnaround in 1937, the Court began to take an expansive view of the Commerce Clause and permitted Congress wide latitude in the area of economic policy making.
- Under a view that prevailed between 1937 and 1995, the Commerce Clause provided the basis for federal laws dealing with the environment, civil rights and criminal law, and economic policy.

- In recent decisions, the Rehnquist Court has made it clear that Congressional power under the Commerce Clause is not unlimited—that there must be a reasonable connection between Congress's policy objectives and interstate commerce.

TAXING AND SPENDING POWERS

If the absence of power to regulate commerce stifled economic growth under the Articles of Confederation, the inability to tax and resulting limits on the ability to spend threatened the continued existence of the national government itself. The Framers of the Constitution proposed to remedy these weaknesses by providing in the very first clause of Article I, Section 8, the following enumerated powers: "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." The federal taxing power was significantly expanded by the ratification of the Sixteenth Amendment (the income tax amendment) in 1913 (see Chapter 1). The vast taxing and spending powers exercised by the national government today are accordingly based on the broad language of Article I, Section 8, and the Sixteenth Amendment.

Taxation as a Source of Congressional Power

We must distinguish between two important functions related to taxation—namely, raising revenue and regulation. It is in the second of these areas that the more enduring and important questions of constitutional interpretation have been debated.

Although the modern Supreme Court accords wide latitude to both the revenue-raising and regulatory aspects of national taxation, it is at least theoretically more likely to entertain constitutional objections to the latter.

The **taxing power** is independent of any of the specific regulatory powers listed in other provisions of the Constitution. However, through linkage with the Necessary and Proper Clause, this power can be used far beyond the supposed limits of its own enumeration to implement various regulatory programs. In other words, the taxing power is not confined to the objectives set forth in Article I, Section 8, Clause 1—that is, those of paying the debt and providing "for the common Defence and general Welfare of the United States." Congress, as Justice Felix Frankfurter pointed out, may also "make an oblique use of the taxing power in relation to activities with which it may deal directly, as, for instance, commerce between the states" (*United States v. Kahriger* [1953], dissenting opinion).

The national taxing power, like the taxing power of the states, is exercised on the people directly. But within strict limits, the national government and the states may also tax each other, provided that fundamental considerations of sovereignty are observed. Sovereignty is an exceedingly elusive concept, and its meaning in this context is determined by the Supreme Court on a case-by-case basis. The doctrine of **reciprocal immunity** has historically imposed some limits on intergovernmental taxation. Although those limits still exist in theory, as a practical matter they are seldom recognized (see Chapter 5).

The Constitution distinguishes between direct and indirect taxes but leaves those vague categories largely undefined. Two separate provisions in Article I specify that direct taxes shall be apportioned among the states on the basis of population (Section 2, Clause 3, and Section 9, Clause 4). The second of these provisions refers to "Capitation or other direct Tax," suggesting that the Framers had in mind a distinction between direct taxes, such as those imposed on persons without regard to particular

activities, and indirect taxes, such as those levied on businesses, goods, services, and various privileges. Nevertheless, the distinction between direct and indirect taxes was and is a muddy one. Fortunately, it is of little constitutional significance today. It figured prominently in the income tax controversy of the 1890s, but the relevance of the distinction in this field was rendered moot by passage of the Sixteenth Amendment in 1913.

Most constitutional issues in the field of taxation have involved levies on various aspects of business. The indirect nature of such taxes can be seen in the capacity of the individuals and corporations taxed to pass the burden on to consumers of the product or service in question. The only limitation the Constitution imposes on indirect taxes is that of geographic uniformity: They must be "uniform throughout the United States"—that is, uniform in their application among the states, not identical as applied to each person taxed.

Federal Taxation as a Means of Regulation

The Supreme Court has always given wide latitude to the taxing power as a source of regulatory authority when used in combination with other enumerated powers. The case of *Veazie Bank v. Fenno* (1869) provides a classic example. There, the court upheld a tax of 10 percent on notes issued by state banks, a measure designed by the federal government to drive this unstable form of currency out of existence. In the Court's view, it was significant that the tax was linked with the congressional power to regulate currency, a power that emanates from several provisions in Article I, Section 8.

Historically, the Court has expressed less certainty about the use of the taxing power as an independent regulatory device. By the mid-1930s, two conflicting lines of constitutional precedent bearing on this question had emerged, one endorsing and the other denying broad constitutional authority.

In *McCray v. United States* (1904), a divided Court upheld an act under which Congress, responding to pressure from the dairy industry, levied a tax of 10 cents a pound on oleomargarine colored to look like butter. In contrast, there was a tax of only one-fourth cent per pound on uncolored oleomargarine. The majority conceded that both the Fifth Amendment's Due Process Clause and the Tenth Amendment's recognition of the states' reserved powers imposed limits on the taxing power of Congress. But, according to Justice (later Chief Justice) Edward D. White, who wrote the majority opinion, those limits had not been breached by this tax.

According to Justice White, if it were "plain to the judicial mind" that the taxing power was not being used to raise revenue "but solely for the purpose of destroying rights" implicit in constitutional principles of freedom and justice, courts would be duty bound to declare that Congress had acted beyond the authority conferred by the Constitution. The difference between the abuse of legislative power and the exercise of reasonable discretion was simply a matter of judgment, to be made in each case.

Applying this elusive standard, White concluded that "the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights." Note that, unlike other exercises of the national police power early in the twentieth century, this law was not clearly identified with the promotion of public health, safety, or morality. At best, it discouraged the deceptive marketing of a food product with which the dairy industry did not want to compete.

The *McCray* decision served as a precedent for using the taxing power to regulate the sale of narcotics and firearms (*United States v. Doremus* [1919], *Sonzinsky v. United States* [1937]). But the *McCray* rationale was not applied to the regulation of child labor (*Bailey v. Drexel Furniture Company* [1922]) or to the regulation of agricultural production (*United States v. Butler* [1936]). In the *Doremus* and *Sonzinsky* cases, the

Court chose to recognize the validity of the revenue-raising features of the taxation in question and to view their regulatory aspects as consistent with the constitutional exercise of legislative power. In the *Bailey* and *Butler* cases, the Court did just the opposite, choosing to view the taxes not as revenue measures (although they obviously produced revenue), but as penalties or coercive regulations infringing on either individual liberty or the reserved powers of the states.

In *Bailey* (better known as the child labor tax case), Chief Justice William Howard Taft maintained that Congress through the taxing power was attempting to regulate an activity properly within the scope of state authority. He noted the Court's previous recognition of state autonomy regarding the control of child labor (*Hammer v. Dagenhart*), concluding that Congress could not accomplish through the taxing power an objective previously denied it as an unconstitutional exercise of the commerce power. The tax amounted to 10 percent of the annual net income of mills, factories, mines, and quarries employing children under certain ages. This act singled out certain employment practices for tax purposes, just as the oleomargarine law singled out a particular marketing practice. Both were designed to discourage specific activities through the application of differential tax burdens. Yet the Court viewed one as an appropriate revenue measure and the other as an impermissible use of the taxing power.

The Court also invalidated the Agricultural Adjustment Act of 1933, as, among other things, an unconstitutional exercise of the taxing power. *United States v. Butler* thus nullified a major component of Franklin D. Roosevelt's New Deal program. The decision rejected congressional use of the taxing power as a basis for regulating agricultural production. In fact, the Court's condemnation of the processing tax at issue in this case is, to this day, the last repudiation of national legislative authority based on the distinction between the regulatory and revenue-raising features of a federal tax. In this respect, the *Butler* decision simply reiterated the rationale applied in the child labor tax case, but its constitutional importance is greater because it provided the Court with its first clear opportunity to consider the scope of the spending power as well.

The Spending Power of Congress

The source of the **spending power** is, of course, found in the same clause of the Constitution that grants Congress the power to tax. The provision simply states: "Congress shall have Power To . . . pay the Debts and provide for the common Defence and general Welfare of the United States." The latter phrase—known as the General Welfare Clause (not to be confused with the "general welfare" provision in the Preamble to the Constitution)—has been used in combination with other enumerated powers since *United States v. Butler* as a basis for the establishment of vast governmental programs.

Under the Agricultural Adjustment Act of 1933, proceeds from the processing tax were used to pay farmers in exchange for their promises to reduce crop acreage. Thus, the scheme of regulation at issue embodied both taxing and spending features and rested squarely on Article I, Section 8, Clause 1, as its constitutional source. Justice Owen J. Roberts, writing one of his most influential majority opinions, recognized that Congress could use appropriations for regulatory purposes by making them conditional—that is, by withholding them until the potential recipients either performed or failed to perform specified actions. In this way, the spending power could serve the same indirect regulatory function as the taxing power. He found the act objectionable primarily because both its taxing and spending aspects sought to regulate agricultural production, an area then regarded as reserved to the

states by the Tenth Amendment. His detailed analysis of the spending power, however, did not necessarily point to this result.

Justice Roberts adopted the view widely held by constitutional scholars that the General Welfare Clause was not an unrestricted grant of power but was linked to the taxing power granted in the same constitutional provision. According to this view, the General Welfare Clause conferred no independent regulatory power as such but only a power to spend. However, he rejected the narrow interpretation advanced by James Madison that the taxing and spending power was to be exercised only in furtherance of other enumerated congressional powers. He reasoned that each of the other enumerated powers incidentally involved the expenditure of money and that if the provisions of Section 8, Clause 1, were to be used only in combination with them, the taxing and spending power was "mere tautology." Roberts accepted the broader alternative view first articulated by Alexander Hamilton and later endorsed by Justice Joseph Story in his influential *Commentaries on the Constitution*. Under this interpretation, the taxing and spending power, although not unrestricted, is subject to limitations found within the General Welfare Clause itself, rather than in other enumerated powers. Thus, Roberts, in effect, recognized an independent source of congressional power to tax and spend but at the same time attempted to place internal limits on that power. He was drawing what he regarded as a crucial distinction between special, enumerated powers and a broad unrestricted grant of national authority. Considerations of classical federalism—the division of power between the national government and the states—were of key importance in his analysis. This is evident from the structure of his detailed and elaborate opinion. After commenting on the internal limits of the taxing and spending power, he shifted abruptly to a consideration of the regulatory scheme contemplated by the Agricultural Adjustment Act, concluding that it violated the reserved powers of the states.

Justice Roberts's opinion has a quality of ambivalence, reflecting his apparent uncertainty about the emergence of sweeping regulatory power at the national level—an uncertainty shared by several other justices during this chaotic period in the Court's history. In any event, his interpretation of the General Welfare Clause proved untenable as a workable standard for assessing the constitutionality of other federal programs based on the taxing and spending power.

Dissenting in *Butler,* Justice Harlan Fiske Stone accused the majority of second-guessing Congress on the "wisdom" of the Agricultural Adjustment Act, remarking caustically: "Courts are not the only agency of government that must be assumed to have the capacity to govern." Stone's call for judicial self-restraint became a central theme of majority opinions in the fields of commerce and fiscal policy from 1937 forward.

The Modern Approach

Beginning with two 1937 decisions upholding the newly enacted Social Security and unemployment compensation programs, the Court abandoned the *Butler* rationale (*Chas. C. Steward Machine Company v. Davis* and *Helvering v. Davis*). In the *Steward Machine Company* case, the Court upheld the unemployment compensation features of the Social Security Act of 1935. Justice Benjamin N. Cardozo's majority opinion recognized extensive congressional power to tax and spend based on an interpretation of the General Welfare Clause as a source of plenary power. Cardozo asserted: "The subject matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states." In *Mulford v. Smith* (1939), the Court underscored this expansive view of national economic

policy making power by upholding a second Agricultural Adjustment Act that, for all practical purposes, was as far reaching as the 1933 statute that had been struck down by the "nine old men" in *United States v. Butler* (1936).

A more recent illustration of the broad spending powers of the modern Congress involves the effort to persuade the states to raise their legal drinking ages. In 1984, Congress adopted an act directing the secretary of transportation to withhold federal highway funds from states whose drinking age was lower than 21. South Dakota brought suit, attacking the power of the federal government to impose this condition on the receipt of federal funds. In *South Dakota v. Dole* (1987), the Supreme Court rejected the state's challenge, saying that "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel."

Individual Rights as Restraints on the Taxing and Spending Powers

The potential limits imposed by various provisions of the Bill of Rights remain important in determining the extent of the taxing and spending powers. Due process standards place significant procedural requirements on all legislation, including taxing and spending measures. As a practical matter, however, the Fifth Amendment protection against compulsory self-incrimination has served as the primary constitutional basis in recent years for invalidating the exercise of such power. Justice Black first articulated this source of constitutional restraint in a dissenting opinion in a case sustaining the "wagering tax" provisions of the Revenue Act of 1951 (*United States v. Kahriger* [1953]). He read the registration provisions of the act as requiring persons to confess that they were engaged in the illegal "business of gambling." In his view, such compulsion, however indirect, was condemned by the Fifth Amendment.

In the years following the *Kahriger* decision, the Supreme Court, under the leadership of Chief Justice Earl Warren, greatly expanded the constitutional rights of persons accused of crimes. Consistent with this trend, Justice Black's dissenting view was adopted by a Court majority in 1968, and *Kahriger* was expressly overruled (*Marchetti v. United States* and *Grosso v. United States*). Writing for the Court in *Marchetti,* Justice Harlan was careful to distinguish between the scope of the taxing power, which he did not wish to diminish, and the specific individual safeguards of the Fifth Amendment, which he sought to recognize. The issue was "whether the methods employed by Congress in the Federal Wagering Tax statutes [were] in this situation consistent with the limitations created by the privilege against self-incrimination." Because the registration requirements forced gamblers to expose their own illegal activities, he concluded that the Fifth Amendment was violated.

The Court made it clear in a 1976 decision, however, that the protection against compulsory self-incrimination does not come into play automatically—one must positively assert the right (*Garber v. United States*). Thus, it rejected a defendant's contention that the introduction into evidence of his income tax return, which listed his occupation as that of "professional gambler," violated his immunity against compulsory self-incrimination. In another attempt to strike a balance between procedural safeguards and substantive powers, the Court recognized that the taxing power cannot be used in such a way as to undermine Fourth Amendment restrictions against unreasonable searches and seizures. Thus, in *General Motors Leasing Corporation v. United States* (1977), it held that a warrantless entry into a business office under the purported authority of the Internal Revenue Code was, under the circumstances, a violation of the Fourth Amendment.

TO SUMMARIZE:

- The broad taxing and spending powers of the federal government are based on Article I, Section 8, Clause 1, as supplemented by the Sixteenth Amendment.
- Historically, the most important limitations on the federal taxing power focused on the distinction between taxation as a means of revenue enhancement and taxation for purposes of regulation. Today, this distinction has been virtually abolished.
- Like the commerce and taxing powers, Congress's spending power has been greatly expanded since the constitutional revolution of 1937. It has even been interpreted to allow Congress to place reasonable conditions on states' use of federal grant money.

CONGRESSIONAL ENFORCEMENT OF CIVIL RIGHTS AND LIBERTIES

A number of constitutional amendments provide for congressional enforcement of various rights through "appropriate legislation." All three Civil War Amendments (Thirteen, Fourteen, and Fifteen) contain such provisions, and Congress frequently relied on this enforcement authority in developing civil rights legislation during the Reconstruction Era. For example, the Civil Rights Act of 1866, based on the Thirteenth Amendment's enforcement provision, sought to remove vestiges of slavery perpetuated in the "Black Codes" that had been enacted in Southern states to lessen the full force of the amendment. The 1866 legislation provided, among other things, that all citizens were to be accorded the same right "as enjoyed by white citizens" to have access to the courts, to enter into enforceable contracts, and to buy and sell real estate.

In 1968, the Supreme Court held that the Civil Rights Act of 1866 prohibited racial discrimination in the sale of private housing (see *Jones v. Alfred H. Mayer Company*).

Shortly thereafter, Congress adopted the Fair Housing Act, which prohibits racial discrimination in the rental and sale of private residences where such transactions are handled by agents or brokers (transactions by private individuals are not covered).

The Fair Housing Act strengthens the prohibition of racial discrimination in housing transactions by authorizing the Department of Housing and Urban Development to refer cases of racial discrimination to the Justice Department for possible prosecution.

The Voting Rights Act of 1965

Aside from the Civil Rights Act of 1964 (discussed previously in connection with the Commerce Clause), the most significant modern legislation in the field of civil rights is the **Voting Rights Act of 1965.** This far-reaching statute (reenacted in 1982 in spite of initial reservations by the Reagan administration and again in 2006) authorizes the attorney general to suspend voting tests and assign federal voting registrars and poll watchers to any state or political subdivision in which fewer than 50 percent of the voting age population was registered as of a certain specified date (November 1, 1964, under the original act).

In a civil action originating in the U.S. Supreme Court, South Carolina challenged the constitutionality of the Voting Rights Act (*South Carolina v. Katzenbach* [1966]).

The Court, in an opinion by Chief Justice Warren, rejected this challenge, concluding that Congress had established an ample factual basis for the legislation and that the provisions in question "are a valid means for carrying out the commands of the Fifteenth Amendment." Warren stated that "the basic test to be applied in a case involving Section 2 of the Fifteenth Amendment [the enforcement section] is the

same as in all cases concerning the express powers of Congress with relation to the reserved powers of the states." Warren was relying specifically on Chief Justice Marshall's formulation of implied powers in *M'Culloch v. Maryland*.

The Voting Rights Act met this basic standard of rationality and was thus deemed an "appropriate" mode for enforcing the Fifteenth Amendment command that "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." In *Katzenbach v. Morgan* (1966), the Supreme Court upheld another provision of the Voting Rights Act of 1965 as an "appropriate" exercise of constitutional power to enforce the equal protection guarantee of the Fourteenth Amendment. The section in question provided that no person completing the sixth grade in an accredited non–English-language Puerto Rican school can be denied the right to vote through inability to read or write English. John P. and Christine Morgan, registered voters in New York City, challenged this section on the ground that it prohibited enforcement of the requirement that New York's English literacy test be passed in order to register to vote.

In an earlier decision, the Supreme Court had held that a similar North Carolina literacy requirement did not violate the Equal Protection Clause of the Fourteenth Amendment (*Lassiter v. Northampton County Board of Elections* [1959]). The New York attorney general argued that Congress could not prohibit the implementation of a state law by invoking the enforcement provision of the Fourteenth Amendment unless the judicial branch determined that the state law violated the Constitution.

Justice Brennan, writing for a 7-to-2 majority, disagreed, observing that such an interpretation would "depreciate both constitutional resourcefulness and congressional responsibility for implementing the Amendment." The central question, as he viewed it, was not whether the Supreme Court itself regarded English literacy tests as unconstitutional but whether Congress could "prohibit the enforcement of the state law by legislating under Section 5 of the Fourteenth Amendment." Thus the Court's task was "limited to determining whether such legislation is, as required by Section 5, appropriate legislation to enforce the Equal Protection Clause."

Justice Brennan maintained that the authors of the Fourteenth Amendment intended through Section 5 to give Congress **enforcement power under the Fourteenth Amendment** comparable to the "broad powers expressed in the Necessary and Proper Clause." Again the Court relied on *M'Culloch v. Maryland,* finding that the challenged section of the Voting Rights Act was "appropriate" legislation because it met the rationality standard articulated by Chief Justice Marshall in that landmark decision.

The remedy that Congress chose to provide in protecting the voting rights of non–English-speaking Puerto Ricans could be justified on the basis of two alternative theories: (1) It might provide these persons with a "political weapon" that could be used to fight discriminatory practices by government (a rationale similar to that employed in *South Carolina v. Katzenbach*), or (2) Congress might have concluded that New York's English literacy test requirement violated the Equal Protection Clause of the Fourteenth Amendment, regardless of the Supreme Court's previous position on this issue. The importance of this justification is that it in effect recognizes Congress as a "constitutional interpreter." The implications of this rationale have fascinated legal scholars, some of whom regard *Morgan* as potentially undercutting the authority of the Supreme Court as a final interpreter of the Constitution. Moreover, if Congress has the power to define the scope of constitutional protections, as Brennan's opinion suggests, it logically follows that Congress might at some time narrow, rather than broaden, such protections. In his dissenting

opinion, Justice Harlan expressed concern about this possibility. He maintained that Congress could define constitutional rights "so as, in effect, to dilute the equal protection and due process decisions of this Court." However, the *Morgan* decision is confined to the enforcement of rights explicitly recognized in provisions of the Constitution—in this instance, the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, it serves to remind us that other branches of the national government have important roles to play in defining and implementing constitutional rights.

The Religious Freedom Restoration Act

In Chapter 1 we discussed the Religious Freedom Restoration Act of 1993 (RFRA), which Congress enacted as a response to the Supreme Court's 1990 decision in *Employment Division v. Smith*. In *Smith,* the Court departed from modern precedent and adopted a more restrictive interpretation of the Free Exercise Clause of the First Amendment. In passing RFRA, Congress sought to restore the status quo ante—to return the law in this area to what it was prior to the *Smith* decision. In adopting this statute, Congress was again invoking its broad powers under Section 5 of the Fourteenth Amendment. Although the Fourteenth Amendment does not expressly protect freedom of religion, the Supreme Court said long ago that freedom of religion is one of those fundamental rights incorporated within the broad term "liberty" in Section 1 of the Fourteenth Amendment (see *Hamilton v. Regents of the University of California* [1934]). Logically, then, Congress may use its legislative power to protect all of the freedoms the courts have recognized as essential to "a scheme of ordered liberty," to quote the Supreme Court's opinion in *Palko v. Connecticut* (1937).

In striking down RFRA (see *City of Boerne v. Flores* [1997]), the Supreme Court was not concerned with the fact that Congress was using its legislative authority in furtherance of a right not explicitly protected by the Fourteenth Amendment. Rather, the Court objected to Congress's attempt to use a simple statute to vitiate the Court's previous interpretation of the First Amendment. In *Boerne,* the Court made clear that it, not the Congress, is the final interpreter of the Constitution. Under *Boerne,* congressional enforcement powers under the Fourteenth Amendment may not be used in contravention of the Court's interpretation of the Constitution.

Critics of *Boerne* question whether it can be reconciled with the expansive view of congressional power under Section 5 of the Fourteenth Amendment that the Court advanced in *Katzenbach v. Morgan*. Remember, however, that the Fourteenth Amendment was adopted shortly after the Civil War primarily to protect the civil rights of African Americans. The Voting Rights Act upheld in *Morgan* was consistent with this great objective. The Religious Freedom Restoration Act, on the other hand, was designed to reassert liberties that the Supreme Court itself had not recognized until the modern era. Viewed in this historical perspective, therefore, *Katzenbach v. Morgan* may not be fundamentally inconsistent with the *City of Boerne* decision. Nevertheless, *Boerne* has spawned a lively constitutional debate over the scope of congressional power under Section 5 of the Fourteenth Amendment.

The Violence against Women Act

As we noted above in our discussion of the Commerce Clause, the Supreme Court in *United States v. Morrison* (2000) struck down a federal statutory provision allowing victims of gender-motivated violence to sue their victimizers in federal court. The disputed

provision was based not solely on the Commerce Clause, however, but also on Congress's authority under Section 5 of the Fourteenth Amendment. In striking down the provision, the Court noted that it was "directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias." Applying the **state action doctrine** first articulated in 1883 (see, for example, *The Civil Rights Cases,* discussed and excerpted in Chapter 7, Volume II), the Court held that the Fourteenth Amendment does not empower Congress to provide remedies for injuries inflicted upon individuals by other individuals. In the view of the Court's conservative majority, protecting individuals from violence is the function of the states. Writing for the Court, Chief Justice Rehnquist concluded that "under our federal system that remedy must be provided by the Commonwealth (state) of Virginia and not the United States."

TO SUMMARIZE:

- Section 5 of the Fourteenth Amendment allows Congress to adopt "appropriate legislation" to protect and enforce civil rights and liberties.
- The Supreme Court's jurisprudence reflects a degree of ambivalence as to the precise scope of congressional enforcement powers in this area.

CONCLUSION

From the foregoing discussion it is clear that Congress has many sources of constitutional authority. Some of these are quite explicit, as the list of enumerated powers in Article I, Section 8, makes clear. Others are implicit, open-ended, and subject to no complete or conclusive definition. These implied powers are fully recognized, however, in the Necessary and Proper Clause and in the enforcement provisions of several constitutional amendments, most notably the Thirteenth, Fourteenth, and Fifteenth Amendments. Within this broad range of explicit and implicit powers, Congress has been accorded broad latitude to address the major problems, needs, and goals of the nation, as perceived by succeeding generations of Americans during more than two centuries of constitutional history. As recent decisions of the Supreme Court indicate, however, Congress's power is by no means unlimited.

KEY TERMS

distributive articles
reapportionment
bicameralism
Speech or Debate Clause
immunity
enumerated powers
Article I, Section 8
police power
implied powers
oversight
power to investigate
subpoena
compulsory process
contempt of Congress
power to regulate interstate commerce
local aspects of interstate commerce
Interstate Commerce Act of 1887
Sherman Antitrust Act of 1890
stream of commerce doctrine
direct–indirect test
distinction between manufacturing and commerce
Civil Rights Act of 1964
RICO Act
Tenth Amendment
taxing power
reciprocal immunity
spending power
Voting Rights Act of 1965
enforcement power under the Fourteenth Amendment
state action doctrine

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Case

U.S. Term Limits, Inc. v. Thornton

514 U.S. 779; 115 S.Ct. 1842; 131 L.Ed. 2d 881 (1995)
Vote: 5–4

An amendment to the Arkansas Constitution (Amendment 73) prohibited persons who had already served three terms in the U.S. House of Representatives or two terms in the U.S. Senate from running for Congress. The Arkansas Supreme Court struck down the amendment.

Justice Stevens delivered the opinion of the Court.

. . . [T]he constitutionality of Amendment 73 depends critically on the resolution of two distinct issues. The first is whether the Constitution forbids States from adding to or altering the qualifications specifically enumerated in the Constitution. The second is, if the Constitution does so forbid, whether the fact that Amendment 73 is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance. Our resolution of these issues draws upon our prior resolution of a related but distinct issue: whether Congress has the power to add to or alter the qualifications of its Members.

Twenty-six years ago, in *Powell v. McCormack* . . . (1969), we reviewed the history and text of the Qualifications Clauses in a case involving an attempted exclusion of a duly elected Member of Congress. The principal issue was whether the power granted to each House in Art. I, § 5, to judge the Qualifications of its own Members includes the power to impose qualifications other than those set forth in the text of the Constitution. In an opinion by Chief Justice Warren for eight Members of the Court, we held that it does not. . . .

Our reaffirmation of *Powell* does not necessarily resolve the specific questions presented in these cases. For petitioners argue that whatever the constitutionality of additional qualifications for membership imposed by Congress, the historical and textual materials discussed in *Powell* do not support the conclusion that the Constitution prohibits additional qualifications imposed by States. In the absence of such a constitutional prohibition, petitioners argue, the Tenth Amendment and the principle of reserved powers require that States be allowed to add such qualifications. . . .

Petitioners argue that the Constitution contains no express prohibition against state-added qualifications, and that Amendment 73 is therefore an appropriate exercise of a State's reserved power to place additional restrictions on the choices that its own voters may make. We disagree for two independent reasons. First, we conclude that the power

to add qualifications is not within the original powers of the States, and thus is not reserved to the States by the Tenth Amendment. Second, even if States possessed some original power in this area, we conclude that the Framers intended the Constitution to be the exclusive source of qualifications for members of Congress, and that the Framers thereby divested States of any power to add qualifications. . . .

Contrary to petitioners' assertions, the power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States. Petitioners' Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only reserve that which existed before. . . .

With respect to setting qualifications for service in Congress, no such right existed before the Constitution was ratified. The contrary argument overlooks the revolutionary character of the government that the Framers conceived. Prior to the adoption of the Constitution, the States had joined together under the Articles of Confederation. In that system, the States retained most of their sovereignty, like independent nations bound together only by treaties. . . . After the Constitutional Convention convened, the Framers were presented with, and eventually adopted a variation of, a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature. . . . In adopting that plan, the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States. . . . In that National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation. . . .

It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States, namely that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." This duty parallels the duty under Article II that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." . . . These Clauses are express delegations of power to the States to act with respect to federal elections.

This conclusion is consistent with our previous recognition that, in certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution. Thus, we have noted that [w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I. . . .

In short, as the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself. The Tenth Amendment thus provides no basis for concluding that the States possess reserved power to add qualifications to those that are fixed in the Constitution. Instead, any state power to set the qualifications for membership in Congress must derive not from the reserved powers of state sovereignty, but rather from the delegated powers of national sovereignty. In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist. . . .

Congress' subsequent experience with state-imposed qualifications provides further evidence of the general consensus on the lack of state power in this area. In *Powell,* we examined that experience and noted that during the first 100 years of its existence, Congress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution. . . .

We recognize, as we did in *Powell,* that congressional practice has been erratic and that the precedential value of congressional exclusion cases is quite limited. . . . Nevertheless, those incidents lend support to the result we reach today.

Our conclusion that States lack the power to impose qualifications vindicates the same fundamental principle of our representative democracy that we recognized in *Powell,* namely that the people should choose whom they please to govern them. . . .

As we noted earlier, the *Powell* Court recognized that an egalitarian ideal that election to the National Legislature should be open to all people of merit provided a critical foundation for the Constitutional structure. This egalitarian theme echoes throughout the constitutional debates. . . .

. . . [W]e believe that state-imposed qualifications, as much as congressionally imposed qualifications, would undermine the second critical idea recognized in *Powell:* that an aspect of sovereignty is the right of the people to vote for whom they wish. Again, the source of the qualification is of little moment in assessing the qualification's restrictive impact.

Finally, state-imposed restrictions, unlike the congressionally imposed restrictions at issue in *Powell,* violate a third idea central to this basic principle: that the right to choose representatives belongs not to the States, but to the people. . . .

Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure. . . . Such a patchwork would also sever the direct

link that the Framers found so critical between the National Government and the people of the United States. . . .

Petitioners argue that, even if States may not add qualifications, Amendment 73 is constitutional because it is not such a qualification, and because Amendment 73 is a permissible exercise of state power to regulate the Times, Places, and Manner of Holding Elections. We reject these contentions.

Unlike §§ 1 and 2 of Amendment 73, which create absolute bars to service for long-term incumbents running for state office, § 3 merely provides that certain Senators and Representatives shall not be certified as candidates and shall not have their names appear on the ballot. They may run as write-in candidates and, if elected, they may serve. Petitioners contend that only a legal bar to service creates an impermissible qualification, and that Amendment 73 is therefore consistent with the Constitution. . . .

We need not decide whether petitioners' narrow understanding of qualifications is correct because, even if it is, Amendment 73 may not stand. As we have often noted, . . . "[c]onstitutional rights would be of little value if they could be . . . indirectly denied." . . . The Constitution nullifies sophisticated as well as simpleminded modes of infringing on Constitutional protections. . . .

In our view, Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly. As the plurality opinion of the Arkansas Supreme Court recognized, Amendment 73 is an effort to dress eligibility to stand for Congress in ballot access clothing, because the intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service. . . . We must, of course, accept the State Court's view of the purpose of its own law: we are thus authoritatively informed that the sole purpose of § 3 of Amendment 73 was to attempt to achieve a result that is forbidden by the Federal Constitution. Indeed, it cannot be seriously contended that the intent behind Amendment 73 is other than to prevent the election of incumbents. The preamble of Amendment 73 states explicitly: "[T]he people of Arkansas . . . herein limit the terms of elected officials." Sections 1 and § 2 create absolute limits on the number of terms that may be served. There is no hint that § 3 was intended to have any other purpose. . . .

Petitioners make the . . . argument that Amendment 73 merely regulates the Manner of elections, and that the Amendment is therefore a permissible exercise of state power under Article I, § 4, cl. 1 (the Elections Clause) to regulate the Times, Places, and Manner of elections. We cannot agree.

A necessary consequence of petitioners' argument is that Congress itself would have the power to make or alter a measure such as Amendment 73. . . . That the Framers would have approved of such a result is unfathomable. As our decision in *Powell* and our discussion above make clear, the Framers were particularly concerned that a grant to Congress of the authority to set its own qualifications would lead inevitably to congressional self-aggrandizement and the upsetting of the delicate constitutional balance. . . .

Petitioners would have us believe, however, that even as the Framers carefully circumscribed congressional power to set qualifications, they intended to allow Congress to achieve the same result by simply formulating the regulation as a ballot access restriction under the Elections Clause. We refuse to adopt an interpretation of the Elections Clause that would so cavalierly disregard what the Framers intended to be a fundamental constitutional safeguard.

Moreover, petitioners' broad construction of the Elections Clause is fundamentally inconsistent with the Framers' view of that Clause. The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office. . . .

The merits of term limits, or rotation, have been the subject of debate since the formation of our Constitution, when the Framers unanimously rejected a proposal to add such limits to the Constitution. The cogent arguments on both sides of the question that were articulated during the process of ratification largely retain their force today. Over half the States have adopted measures that impose such limits on some offices either directly or indirectly, and the Nation as a whole, notably by constitutional amendment, has imposed a limit on the number of terms that the President may serve. Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents. It is not our province to resolve this long-standing debate.

We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather as have other important changes in the electoral process—through the Amendment procedures set forth in Article V. The Framers decided that the qualifications for service in the Congress of the United States be fixed in the Constitution and be uniform throughout the Nation. That decision reflects the Framers' understanding that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States. They are not merely delegates appointed

by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government. In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a more perfect Union. . . .

Justice Kennedy, concurring. . . .

Justice Thomas, with whom the ***Chief Justice, Justice O'Connor,*** and ***Justice Scalia*** join, dissenting.

It is ironic that the Court bases today's decision on the right of the people to "choose whom they please to govern them." . . . Under our Constitution, there is only one State whose people have the right to "choose whom they please" to represent Arkansas in Congress. The Court holds, however, that neither the elected legislature of that State nor the people themselves (acting by ballot initiative) may prescribe any qualifications for those representatives. The majority therefore defends the right of the people of Arkansas to "choose whom they please to govern them" by invalidating a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State.

I dissent. Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people. . . .

I take it to be established, then, that the people of Arkansas do enjoy "reserved" powers over the selection of their representatives in Congress. Purporting to exercise those reserved powers, they have agreed among themselves that the candidates covered by § 3 of Amendment 73—those whom they have already elected to three or more terms in the House of Representatives or to two or more terms in the Senate—should not be eligible to appear on the ballot for reelection, but should nonetheless be returned to Congress if enough voters are sufficiently enthusiastic about their candidacy to write in their names. Whatever one might think of the wisdom of this arrangement, we may not override the decision of the people of Arkansas unless something in the Federal Constitution deprives them of the power to enact such measures.

The majority settles on "the Qualifications Clauses" as the constitutional provisions that Amendment 73 violates. . . . Because I do not read those provisions to impose any unstated prohibitions on the States, it is unnecessary for me to decide whether the majority is correct to identify Arkansas' ballot-access restriction with laws fixing true term limits or otherwise prescribing "qualifications" for congressional office. . . .

. . . [T]oday's decision reads the Qualifications Clauses to impose substantial implicit prohibitions on the States and the people of the States. I would not draw such an expansive negative inference from the fact that the Constitution requires Members of Congress to be a certain age, to be inhabitants of the States that they represent, and to have been United States citizens for a specified period. Rather, I would read the Qualifications Clauses to do no more than what they say. I respectfully dissent.

Case

M'Culloch v. Maryland

4 Wheat. (17 U.S.) 316; 4 L.Ed. 579 (1819)
Vote: 7–0

In 1818, the Maryland legislature imposed a tax on all banks not chartered by the state. The act imposed an annual fee of $15,000 payable in advance or a 2 percent tax on the value of notes issued by such banks. A penalty of $500 was imposed for each violation of this tax measure, which, as everyone recognized, was aimed squarely at the Bank of the United States. M'Culloch, the cashier of the Baltimore branch of the Bank of the United States, refused to comply with the state law. A lower court judgment against M'Culloch was upheld by the Maryland Court of Appeals.

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

. . . The first question made in the cause is, has Congress power to incorporate a bank? . . . The power now contested was exercised by the first Congress elected under the present Constitution. . . . Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, . . . it became a law. The original act was permitted to expire;

but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity and induced the passage of the present law. . . .

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

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

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

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any state to the contrary notwithstanding." Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people:" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . In considering this question, then, we must never forget that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. . . . [I]t may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. . . .

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof." The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect. . . . In support of this proposition, they have found it necessary to contend, that this clause was

inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress. . . . That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple. Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without the other? We think it does not. . . . To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea. . . .

It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far a human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. . . .

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on the vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

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

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. . . . [W]e find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. . . .

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy.

. . . [W]ere its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers pass laws for the accomplishment of

objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power. . . .

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

It being the opinion of the court that the act incorporating the bank is constitutional, . . . we proceed to inquire: Whether the state of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But, such is the paramount character of the Constitution that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. . . .

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. . . .

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. . . .

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

The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is an empty and unmeaning declaration. . . .

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But, when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme. But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.

This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

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

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument of the Union to carry its powers into execution. Such a tax must be unconstitutional. . . .

Case

WATKINS V. UNITED STATES

354 U.S. 178; 77 S.Ct. 1173; 1 L.Ed. 2d 1273 (1957)
Vote: 6–1

John Watkins was subpoenaed to testify before the House Committee on Un-American Activities. After answering the committee's questions about his past association with the Communist Party, Watkins refused to say whether certain other named individuals were members of the party. Watkins protested the committee's questions, saying, "I do not believe that such questions are relevant to the work of this committee nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities." For his refusal to cooperate, Watkins was convicted of contempt of Congress.

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

. . . We start with several basic premises on which there is general agreement. The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possible needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible. It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged. . . .

In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally this was the result of the various investigations into the threat of subversion of the United States Government, but other subjects of congressional interest also contributed to the changed scene. This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens. It brought before the courts novel questions of the appropriate limits of congressional inquiry. Prior cases . . . had defined the scope of investigative power in terms of the inherent limitations of the sources of that power. In the recent cases, the emphasis shifted to problems of accommodating the interests of the Government with the rights and privileges of individuals. The central theme was the application of the Bill of Rights as a restraint upon the assertion of governmental power in this form.

It was during this period that the Fifth Amendment privilege against self-incrimination was frequently invoked and recognized as a legal limit upon the authority of a

committee to require that a witness answer its questions. Some early doubts as to the applicability of that privilege before a legislative committee never matured. When the matter reached this Court, the Government did not challenge in any way that the Fifth Amendment protection was available to the witness, and such a challenge could not have prevailed. . . .

A far more difficult task evolved from the claim by witnesses that the committee's interrogations were infringements upon the freedoms of the First Amendment. Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law-making. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by law-making.

Abuses of the investigative process may imperceptibly lead to abridgment of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. This effect is even more harsh when it is past beliefs, expressions or associations that are disclosed and judged by current standards rather than those contemporary with the matters exposed. Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time. That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction. . . .

We have no doubt that there is no congressional power to expose for the sake of exposure. The public is, of course, entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals. But a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served.

. . . The theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose. Their function is to act as the eyes and ears of the Congress in obtaining facts upon which the full legislature can act. To carry out this mission, committees and subcommittees, sometimes one Congressman, are endowed with the full power of the Congress to compel testimony. In this case, only two men exercised that authority in demanding information over petitioner's protest. An essential premise in this situation is that House or Senate shall have instructed the committee members on what they are to do with the power delegated to them. It is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out that group's jurisdiction and purpose with sufficient particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter. Broadly drafted and loosely worded, however, such resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress.

The authorizing resolution of the Un-American Activities Committee was adopted in 1938. . . . Several years later, the Committee was made a standing organ of the House with the same mandate. It defines the Committee's authority as follows:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of "un-American"? What is that single, solitary "principle of the form of government as guaranteed by our Constitution"? . . .

Combining the language of the resolution with the construction it has been given, it is evident that the preliminary control of the Committee exercised by the House of Representatives is slight or non-existent. No one could reasonably deduce from the charter the kind of investigation

that the Committee was directed to make. As a result, we are asked to engage in a process of retroactive rationalization. Looking backward from the events that transpired, we are asked to uphold the Committee's actions unless it appears that they were clearly not authorized by the charter. As a corollary to this inverse approach, the Government urges that we must view the matter hospitably to the power of the Congress—that if there is any legislative purpose which might have been furthered by the kind of disclosure sought, the witness must be punished for withholding it. No doubt every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our Government. But such deference cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms.

The Government contends that the public interest at the core of the investigations of the Un-American Activities Committee is the need by the Congress to be informed of efforts to overthrow the Government by force and violence so that adequate legislative safeguards can be erected. From this core, however, the Committee can radiate outward infinitely to any topic thought to be related in some way to armed insurrection. The outer reaches of this domain are known only by the content of "un-American activities." . . . A third dimension is added when the investigators turn their attention to the past to collect minutiae on remote topics, on the hypothesis that the past may reflect upon the present. . . .

It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected. An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. . . .

Since World War II, the Congress has practically abandoned its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House. The sanction there imposed is imprisonment by the House until the recalcitrant witness agrees to testify or disclose the matters sought, provided that the incarceration does not extend beyond adjournment. The Congress has instead invoked the aid of the federal judicial system in protecting itself against contumacious conduct. It has become customary to refer these matters to the United States Attorneys for prosecution under criminal law. . . .

. . . [In such cases] the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases. Among these is the right to have available, through a sufficiently precise statute, information revealing the standard of criminality before the commission of the alleged offense. Applied to persons prosecuted under [the statute] . . . this raises a special problem in that the statute defines the crime as refusal to answer "any question pertinent to the question under inquiry." Part of the standard of criminality, therefore, is the pertinency of the questions propounded to the witness.

The problem attains proportion when viewed from the standpoint of the witness who appears before a congressional committee. He must decide at the time the questions are propounded whether or not to answer. . . . An erroneous determination on his part, even if made in the utmost good faith, does not exculpate him if the court should later rule that the questions were pertinent to the question under inquiry.

It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. The "vice of vagueness" must be avoided here as in all other crimes. There are several sources that can outline the "question under inquiry" in such a way that the rules against vagueness are satisfied. The authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves might sometimes make the topic clear. This case demonstrates, however, that these sources often leave the matter in grave doubt.

. . . [Watkins] was not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment.

We are mindful of the complexities of modern government and the ample scope that must be left to the Congress as the sole constitutional depository of legislative power. Equally mindful are we of the indispensable function, in the exercise of that power, of congressional investigations. The conclusions we have reached in this case will not prevent the Congress, through its committees, from obtaining any information it needs for the proper fulfillment of its role in our scheme of government. The legislature is free to determine the kinds of data that should be collected. It is only those investigations that are conducted by use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of

power from responsibility and which provide the constitutional requisites of fairness for witnesses. A measure of added care on the part of the House and the Senate in authorizing the use of compulsory process and by their committees in exercising that power would suffice. That is a small price to pay if it serves to uphold the principles of limited, constitutional government without constricting the power of the Congress to inform itself.

The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court with instructions to dismiss the indictment. . . .

Mr. Justice Burton and ***Mr. Justice Whittaker*** took no part in the consideration or decision of this case.

Mr. Justice Frankfurter, concurring. . . .

Mr. Justice Clark, dissenting.

As I see it the chief fault in the majority opinion is its mischievous curbing of the informing function of the Congress. While I am not versed in its procedures, my experience in the executive branch of the government leads me to believe that the requirements laid down in the opinion for the operation of the committee system of inquiry are both unnecessary and unworkable. . . .

It may be that at times the House Committee on Un-American Activities has, as the Court says, "conceived of its task in the grand view of its name." And, perhaps, as the Court indicates, the rules of conduct placed upon the Committee by the House admit of individual abuse and unfairness. But that is none of our affair. So long as the object of a legislative inquiry is legitimate and the questions propounded are pertinent thereto, it is not for the courts to interfere with the committee system of inquiry. To hold otherwise would be an infringement on the power given the Congress to inform itself, and thus a trespass upon the fundamental American principle of separation of powers. The majority has substituted the judiciary as the grand inquisitor and supervisor of congressional investigations. It has never been so. . . .

Case

BARENBLATT V. UNITED STATES

360 U.S. 109; 79 S.Ct. 1081; 3 L.Ed. 2d 1115 (1959)
Vote: 5–4

As part of its investigation into Communist infiltration into the education system, the House Un-American Activities Committee subpoenaed Lloyd Barenblatt, a former college professor. Barenblatt appeared before the committee but refused to answer its questions, which dealt primarily with his political beliefs and associations. Barenblatt based his refusal not on the self-incrimination clause of the Fifth Amendment, but on the First Amendment protections of political speech and association. Barenblatt was convicted of contempt of Congress.

Mr. Justice Harlan delivered the opinion of the Court.

. . . The precise constitutional issue confronting us is whether the Subcommittee's inquiry into petitioner's past or present membership in the Communist Party transgressed the provisions of the First Amendment, which of course reach and limit congressional investigations. . . . The Court's past cases establish sure guides to decision. Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown. These principles were recognized in the *Watkins* Case. . . .

The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose. . . .

That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient to say, without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here. In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society." . . . Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist

Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress. . . .

. . . To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should not be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II, . . . and to the vast burdens which these conditions have entailed for the entire Nation.

We think that investigatory power in this domain is not to be denied Congress solely because the field of education is involved. . . . Indeed we do not understand the petitioner here to suggest that Congress in no circumstances may inquire into Communist activity in the field of education. Rather, his position is in effect that this particular investigation was aimed not at the revolutionary aspects but at the theoretical classroom discussion of communism.

In our opinion this position rests on a too constricted view of the nature of the investigatory process, and is not supported by a fair assessment of the record before us. An investigation of advocacy of or preparation for overthrow certainly embraces the right to identify a witness as a member of the Communist Party . . . and to inquire into the various manifestations of the Party's tenets. The strict requirements of a prosecution under the Smith Act, . . . are not the measure of the permissible scope of a congressional investigation into "overthrow," for of necessity the investigatory process must proceed step by step. Nor can it fairly be concluded that this investigation was directed at controlling what is being taught at our universities rather than at overthrow. The statement of the Subcommittee Chairman at the opening of the investigation evinces no such intention, and so far as this record reveals nothing thereafter transpired which would justify our holding that the thrust of the investigation later changed. The record discloses considerable testimony concerning the foreign domination and revolutionary purposes and efforts of the Communist Party. That there was also testimony on the abstract philosophical level does not detract from the dominant theme of this investigation—Communist infiltration furthering the alleged ultimate purpose of overthrow. And certainly the conclusion would not be justified that the questioning of the petitioner would have exceeded permissible bounds had he not shut off the Subcommittee at the threshold.

Nor can we accept the further contention that this investigation should not be deemed to have been in furtherance of a legislative purpose because the true objective of the Committee and of the Congress was purely "exposure." So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power. "It is of course, true," . . . "that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power." These principles of course apply as well to committee investigations into the need for legislation as to the enactments which such investigations may produce. . . . Thus, in stating in the *Watkins* Case . . . that "there is no congressional power to expose for the sake of exposure," we at the same time declined to inquire into the "motives of committee members," and recognized that their "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." Having scrutinized this record we cannot say that the unanimous panel of the Court of Appeals which first considered this case was wrong in concluding that "the primary purposes of the inquiry were in aid of legislative processes." Certainly this is not a case like *Kilbourn v. Thompson* . . . , where "the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of government, because it was in its nature clearly judicial." The constitutional legislative power of Congress in this instance is beyond question.

Finally, the record is barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state. There is no indication in this record that the Subcommittee was attempting to pillory witnesses. Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee. And the relevancy of the questions put to him by the Subcommittee is not open to doubt.

We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended.

We hold that petitioner's conviction for contempt of Congress discloses no infirmity and that the judgment of the Court of Appeals must be Affirmed.

Mr. Justice Black, with whom ***Chief Justice Warren*** and ***Mr. Justice Douglas*** concur, dissenting. . . .

Mr. Justice Brennan, dissenting.

. . . I would reverse this conviction. It is sufficient that I state my complete agreement with my Brother Black that no purpose for the investigation of Barenblatt is revealed by the record except exposure purely for the sake of exposure. This is not a purpose to which Barenblatt's rights under the First Amendment can validly be subordinated. An investigation in which the processes of law-making and law-evaluating are submerged entirely in exposure of individual behavior—in adjudication, of a sort, through the exposure process—is outside the constitutional pale of congressional inquiry. . . .

Case

GIBBONS V. OGDEN

9 Wheat. (22 U.S.) 1; 6 L.Ed. 23 (1824)
Vote: 6–0

Aaron Ogden held an exclusive right to navigate steamboats in New York waters, a monopoly granted by the New York state legislature. Gibbons held a "coasting license" from the federal government. When Gibbons began operating a steamboat ferry service between New York and New Jersey, Ogden obtained an injunction in the New York courts.

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

[Gibbons] contends that [New York's injunction] is erroneous, because the laws [of New York] which purport to give the exclusive privilege (to Ogden to navigate steamboats on New York waters) are repugnant to the Constitution and laws of the United States.

They are said to be repugnant . . . to that clause in the Constitution which authorizes Congress to regulate commerce. . . .

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for [Ogden] would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late. . . .

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning

throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state. . . .

We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that although the power of Congress to regulate commerce with foreign nations, and among the several states, be coextensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty, before the formation of the Constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the Tenth Amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

[Gibbons] conceding these postulates, except the last, contends that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it. . . .

In discussing the question, whether this [commerce] power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that

inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states, while Congress is regulating it? . . .

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other. . . .

Since, . . . in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . .

. . . [It] has been contended that if a law, passed by a state in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it. . . .

. . . To the court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade. . . .

If the power resides in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally, must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress. . . .

. . . The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is that the laws of Congress, for the regulation of commerce, do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and, in that vast and complex system of legislative enactment concerning it, which embraces everything that the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act, granting a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. . . .

This act demonstrates the opinion of Congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with the act. . . .

Mr. Justice Johnson [concurring].

. . . The "power to regulate commerce," here meant to be granted, was that power to regulate commerce which previously existed in the states. But what was that power? The states were, unquestionably, supreme, and each possessed

that power over commerce which is acknowledged to reside in every sovereign state. . . . The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the state to act upon. . . .

It is impossible, with the views which I entertained of the principle on which the commercial privileges of the people of the United States, among themselves, rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of [Gibbons]. If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was repealed tomorrow, the rights of [Gibbons] to a reversal of the decision complained of, would be as strong as it is under this license. . . .

Case

HAMMER V. DAGENHART

247 U.S. 251; 38 S.Ct. 529; 62 L.Ed. 1101 (1918)
Vote: 5–4

In 1916 Congress enacted a statute prohibiting the interstate shipment of goods produced at factories employing children under the age of 14 or permitting children between the ages of 14 and 16 to work more than eight hours a day or more than six days a week. The question before the Supreme Court is whether this prohibition is a valid regulation of interstate commerce.

Mr. Justice Day delivered the opinion of the Court.

A bill was filed in the United States district court for the western district of North Carolina by a father in his own behalf and as next of kin to his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employees in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor. . . .

The district court held the act unconstitutional. . . . This appeal brings the case here. . . .

The power essential to the passage of this act, the government contends, is found in the commerce clause of the Constitution, which authorizes Congress to regulate commerce with foreign nations and among the states.

. . . [The commerce] power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities, and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them, is such that the authority to prohibit is, as to them, but the exertion of the power to regulate.

. . . [It has been held that] Congress might pass a law having the effect to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes; . . . [to prohibit] the introduction into the states by means of interstate commerce of impure food and drugs; . . . [to forbid] transportation of a woman in interstate commerce for the purpose of prostitution; . . . [to prohibit] the transportation of women in interstate commerce for the purposes of debauchery and kindred purposes; . . . [and to bar] the transportation of intoxicating liquors. . . .

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce

transportation does not make their production subject to Federal control under the commerce power.

Commerce "consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. . . .

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. . . . If it were otherwise, all manufacture intended for interstate shipment would be brought under Federal control to the practical exclusion of the authority of the states—a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the states. . . .

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition thus engendered may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. . . .

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. . . .

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every state in the Union has a law upon the subject, limiting the right to thus employ children. In North Carolina, the state wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work. . . .

In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. . . . To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

. . . [T]he act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the state over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be affirmed.

Mr. Justice Holmes, dissenting.

. . . [I]f an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may

have, however obvious it may be that it will have those effects; and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects, and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulations may prohibit any part of such commerce that Congress sees fit to forbid. . . .

The question, then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the states in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state. . . .

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants, and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where, in my opinion, they do not belong, this was pre-eminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone, and that this court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink, but not as against the product of ruined lives.

The act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states, but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her boundaries, the state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

Mr. Justice McKenna, Mr. Justice Brandeis, and ***Mr. Justice Clarke*** concur in this opinion.

Case

CARTER V. CARTER COAL COMPANY

298 U.S. 238; 56 S.Ct. 855; 80 L.Ed. 1160 (1936)
Vote: 5–4

The Bituminous Coal Act of 1935 created a national commission with authority to regulate wages and prices for the coal industry. A 15 percent tax was levied on all coal sold at the mine, and producers who accepted the federal regulations were entitled to a 90 percent rebate of assessed taxes. Carter, a stockholder in the Carter Coal Company, brought suit seeking to enjoin the company from paying the tax or complying with the code.

Mr. Justice Sutherland delivered the opinion of the Court.

. . . The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from the powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court. . . .

. . . [T]he general purposes which the act recites . . . are beyond the power of Congress except so far, and only so far, as they may be realized by an exercise of some specific power granted by the Constitution. . . . [W]e shall find no grant of power which authorized Congress to legislate in respect of these general purposes unless it be found in the commerce clause—and this we now consider. . . .

. . . [T]he word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade." Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it.

. . . [T]he effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce. . . . Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, or manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products. . . .

That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, as the "preamble" recites, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the *Schechter* case. . . .

Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word "direct" implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here, since the question is not—What is the extent of the local activity or condition, or the extent of the effect produced upon interstate commerce? but—What is the relation between the activity or condition and the effect?

Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. . . . And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character. . . .

. . . [We] now declare, that the want of power on the part of the federal government is the same whether the wages, hours or service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended. . . .

Separate opinion of ***Mr. Chief Justice Hughes*** [dissenting].

The power to regulate interstate commerce embraces the power to protect that commerce from injury, whatever may be the source of the dangers which threaten it, and to adopt any appropriate means to that end. . . . Congress thus has adequate authority to maintain the orderly conduct of interstate commerce and to provide for the peaceful settlement of disputes which threaten it. . . . But Congress may not use this protective authority as a pretext

for the exertion of power to regulate activities and relations within the States which affect interstate commerce only indirectly. . . .

But . . . [t]he Act also provides for the regulation of the prices of bituminous coal sold in interstate commerce and prohibits unfair methods of competition in interstate commerce. Undoubtedly transactions in carrying on interstate commerce are subject to the federal power to regulate that commerce and the control of charges and the protection of fair competition in that commerce are familiar illustrations of the exercise of the power, as the Interstate Commerce Act, the Packers and Stockyards Act, and the Anti-Trust Acts abundantly show. . . .

. . . The marketing provisions in relation to interstate commerce can be carried out as provided in Part II without regard to the labor provisions contained in Part III. That fact, in the light of the congressional declaration of separability, should be considered of controlling importance.

In this view, the Act, and the Code for which it provides, may be sustained in relation to the provisions for marketing in interstate commerce, and the decisions of the courts below, so far as they accomplish that result, should be affirmed.

Mr. Justice Cardozo . . . [dissenting].

. . . I am satisfied that the Act is within the power of the central government in so far as it provides for minimum and maximum prices upon sales of bituminous coal in the transactions of interstate commerce and in those of intrastate commerce where interstate commerce is directly or intimately affected. Whether it is valid also in other provisions that have been considered and condemned in the opinion of the Court, I do not find it necessary to determine at this time. Silence must not be taken as importing acquiescence. . . .

I am authorized to state that Mr. Justice Brandeis and Mr. Justice Stone join in this opinion.

Case

National Labor Relations Board v. Jones & Laughlin Steel Corporation

301 U.S. 1; 57 S.Ct. 615; 81 L.Ed. 893 (1937)
Vote: 5–4

In this case the Court considers the constitutionality of the National Labor Relations Act of 1935, which recognized the right of workers to organize and bargain collectively with management. The act also created the National Labor Relations Board (NLRB), which was empowered to issue "cease and desist" orders to prevent unfair labor practices by corporations.

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

In a proceeding under the National Labor Relations Act of 1935, the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. . . . The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition, holding that the order lay beyond the range of federal power. . . . We granted certiorari.

The scheme of the National Labor Relations Act . . . may be briefly stated. The first section sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining. There follows a declaration that it is the policy of the United States to eliminate these causes of obstruction to the free flow of commerce. The Act then defines the terms it uses, including the terms "commerce" and "affecting commerce." . . . It creates the National Labor Relations Board and prescribes its organization. . . . It sets forth the right of employees to self-organization and to bargain collectively through representatives of their own choosing. . . . It defines "unfair labor practices." . . . It lays down rules as to the representation of employees for the purpose of collective bargaining. . . . The Board is

empowered to prevent the described unfair labor practices affecting commerce and the Act prescribes the procedure to that end. The Board is authorized to petition designated courts to secure the enforcement of its orders. The findings of the Board as to the facts, if supported by evidence, are to be conclusive. If either party on application to the court shows that additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearings before the Board, the court may order the additional evidence to be taken. Any person aggrieved by a final order of the Board may obtain a review in the designated courts with the same procedure as in the case of an application by the Board for the enforcement of its order. . . . The Board has broad powers of investigation. . . . Interference with members of the Board or its agents in the performance of their duties is punishable by fine and imprisonment. . . . Nothing in the Act is to be construed to interfere with the right to strike. . . .

The procedure in the instant case followed the statute. . . .

Contesting the ruling of the Board, [Jones & Laughlin] argues (1) that the Act is in reality a regulation of labor relations and not of interstate commerce; [and] (2) that the act can have no application to the respondent's relations with its production employees because they are not subject to regulation by the federal government. . . .

First. The scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable at best; that the Act is not a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. . . .

If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. . . . The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. . . .

But we are not at liberty to deny effect to specific provisions, which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. . . .

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. . . .

There can be no question that the commerce . . . contemplated by the Act . . . is interstate and foreign commerce in the constitutional sense. The Act also defines the term "affecting commerce." . . .

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise or control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes.

. . . It is the effect upon commerce, not the source of the injury, which is the criterion. . . . Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

Second. The unfair labor practices in question. [I]n its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the

maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. . . . Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." . . .

Third. The application of the Act to employees engaged in production.—The principle involved.—Respondent [Jones & Laughlin Steel Corporation] says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department . . . are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. . . .

. . . The various parts of respondent's enterprise are described as interdependent and as thus involving "a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business." It is urged that these activities constitute a "stream" or "flow" of commerce . . . and that industrial strife at [the central manufacturing plant of Jones & Laughlin] would cripple the entire movement. . . .

We do not find it necessary to determine whether these features of [Jones & Laughlin's] business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protection power which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement"; . . . to adopt measures "to promote its growth and insure its safety"; . . . "to foster, protect, control and restrain." . . . That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. . . . The question is necessarily one of degree. . . .

That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. . . . It is manifest that intrastate rates deal primarily with a local activity. But in rate-making they bear such a close relation to interstate rates that effective control of the one must embrace some control over the other. . . .

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. . . .

It is . . . apparent that the fact that the employees here concerned were engaged in production is not determinative.

The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter* case . . . we found that the effect there was so remote as to be beyond the federal power. To find "immediacy or directness" there was to find it "almost everywhere," a result inconsistent with the maintenance of our federal system. In the *Carter* case . . . the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here.

Fourth. Effects of the unfair labor practice in respondent's enterprise.— . . . [T]he stoppage of [Jones & Laughlin's] operations by industrial strife would have a most

serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. . . .

These questions have frequently engaged the attention of Congress and have been the subject of many inquiries. The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. . . . It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of [Jones & Laughlin's] employees to self-organization and freedom in the choice of representatives for collective bargaining. . . .

Our conclusion is that the order of the Board was within its competency and that the act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Mr. Justice McReynolds [joined by ***Mr. Justice Van Devanter, Mr. Justice Sutherland,*** and ***Mr. Justice Butler***] delivered the following dissenting opinion.

. . . Considering [the statute's] far-reaching import . . . , the departure from what we understand has been consistently ruled here, and the extraordinary power confirmed to a Board of three [the NLRB], the obligation to present our views becomes plain. . . .

Any effect on interstate commerce by the discharge of employees shown here, would be indirect and remote in the highest degree, as consideration of the facts will show.

In [this case] ten men out of ten thousand were discharged. . . . The immediate effect in the factory may be to create discontent among all those employed and a strike may follow, which, in turn, may result in reducing production, which ultimately may reduce the volume of goods moving in interstate commerce. By this chain of indirect and progressively remote events we finally reach the evil with which it is said the legislation under consideration undertakes to deal. A more remote and indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine.

The Constitution still recognizes the existence of states with indestructible powers; the Tenth Amendment was supposed to put them beyond controversy.

We are told that Congress may protect the "stream of commerce" and that one who buys raw material without the state, manufactures it therein, and ships the output to another state is in that stream. Therefore it is said he may be prevented from doing anything which may interfere with its flow.

This, too, goes beyond the constitutional limitations heretofore enforced. If a man raises cattle and regularly delivers them to a carrier for interstate shipment, may Congress prescribe the conditions under which he may employ or discharge helpers on the ranch? The products of a mine pass daily into interstate commerce; many things are brought to it from other states. Are the owners and the miners within the power of Congress in respect of the miners' tenure and discharge? May a mill owner be prohibited from closing his factory or discontinuing his business because to do so would stop the flow of products to and from his plant in interstate commerce? May employees in a factory be restrained from quitting work in a body because this will close the factory and thereby stop the flow of commerce? May arson of a factory be made a Federal offense whenever this would interfere with such flow? If the business cannot continue with the existing wage scale, may Congress command a reduction? If the ruling of the Court just announced is adhered to, these

questions suggest some of the problems certain to arise. And if this theory of a continuous "stream of commerce" as now defined is correct, will it become the duty of the Federal Government hereafter to suppress every strike which by possibility may cause a blockage in that stream? . . . Moreover, since Congress has intervened, are labor relations between most manufacturers and their employees removed from all control by the State? . . . There is no ground on which reasonably to hold that refusal by a manufacturer, whose raw materials come from states other than that of his factory and whose products are regularly carried to other states, to bargain collectively with employees in his manufacturing plant, directly affects interstate commerce. In such business, there is not one but two distinct movements or streams in interstate transportation. The first brings in raw material and there ends. Then follows manufacture, a separate and local activity. Upon completion of this, and not before, the second distinct movement or stream in interstate commerce begins and the products go to their states. Such is the common course for small as well as large industries. It is unreasonable and unprecedented to say the commerce clause confers upon Congress power to govern relations between employers and employees in these local activities. . . . In Schechter's case we condemned as unauthorized by the commerce clause the assertion of federal power in respect of commodities which had come to rest after interstate transportation. And, in Carter's case, we held Congress lacked power to regulate labor relations in respect of commodities before interstate commerce has begun.

It is gravely stated that experience teaches that if any employer discourages membership in "any organization of any kind . . . in which employees participate, and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work," discontent may follow and this in turn may lead to a strike, and as the outcome of the strike there may be a block in the stream of interstate commerce. Therefore Congress may inhibit the discharge. Whatever effect any cause of discontent may ultimately have upon commerce is far too indirect to justify Congressional regulations.

Almost anything—marriage, birth, death—may in some fashion affect commerce. That Congress has power by appropriate means, not prohibited by the Constitution, to prevent direct and material interference with the conduct of interstate commerce is settled doctrine. But the interference struck at must be direct and material, not some mere possibility contingent on wholly uncertain events; and there must be no impairment of rights guaranteed. . . . The right to contract is fundamental and includes the privilege of selecting those with whom one is willing to assume contractual relations. This right is unduly abridged by the act now upheld. A private owner is deprived of power to manage his own property by freely selecting those to whom his manufacturing operations are to be entrusted. We think this cannot lawfully be done in circumstances like those here disclosed.

It seems clear to us that Congress has transcended the powers granted.

Case

WICKARD V. FILBURN

317 U.S. 111; 63 S.Ct. 82; 87 L.Ed. 122 (1942)
Vote: 9–0

In this important New Deal–era decision, the Supreme Court upholds broad federal power to regulate the production of agricultural commodities. The unanimous opinion shows the degree to which the post-1937 Court was willing to defer to congressional power under the Commerce Clause.

Mr. Justice Jackson delivered the opinion of the Court.

. . . [Roscoe C. Filburn] for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for [Filburn's] 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940 before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act . . . constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all.

[Filburn] has not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture. . . .

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances.

The Act provides further that whenever it appears that the total supply of wheat as of the beginning of any marketing year . . . will exceed a normal year's domestic consumption and export . . . a compulsory national marketing quota shall be in effect with respect to the marketing of wheat. . . . [T]he Secretary must . . . conduct a referendum of farmers who will be subject to the quota to determine whether they favor or oppose it; and if more than one third of the farmers voting in the referendum do oppose, the Secretary must prior to the effective date of the quota by proclamation suspend its operation. . . .

Pursuant to the Act, the referendum of wheat growers was held on May 31, 1941. According to the required published statement of the Secretary of Agriculture, 81 per cent of those voting favored the marketing quota, with 19 per cent opposed. . . .

It is urged that under the Commerce Clause of the Constitution, Article I, Sec. 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in *United States v. Darby* [1941] . . . sustaining the federal power to regulate production of goods for commerce except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives so that as related to wheat in addition to its conventional meaning it also means to dispose of "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat either within or without the quota is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

[Filburn] says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most "indirect." In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a "necessary and proper" implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption rather than of marketing is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. . . . He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. . . .

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative

exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference, instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as "production," "manufacturing," and "mining" were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.

It was not until 1887 with the enactment of the Interstate Commerce Act that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress. . . .

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones,—and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden* [1824]. . . .

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production" nor can consideration of its economic effects be foreclosed by calling them "indirect." . . .

Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if [Filburn's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect." . . .

The wheat industry has been a problem industry for some years. . . . The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion. . . .

In the absence of regulation the price of wheat in the United States would be much affected by world conditions. . . .

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That [Filburn's] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. . . .

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation

of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do. . . .

Case

Heart of Atlanta Motel v. United States

379 U.S. 241; 85 S.Ct. 348; 13 L.Ed. 2d 258 (1964)
Vote: 9–0

In the Civil Rights Cases (1883) the Supreme Court held that Congress cannot use its power to enforce the Fourteenth Amendment to outlaw racial discrimination by privately owned places of public accommodation unless there is some significant degree of official state action supporting the discriminatory practices. Thus, in adopting Title II of the 1964 Civil Rights Act, Congress sought to prohibit racial discrimination by hotels, restaurants, and other public facilities by invoking its broad authority to regulate interstate commerce. In this case, the owner of the Heart of Atlanta Motel filed suit in federal district court seeking an injunction against the enforcement of Title II. The suit claimed that in enacting Title II, Congress exceeded its powers under the Commerce Clause. The owner claimed that his hotel business was a local activity beyond the reach of federal power over interstate commerce.

Mr. Justice Clark delivered the opinion of the Court.

. . . Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the [Civil Rights Act of 1964] the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

The appellant contends that Congress in passing [the Civil Rights Act] exceeded its power to regulate commerce under Art. I, Sec. 8, cl. 3, of the Constitution of the United States. . . .

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on Sec. 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, Sec. 8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." At the same time, however, it noted that such an objective has been and could be readily achieved "by congressional action based on the commerce power of the Constitution." . . . Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. . . .

While the Act as adopted carried no congressional findings, the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. . . . This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular

have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight, . . . and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel. . . . These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well. . . . This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. . . . This was the conclusion not only of the Under Secretary of Commerce but also of the Administrator of the Federal Aviation Agency who wrote the Chairman of the Senate Commerce Committee that it was his "belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations." . . . [T]he voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. . . . [T]he determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more States than one" and has a real and substantial relation to the national interest. Let us now turn to this facet of the problem.

That the "intercourse" of which the Chief Justice spoke included the movement of persons through more States than one was settled as early as 1849, in the Passenger Cases, . . . where Mr. Justice McLean stated: "That the transportation of passengers is a part of commerce is not now an open question." . . . The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling, . . . to deceptive practices in the sale of products, . . . to fraudulent security transactions, . . . to misbranding of drugs, . . . to wages and hours, . . . to members of labor unions, . . . to crop control, . . . to discrimination against shippers, . . . to the protection of small business from injurious price cutting, . . . to resale price maintenance, . . . to professional football, . . . and to racial discrimination by owners and managers of terminal restaurants. . . .

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." . . . Thus the power of Congress to promote interstate commerce also included the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however "local" their operations may appear. . . .

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress, not with the courts. How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Mr. Justice Black, concurring. . . .

Mr. Justice Douglas, concurring.

Though I join the Court's opinion, I am somewhat reluctant here . . . to rest solely on the Commerce Clause. My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interests of

human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the "right of persons to move freely from State to State" . . . "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel, and coal across state lines." . . .

Hence I would prefer to test on the assertion of legislative power contained in Sec. 5 of the Fourteenth Amendment which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—a power which the Court concedes was exercised at least in part in this Act.

A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history. . . .

Case

KATZENBACH V. MCCLUNG

379 U.S. 294; 85 S.Ct. 377; 13 L.Ed. 2d 290 (1964)
Vote: 9–0

In this companion case to Heart of Atlanta Motel v. United States, the Court considers the constitutionality of Title II of the Civil Rights Act of 1964 as applied to a restaurant in Birmingham, Alabama. Ollie McClung, the owner of Ollie's Barbecue in Birmingham, Alabama, brought suit in the federal court to enjoin the enforcement of Title II against his business. McClung argued that because his restaurant was a local commercial activity with minimal impact on interstate commerce, it was beyond the reach of federal regulatory authority. The federal district court in Alabama agreed and declared Title II unconstitutional as applied to Ollie's Barbecue and similar establishments. The court found that there was not "a close and substantial relation between local activities and interstate commerce" to justify congressional regulation in this context. The district court enjoined the attorney general, Nicholas Katzenbach, from enforcing Title II against McClung's business.

Mr. Justice Clark delivered the opinion of the Court.

Ollie's Barbecue is a family-owned restaurant . . . specializing in barbecued meats and homemade pies, with a seating capacity of 220 customers. It is located on a state highway 11 blocks from an interstate highway . . . and a somewhat greater distance from railroad and bus stations. The restaurant caters to a family and white-collar trade with a take-out service for Negroes. It employs 36 persons, two-thirds of whom are Negroes.

In the 12 months preceding the passage of the Act, the restaurant purchased locally approximately $150,000 worth of food, $69,683 or 46% of which was meat that it bought from a local supplier who had procured it from outside the State. The district Court expressly found that a substantial portion of the food served in the restaurant had moved in interstate commerce. The restaurant has refused to serve Negroes in its dining accommodations since its original opening in 1927, and since July 2, 1964, it has been operating in violation of the Act. The court below concluded that if it were required to serve Negroes it would lose a substantial amount of business.

. . . The activities that are beyond the reach of Congress are "those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Gibbons v. Ogden* . . . (1824). This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago.

This Court has held time and again that this power extends to activities of retail establishments, including restaurants, which directly or indirectly burden or obstruct interstate commerce. . . .

Nor are the cases holding that interstate commerce ends when goods come to rest in the State of destination apposite here. That line of cases has been applied with reference to state taxation or regulation but not in the field of federal regulation. . . .

Here, as there, Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary

to the protection of commerce, our investigation is at an end. The only remaining question—one answered in the affirmative by the court below—is whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce. . . .

Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. . . .

The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid. . . .

Case

UNITED STATES V. LOPEZ

514 U.S. 549; 115 S.Ct. 1624; 131 L.Ed. 2d 626 (1995)
Vote: 5–4

In enacting the Gun-Free School Zones Act of 1990, Congress made it a federal 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." A twelfth grade student in San Antonio, Texas, was convicted under the statute after he was found to be carrying a concealed .38-caliber handgun and five bullets at school. The Court of Appeals for the Fifth Circuit reversed respondent's conviction, holding the act was invalid because Congress had exceeded its authority under the Commerce Clause. The Supreme Court granted certiorari.

Chief Justice Rehnquist delivered the opinion of the Court.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. . . . As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." . . . This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." . . . "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." . . .

. . . [W]e have 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. . . . Second, Congress is empowered 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. . . . For example, the destruction of an aircraft or . . . thefts from interstate shipments. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce. . . .

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. . . . We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact [the challenged statute]. The first two categories of authority may be quickly disposed of: [the challenged statute] is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [the challenged statute] be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if [the challenged statute] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; . . . intrastate extortionate credit transactions, . . . restaurants utilizing substantial interstate

supplies, . . . inns and hotels catering to interstate guests, . . . and production and consumption of home-grown wheat. . . . These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained. . . .

. . . [The challenged statute] is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. [It] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce. . . .

The Government's essential contention . . . is that we may determine here that [the challenged statute] is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. . . . The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. . . . Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. . . . The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that [the challenged statute] substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. . . . Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of [the challenged statute], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate. . . .

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori,* it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum . . . because what is taught in local schools has a significant "effect on classroom learning," . . . and that, in turn, has a substantial effect on interstate commerce. . . .

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do. . . .

Justice Kennedy, with whom ***Justice O'Connor*** joins, concurring. . . .

Justice Thomas, concurring. . . .

Justice Stevens, dissenting. . . .

Justice Souter, dissenting. . . .

Justice Breyer, with whom ***Justice Stevens, Justice Souter,*** and ***Justice Ginsburg*** join, dissenting.

The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. . . . In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half-century.

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce . . . among the several States" . . . encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. . . . Second, in determining whether a local activity will likely

have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act . . . , but rather the cumulative effect of all similar instances (i.e., the effect of all guns possessed in or near schools). . . . Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. . . . Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "a rational basis" for so concluding. . . .

Applying these principles to the case at hand, we must ask whether Congress could have had a rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. Or, to put the question in the language of the explicit finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign commerce"? . . . As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," . . . the answer to this question must be yes. Numerous reports and studies—generated both inside and outside government—make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts. . . . For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. These materials report, for example, that four percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally, . . . that 12 percent of urban high school students have had guns fired at them, . . . that 20 percent of those students have been threatened with guns, . . . and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools. . . . And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. . . . Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. . . . And, Congress could therefore have found a substantial educational problem—teachers unable to teach, students unable to learn—and concluded that guns near schools contribute substantially to the size and scope of that problem.

Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy. . . .

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning also substantially threatens the commerce to which that teaching and learning is inextricably tied? That is to say, guns in the hands of six percent of inner-city high school students and gun-related violence throughout a city's schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority's terminology) "substantial." And, the evidence of (1) the extent of the gun-related violence problem, . . . (2) the extent of the resulting negative effect on classroom learning, . . . and (3) the extent of the consequent negative commercial effects, . . . when taken together, indicate a threat to trade and commerce that is "substantial." At the very least, Congress could rationally have concluded that the links are "substantial."

Specifically, Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, . . . and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage, . . . of a kind that location near a railhead or harbor provided in the past. . . .

In sum, to find this legislation within the scope of the Commerce Clause would permit "Congress . . . to act in terms of economic . . . realities." . . . It would interpret the Clause as this Court has traditionally interpreted it, with the exception of one wrong turn subsequently corrected. . . . Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. . . .

Case

GONZALES V. RAICH

545 U.S. ___; 125 S.Ct. 2195; 162 L.Ed. 2d 1 (2005)
Vote: 6–3

In this case the Court considers whether the power to regulate interstate commerce allows Congress to prohibit individuals from cultivating small amount of marijuana for personal medical use, notwithstanding a state law allowing it. Not only does the case involve the scope of federal power over individuals, it has important implications for the system of federalism.

Justice Stevens delivered the opinion of the Court.

. . . In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996. . . . The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician. . . .

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. . . .

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as "John Does," to provide her with locally grown marijuana at no charge. . . .

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA), to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. Respondents claimed that enforcing the CSA against them would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity.

The District Court denied respondents' motion for a preliminary injunction. Although the court found that the federal enforcement interests "wane[d]" when compared to the harm that California residents would suffer if denied access to medically necessary marijuana, it concluded that respondents could not demonstrate a likelihood of success on the merits of their legal claims.

A divided panel of the Court of Appeals for the Ninth Circuit reversed and ordered the District Court to enter a preliminary injunction. The court found that respondents had "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority." The Court of Appeals distinguished prior Circuit cases upholding the CSA in the face of Commerce Clause challenges by focusing on what it deemed to be the "*separate and distinct class of activities*" at issue in this case: "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law." The court found the latter class of activities "different in kind from drug trafficking" because interposing a physician's recommendation raises different health and safety concerns, and because "this limited use is clearly distinct from the broader illicit drug market—as well as any broader commercial market for medicinal marijuana—insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce."

The majority placed heavy reliance on our decisions in *United States v. Lopez* (1995), and *United States v. Morrison* (2000) . . . to hold that this separate class of purely local activities was beyond the reach of federal power. In contrast, the dissenting judge concluded that the CSA, as applied to respondents, was clearly valid under *Lopez* and *Morrison;* moreover, he thought it "simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in *Wickard v. Filburn* [1942]."

The obvious importance of the case prompted our grant of certiorari. The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those

markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. We accordingly vacate the judgment of the Court of Appeals. . . .

In enacting the CSA, Congress classified marijuana as a Schedule I drug. . . . Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. . . . By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study. . . .

Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause. . . .

Cases decided during that "new era" [of Commerce Clause cases,] which now spans more than a century, have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce. Only the third category is implicated in the case at hand.

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. As we stated in *Wickard,* "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." We have 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. In this vein, we have reiterated that when "'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.' "

Our decision in *Wickard* is of particular relevance. In *Wickard,* we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. The regulations established an allotment of 11.1 acres for Filburn's 1941 wheat crop, but he sowed 23 acres, intending to use the excess by consuming it on his own farm. Filburn argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize "federal regulation [of] production not intended in any part for commerce but wholly for consumption on the farm." Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote:

> "The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

Wickard thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard,* respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . . " and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard,* we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was

that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity. . . .

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly.

Those two cases, of course, are [*U.S. v.*] *Lopez* [1995] and [*U.S. v.*] *Morrison* [2000]. As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison,* the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." . . .

Unlike those at issue in *Lopez* and *Morrison,* the activities regulated by the CSA are quintessentially economic. . . . The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

The Court of Appeals was able to conclude otherwise only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." The court characterized this class as "different in kind from drug trafficking." The differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, *i.e.*, its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme. . . .

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious. Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so. Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, . . . Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

So, from the "separate and distinct" class of activities identified by the Court of Appeals (and adopted by the dissenters), we are left with "the intrastate, noncommercial cultivation, possession and use of marijuana." Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decision in *Wickard v. Filburn* . . . foreclose[s] that claim. . . .

Justice Scalia, concurring in the judgment.

I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. . . .

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. . . .

As we implicitly acknowledged in *Lopez,* however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." This statement referred to those cases permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power." . . . [W]here Congress has the authority to enact a regulation of interstate commerce, "it possesses every power needed to make that regulation effective." . . .

. . . In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market. "To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." . . .

Finally, neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation "inappropriate"—except to argue that the CSA regulates an area typically left to state regulation. That is not enough to render federal regulation an inappropriate means. The Court has repeatedly recognized that, if authorized by the commerce power, Congress may regulate private endeavors "even when [that regulation] may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress." . . . At bottom, respondents' state-sovereignty argument reduces to the contention that federal regulation of the activities permitted by California's Compassionate Use Act is not sufficiently necessary to be "necessary and proper" to Congress's regulation of the interstate market. For the reasons given above and in the Court's opinion, I cannot agree.

I thus agree with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market "could be undercut" if those activities were excepted from its general scheme of regulation. That is sufficient to authorize the application of the CSA to respondents.

Justice O'Connor, with whom the ***Chief Justice*** and ***Justice Thomas*** join . . . , dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve

as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in *Lopez* and . . . *Morrison*. Accordingly I dissent. . . .

Our decision [in Lopez] about whether gun possession in school zones substantially affected interstate commerce turned on four considerations. First, we observed that our "substantial effects" cases generally have upheld federal regulation of economic activity that affected interstate commerce, but that § 922(q) was a criminal statute having "nothing to do with 'commerce' or any sort of economic enterprise." . . . Second, we noted that the statute contained no express jurisdictional requirement establishing its connection to interstate commerce.

Third, we found telling the absence of legislative findings about the regulated conduct's impact on interstate commerce. . . . Finally, we rejected as too attenuated the Government's argument that firearm possession in school zones could result in violent crime which in turn could adversely affect the national economy. The Constitution, we said, does not tolerate reasoning that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." Later in *Morrison,* we relied on the same four considerations to hold that § 40302 of the Violence Against Women Act of 1994 exceeded Congress' authority under the Commerce Clause.

In my view, the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account.

The Court's principal means of distinguishing *Lopez* from this case is to observe that the Gun-Free School Zones Act of 1990 was a "brief, single-subject statute," whereas the CSA is "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'" Thus, according to the Court, it was possible in *Lopez* to evaluate in isolation the constitutionality of criminalizing local activity (there gun possession in school zones), whereas the local activity that the CSA targets (in this case cultivation and possession of marijuana for personal medicinal use) cannot be separated from the general drug control scheme of which it is a part. . . .

I cannot agree that our decision in *Lopez* contemplated such evasive or overbroad legislative strategies with approval. . . . *Lopez* and *Morrison* did not indicate that the constitutionality of federal regulation depends on superficial and formalistic distinctions. . . . If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers. . . .

Justice Thomas, dissenting.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.

Respondents' local cultivation and consumption of marijuana is not "Commerce . . . among the several States." By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power. The majority supports this conclusion by invoking, without explanation, the Necessary and Proper Clause. Regulating respondents' conduct, however, is not "necessary and proper for carrying into Execution" Congress' restrictions on the interstate drug trade. Thus, neither the Commerce Clause nor the Necessary and Proper Clause grants Congress the power to regulate respondents' conduct. . . .

[N]either in enacting the CSA nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana. . . .

Even assuming the CSA's ban on locally cultivated and consumed marijuana is "necessary," that does not mean it

is also "proper." The means selected by Congress to regulate interstate commerce cannot be "prohibited" by, or inconsistent with the "letter and spirit" of, the Constitution. . . .

Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power, Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty.

Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. Further, the Government's rationale—that it may regulate the production or possession of any commodity for which there is an interstate market—threatens to remove the remaining vestiges of States' traditional police powers. This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a "pretext . . . for the accomplishment of objects not intrusted to the government." . . .

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern." The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals. I respectfully dissent.

Case

UNITED STATES V. BUTLER

297 U.S. 1; 56 S.Ct. 312; 80 L.Ed. 477 (1936)
Vote: 6–3

In this case the Court considers the constitutionality of the Agricultural Adjustment Act of 1933, the purpose of which was to reduce surpluses in various agricultural commodities by regulating their production. In essence, farmers were paid to stop producing wheat, cotton, tobacco, corn, rice, milk, and hogs. These payments were financed by excise taxes to be paid by companies that processed or packaged these commodities. A federal district judge upheld the tax provisions of the act; the Court of Appeals reversed. The United States asked the Supreme Court to grant certiorari.

Mr. Justice Roberts delivered the opinion of the Court.

. . . The tax can only be sustained by ignoring the avowed purpose and operation of the act, and holding it a measure merely laying an excise upon processors to raise revenue for the support of government. Beyond cavil the sole object of the legislation is to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processor and bestow it upon farmers who will reduce their acreage for the accomplishment of the proposed end, and, meanwhile, to aid these farmers during the period required to bring the prices of their crops to the desired level.

The tax plays an indispensable part in the plan of regulation. . . . A tax automatically goes into effect for a commodity when the Secretary of Agriculture determines that rental or benefit payments are to be made for reduction of production of that commodity. The tax is to cease when rental or benefit payments cease. The rate is fixed with the purpose of bringing about crop-reduction and price-raising. . . . If the Secretary finds the policy of the act will not be promoted by the levy of the tax for a given commodity, he may exempt it. . . . The whole revenue from the levy is appropriated in aid of crop control; none of it is made available for general governmental use. The entire agricultural adjustment program . . . is to become inoperative when, in the judgment of the President, the national economic emergency ends. . . .

The statute not only avows an aim foreign to the procurement of revenue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production. . . .

We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation and that [Butler has] standing to challenge the legality of the exaction.

It does not follow that as the act is not an exertion of the taxing power and the exaction not a true tax, the statute is void or the exaction uncollectible. . . . [I]f this is an expedient regulation by Congress, of a subject within one of its granted powers, "and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution," the exaction is called a tax. . . .

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.

The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

The question is not what power the federal Government ought to have but what powers in fact have been given by the people. . . . Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

Article I, Section 8, of the Constitution vests sundry powers in the Congress. . . . The clause thought to authorize the legislation—the first—confers upon the Congress power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted "it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.

Nevertheless' the Government asserts that warrant is found in this clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the "general welfare"; that the phrase should be liberally construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination; and finally that the appropriation under attack was in fact for the general welfare of the United States.

The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expected only through appropriation. . . . They can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States." . . .

Since the foundation of the nation, sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his *Commentaries*, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the

direct grants of legislative power found in the Constitution. But the adoption of the broader construction leaves the power to spend subject to limitations.

. . . We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.

It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted. . . .

The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible. . . .

Third. If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The Government asserts that whatever might be said against the validity of the plan, if compulsory, it is constitutionally sound because the end is accomplished by voluntary cooperation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payment will be able to undersell him. The result may well be financial ruin. . . . This is coercion by economic pressure. The asserted power of choice is illusory.

But if the plan were one for purely voluntary cooperation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states. . . .

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negate any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of Sec. 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states. . . .

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States, . . . might be served by obliterating the constituent members of the Union. But to this fatal conclusion the doctrine contended for would inevitably lead. And its sole premise is that, though the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument when seen in its true character and in the light of the inevitable results must be rejected. . . .

Mr. Justice Stone [joined by ***Mr. Justice Brandeis*** and ***Mr. Justice Cardozo***], dissenting.

. . . The Constitution requires that public funds shall be spent for a defined purpose, the promotion of the general welfare. . . . The power of Congress to spend is inseparable

from persuasion to action over which Congress has no legislative control. Congress may not command that the science of agriculture be taught in state universities. But if it would aid the teaching of that science by grants to state institutions, it is appropriate, if not necessary, that the grant be on the condition . . . that it be used for the intended purpose. Similarly it would seem to be in compliance with the Constitution, not violation of it, for the government to take and the university to give a contract that the grant would be so used. It makes no difference that there is a promise to do an act which the condition is calculated to induce. Condition and promise are alike valid since both are in furtherance of the national purpose for which the money is appropriated.

These effects upon individual action, which are but incidents of the authorized expenditure of government money, are pronounced to be themselves a limitation upon the granted power, and so the time-honored principle of constitutional interpretation that the granted power includes all those which are incident to it is reversed. . . .

. . . The spending power of Congress is in addition to the legislative power and not subordinate to it. This independent grant of the power of the purse, and its very nature, involving in its exercise the duty to insure expenditure within the granted power, presuppose freedom of selection among diverse ends and aims, and the capacity to impose such conditions as will render the choice effective. It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure.

The limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get shall give labor in return, or even use it to support their families. It may give money to sufferers from earthquake, fire, tornado, pestilence or flood, but may not impose conditions—health precautions designed to prevent the spread of disease, or induce the movement of population to safer or more sanitary areas. All that, because it is purchased regulation infringing state powers, must be left for the states, who are unable or unwilling to supply the necessary relief. . . . Do all its activities collapse because, in order to effect the permissible purpose, in myriad ways the money is paid out upon terms and conditions which influence action of the recipients within the states, which Congress cannot command? The answer would seem plain. If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end. If appropriation in aid of a program of curtailment of agricultural production is constitutional, and it is not denied that it is, payment to farmers on condition that they reduce their crop acreage is constitutional. It is not any the less so because the farmer at his own option promises to fulfill the condition.

That the governmental power of the purse is a great one is not now for the first time announced. Every student of the history of government and economics is aware of its magnitude and of its existence in every civilized government. Both were well understood by the framers of the Constitution when they sanctioned the grant of the spending power to the federal government, and both were recognized by Hamilton and Story, whose views of the spending power as standing on a parity with the other powers specifically granted, have hitherto been generally accepted. The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. "The power to tax is the power to destroy," but we do not, for that reason, doubt its existence, or hold that its efficacy is to be restricted by its incidental or collateral effects upon the states. . . . The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control. Another is the conscience and patriotism of Congress and the Executive. . . .

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent—expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have the capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institution is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction, is far more likely, in the long run, "to obliterate the constituent members" of "an indestructible union of indestructible states" than the frank recognition of that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money. . . .

Case

Steward Machine Company v. Davis

301 U.S. 548; 57 S.Ct. 883; 81 L.Ed. 1279 (1937)
Vote: 5–4

Here the Court considers the validity of the Social Security Act of 1935. The Charles C. Steward Machine Company brought suit to challenge the requirement that firms with eight or more employees pay a 1 percent payroll tax as partial funding for the Social Security system.

Mr. Justice Cardozo delivered the opinion of the Court.

. . . [Steward Machine Company] paid a tax in accordance with the [Social Security Act], filed a claim for a refund with the Commissioner of Internal Revenue, and sued to recover the payment ($46.14), asserting a conflict between the statute and the Constitution of the United States. . . . An important question of constitutional law being involved, we granted certiorari. . . .

The Social Security Act . . . is divided into eleven separate titles, of which only titles IX and III are so related to this case as to stand in need of summary. . . . [Under Title IX] every employer (with stated exceptions) is to pay for each calendar year "an excise tax, with respect to having individuals in his employ," the tax to be measured by prescribed percentages of the total wages payable by the employer during the calendar year with respect to such employment. . . . Under [Title III] certain sums of money are "authorized to be appropriated for the purpose of assisting the states in the administration of their unemployment compensation laws. . . . " The appropriations when made were not specifically out of the proceeds of the employment tax, but out of any moneys in the Treasury.

Other sections of the title prescribe the method by which the payments are to be made to the state . . . and also certain conditions to be established. . . . They are designed to give assurance to the Federal Government that the moneys granted by it will not be expended for purposes alien to the grant, and will be used in the administration of genuine unemployment compensation laws.

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender. . . .

First: The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost or an excise upon the relation of employment.

1. We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history. From the precedents of colonial days we are supplied with illustrations of excises common in the colonies. They are said to have been bound up with the enjoyment of particular commodities. . . .

. . . Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. . . . But in truth other excises were known, and known since early times. . . . Our colonial forebears knew more about ways of taxing than some of their descendants seem to be willing to concede. The historical prop failing, the prop or fancied prop of principle remains. We learn that employment for lawful gain is a "natural" or "inherent" or "inalienable" right, and not a "privilege" at all. But natural rights, so called, are as much subject to taxation as rights of less importance. An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. . . .

The subject matter of taxation open to the power of Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. . . . The statute books of the states are strewn with illustrations of taxes laid on occupations pursued of common right. We find no basis for a holding that the power in that regard which belongs by accepted practice to the legislatures of the states, has been denied by the Constitution to the Congress of the nation.

2. The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this requirement. According to the settled doctrine the uniformity exacted is geographical, not intrinsic. . . .

Second: The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions.

The statute does not apply . . . to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home or to some other classes of less importance. [Steward Machine Company] contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

The Fifth Amendment unlike the Fourteenth has no equal protection clause. . . . But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. . . . They may tax some kinds of property at one rate, and others at another, and exempt others altogether. . . . They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. . . . If this latitude of judgment is lawful for the states, it is lawful . . . in legislation by the Congress, which is subject to restraints less narrow and confining. . . .

The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. . . . The act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.

Third: The excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government. The proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally. . . . No presumption can be indulged that they will be misapplied or wasted. Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that without more would not make the act invalid. . . .

To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. . . . Of the many available figures a few only will be mentioned. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner means disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in areas and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. . . .

In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overleapt the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a cooperative endeavor to avert a common evil. . . .

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand fulfillment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. . . .

Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. . . . For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. The difficulty with the petitioner's contention is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." . . . In like manner, every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossi-

ble. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree—at times, perhaps, of fact. . . .

In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us. . . .

Separate [dissenting] opinion of ***Mr. Justice McReynolds.***

That portion of the Social Security legislation here under consideration, I think, exceeds the power granted to Congress. It unduly interferes with the orderly government of the State by her own people and otherwise offends the Federal Constitution. . . .

The doctrine thus announced and often repeated, I had supposed was firmly established. Apparently the States remained really free to exercise governmental powers, not delegated or prohibited, without interference by the Federal Government through threats of punitive measures or offers of seductive favors. Unfortunately, the decision just announced opens the way for practical annihilation of this theory. . . .

No defense is offered for the legislation under review upon the basis of emergency. The hypothesis is that hereafter it will continuously benefit unemployed members of a class. Forever, so far as we can see, the States are expected to function under federal direction concerning an internal matter. By the sanction of this adventure, the door is open for progressive inauguration of others of like kind under which it can hardly be expected that the States will retain genuine independence of action. And without independent States a Federal Union as contemplated by the Constitution becomes impossible. . . .

Ordinarily, I must think, a denial that the challenged action of Congress and what has been done under it amount to coercion and impair freedom of government by the people of the State would be regarded as contrary to practical experience. Unquestionably our federate plan of government confronts an enlarged peril.

Separate [dissenting] opinion of ***Mr. Justice Sutherland*** [joined by ***Mr. Justice Van Devanter***].

. . . If we are to survive as the United States, the balance between the powers of the nation and those of the states must be maintained. There is grave danger in permitting it to dip in either direction, danger—if there were no other—in the precedent thereby set for further departures from the equipoise. The threat implicit in the present encroachment upon the administrative functions of the states is that of greater encroachments, and encroachments upon other functions, will follow.

For the foregoing reasons, I think the judgment below should be reversed. . . .

Mr. Justice Butler [dissenting]. . . .

Case

SOUTH DAKOTA v. DOLE

483 U.S. 203; 107 S.Ct. 2793; 97 L.Ed. 2d 171 (1987)
Vote: 7–2

In this case the Court considers whether Congress may withhold federal highway funds from states that refuse to raise the legal drinking age to 21.

Chief Justice Rehnquist delivered the opinion of the Court.

Petitioner South Dakota permits persons 19 years of age or older to purchase beer containing up to 3.2% alcohol. . . . In 1984 Congress enacted 23 U.S.C. Sec. 158 ("Sec. 158"), which directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States "in which the purchase or public possession of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." The State sued in United States District Court seeking a declaratory judgment that Sec. 158 violates the constitutional limitations on congressional exercise of the spending power and violates the Twenty-first Amendment to the United States Constitution. The District Court rejected the State's claims, and the Court of Appeals for the Eighth Circuit affirmed. . . .

In this Court, the parties direct most of their efforts to defining the proper scope of the Twenty-first Amendment. Relying on our statement in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* . . . (1980), that the "Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," South Dakota asserts that the setting of minimum drinking ages is clearly within the "core powers" reserved to the States under Sec. 2 of the Amendment. . . . Section 158, petitioner claims, usurps that core power. The Secretary in response asserts that the Twenty-first Amendment is simply not implicated by Sec. 158; the plain language of Sec. 2 confirms the States' broad power to impose restrictions on the sale and distribution of alcoholic beverages but does not confer on them any power to permit sales that Congress seeks to prohibit. . . . That Amendment, under this reasoning, would not prevent Congress from affirmatively enacting a national minimum drinking age more restrictive than that provided by the various state laws; and it would follow *a fortiori* that the indirect inducement involved here is compatible with the Twenty-first Amendment.

These arguments present questions of the meaning of the Twenty-first Amendment, the bounds of which have escaped precise definition. . . . Despite the extended treatment of the question by the parties, however, we need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." Art. I, Sec. 8, c. 1. Incident to this power, Congress may attach conditions on the receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. . . . The breadth of this power was made clear in *United States v. Butler* . . . (1936), where the court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's enumerated legislative fields . . . may nevertheless be attained through the use of the spending power and the condition grant of federal funds.

The spending power is of course not unlimited, . . . but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself; the exercise of the spending power must be in pursuit of "the general welfare." . . . In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress . . . . Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." . . . Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." . . .

South Dakota does not seriously claim that Sec. 158 is inconsistent with any of the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare, especially in light of the fact that "the concept of welfare or the opposite is shaped by Congress. . . . " . . . Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. . . . And the State itself, rather than challenging the germaneness of the condition to federal purposes, admits that it "has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-First Amendment." . . . Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel. . . . This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the states' drinking ages created "an incentive to drink" because "young persons commut[e] to border States where the drinking age is lower." . . . By enacting Sec. 158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

The remaining question about the validity of Sec. 158—and the basic point of disagreement between the parties—is whether the Twenty-first Amendment constitutes an "independent constitutional bar" to the conditional grant of federal funds. . . . Petitioner, relying on its view that the Twenty-first Amendment prohibits direct regulation of

drinking ages by Congress, asserts that "Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment." . . . But our cases show that this "independent constitutional bar" limitation on the spending power is not of the kind petitioner suggests. *United States v. Butler* [1936], . . . for example, established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.

We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants. . . .

These cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." *Steward Machine Co. v. Davis*. . . . Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. . . .

Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in Sec. 158 is a valid use of the spending power.

Accordingly, the judgment of the Court of Appeals is affirmed.

Justice Brennan, dissenting. . . .

Justice O'Connor, dissenting.

The Court today upholds the National Minimum Drinking Age Amendment . . . as a valid exercise of the Spending Power conferred by Article I, Sec. 8. But Sec. 158 is not a condition on spending reasonably related to the expenditure of federal funds and cannot be justified on that ground. Rather, it is an attempt to regulate the sale of liquor, an attempt that lies outside Congress' power to regulate commerce because it falls within the ambit of Sec. 2 of the Twenty-first Amendment.

My disagreement with the Court is relatively narrow on the Spending Power issue; it is a disagreement about the application of a principle rather than a disagreement on the principle itself. I agree with the Court that Congress may attach conditions on the receipt of federal funds to further "the federal interest in particular national projects or programs." . . . I also subscribe to the established proposition that the reach of the Spending Power "is not limited by the direct grants of legislative power found in the Constitution." . . . Finally, I agree that there are four separate types of limitations on the Spending Power: the expenditure must be for the general welfare, . . . the conditions imposed must be unambiguous, . . . they must be reasonably related to the purpose of the expenditure, . . . and the legislation may not violate any independent constitutional prohibition. . . . Insofar as two of these limitations are concerned, the Court is clearly correct that Sec. 158 is wholly unobjectionable. Establishment of a national minimum drinking age certainly fits within the broad concept of the general welfare and the statute is entirely unambiguous. I am also willing to assume *arguendo* that the Twenty-first Amendment does not constitute an "independent constitutional bar" to a spending condition. . . .

But the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended, is cursory and unconvincing. We have repeatedly said that Congress may condition grants under the Spending Power only in ways reasonably related to the purpose of the federal program. . . . In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose. . . .

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it

is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways—or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds to support Sec. 158. . . .

The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers. . . .

This approach harks back to *United States v. Butler,* . . . the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause. The Butler Court saw the Agricultural Adjustment Act for what it was—an exercise of regulatory, not spending, power. The error in *Butler* was not the Court's conclusion that the Act was essentially regulatory, but rather its crabbed view of the extent of Congress' regulatory power under the Commerce Clause. The Agricultural Adjustment Act was regulatory but it was regulation that today would likely be considered within Congress' Commerce Power. . . .

While *Butler*'s authority is questionable insofar as it assumes that Congress has no regulatory power over farm production, its discussion of the Spending Power and its description of both the power's breadth and its limitations remains sound. The Court's decision in *Butler* also properly recognizes the gravity of the task of appropriately limiting the Spending Power. If the Spending Power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the state's jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." . . . This, of course, as *Butler* held, was not the Framers' plan and it is not the meaning of the Spending Clause. . . .

The immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers. . . . Because [Sec. 158] cannot be justified as an exercise of any power delegated to the Congress, it is not authorized by the Constitution. The Court errs in holding it to be the law of the land, and I respectfully dissent.

Case

South Carolina v. Katzenbach

383 U.S. 301; 86 S.Ct. 803; 15 L.Ed. 2d 769 (1966)
Vote: 8–1

The Voting Rights Act of 1965 brought the power of the federal government to bear on traditional practices designed to keep minorities from participating in the electoral process. The act utilized a triggering formula to target those areas in which voting discrimination was most egregious. In such areas, the act abolished literacy tests, waived poll taxes that had accumulated, and forbade the state from implementing new voting requirements until they were found by the federal courts or the U.S. attorney general to be nondiscriminatory. Additionally, the act called for federal examiners to supervise the conduct of elections. Finally, the statute authorized civil and criminal penalties for those who interfere with the rights guaranteed by the act. In this case, the state of South Carolina challenged the constitutionality of various provisions of the Voting Rights Act.

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

. . . The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting. The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. . . .

These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution. . . . Has Congress exercised its powers in an appropriate manner with relation to the states?

The ground rules for resolving this question are clear, the language and purpose of the Fifteenth Amendment,

the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. . . .

Section 1 of the Fifteenth Amendment declares that "[t]he right of citizens of the United States to vote shall not be denied or abridged on account of race, color or previous condition of servitude." This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. . . . [Here the Court cites numerous cases to illustrate its point.] The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." . . .

South Carolina contends that the cases cited above [omitted] are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role. On the contrary, Section 2 of the Fifteenth Amendment expressly declares that "Congress shall have the power to enforce this article by appropriate legislation." By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in Section 1. . . .

Congress has repeatedly exercised these powers in the past, and its enactments have repeatedly been upheld. . . . On the rare occasions where the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment. . . .

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

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

We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms. . . . Congress exercised its authority . . . in an inventive manner when it adopted the Voting Rights Act of 1965.

First: the measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. . . . Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well shift the advantage of time and inertia from the perpetrators of the evil to its victims. . . .

Second: The Act intentionally confines these remedies to a small number of states and political subdivisions which in most instances were familiar to Congress by name. This, too, was a permissible method of dealing with the problem. Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future. In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. . . . The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared. . . .

We now consider the related question of whether the specific States and political subdivisions . . . were an appropriate target for the new remedies. . . .

To be specific, the new remedies of the Act are imposed on three States—Alabama, Louisiana, and Mississippi—in which federal courts have repeatedly found substantial voting discrimination. Section 4(b) of the Act also embraces two other States—Georgia and South Carolina—plus large portions of a third State—North Carolina—for which there was more fragmentary evidence of recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission. All these areas were appropriately subjected to the new remedies. . . .

The areas listed above, for which there was evidence of actual voting discrimination, share two characteristics incorporated by Congress into the coverage formula: the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average. Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent

for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory. It was therefore permissible to impose the new remedies on the few remaining States and their political subdivisions covered by the formula. . . .

We now arrive at consideration of the specific remedies prescribed by the Act for areas included within the coverage formula. South Carolina assails the temporary suspension of existing voting qualifications. . . . The record shows that in most of the States covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way to facilitate this aim, and have been administered in a discriminatory fashion for many years. Under these circumstances, the Fifteenth Amendment has clearly been violated. . . .

The Act suspends literacy tests and similar devices for a period of five years from the last occurrence of substantial voting discrimination. This was a legitimate response to the problem, for which there is ample precedent in Fifteenth Amendment cases. . . . Underlying the response was the feeling that States and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about "dilution" of their electorates through the registration of Negro illiterates.

Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants. Congress permissibly rejected the alternative of requiring a complete re-registration of all voters, believing that this would be too harsh on whites who had enjoyed the franchise for their entire adult lives. . . .

The Act suspends voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. This may have been an uncommon exercise of Congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate. . . . Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner. . . .

The Act authorizes the appointment of federal examiners to list qualified applicants who are thereafter entitled to vote, subject to an expeditious challenge procedure. This was clearly an appropriate response to the problem, closely related to remedies authorized in prior cases. . . . In many of the political subdivisions covered by . . . the Act, voting officials have persistently employed a variety of procedural tactics to deny Negroes the franchise, often in direct defiance or evasion of federal court decrees. Congress realized that merely to suspend voting rules which have been misused or are subject to misuse might leave this localized evil undisturbed. . . .

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshaled an array of potent weapons against the evil, with authority by the Attorney General to employ them effectively.

Many of the areas affected by this development have indicated their willingness to abide by any restraints legitimately imposed upon them. We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. . . .

The bill of complaint is dismissed.

Justice Black, concurring [in part] and dissenting [in part]. . . .

Case

CITY OF BOERNE V. FLORES

521 U.S. 507; 117 S.Ct. 2157; 138 L.Ed. 2d 624 (1997)
Vote: 6–3

In this case a decision by local authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA). The Court concludes Congress exceeded its authority in enacting the RFRA. The case raises the question of Congress's role in interpreting the Bill of Rights.

Justice Kennedy delivered the opinion of the Court.

. . . Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990). There we 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 which made use of the drug criminal. In evaluating the claim, we declined to apply the balancing test set forth in *Sherbert v. Verner* (1963), under which we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest. . . .

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. The anomaly would have been accentuated, the Court reasoned, by the difficulty of determining whether a particular practice was central to an individual's religion. We explained, moreover, that it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." . . .

These points of constitutional interpretation were debated by Members of Congress in hearings and floor debates. Many criticized the Court's reasoning, and this disagreement resulted in the passage of RFRA. . . .

RFRA prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." . . .

Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States. . . .

The parties disagree over whether RFRA is a proper exercise of Congress' § 5 power "to 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."

In defense of the Act respondent contends, with support from the United States as *amicus,* that RFRA is permissible enforcement legislation. Congress, it is said, is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's Due Process Clause, the free exercise of religion, beyond what is necessary under *Smith.* It is said the congressional decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law's effects accords with the settled understanding that § 5 includes the power to enact legislation designed to prevent as well as remedy constitutional violations. It is further contended that Congress' § 5 power is not limited to remedial or preventive legislation. . . .

Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." . . . For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment . . . as a measure to combat racial discrimination in voting, . . . despite the facial constitutionality of the tests. . . . We have 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. . . .

It is also true, however, that "[a]s broad as the congressional enforcement power is, it is not unlimited." . . . In assessing the breadth of § 5's enforcement power, we begin with its text. Congress has been given the power "to enforce" the "provisions of this article." We agree with respondent, of course, that Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion. . . .

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

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. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause. . . .

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

. . . Although the specific holdings of these early cases might have been superseded or modified, . . . their treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been questioned. . . .

Any suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law. . . .

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." . . . Under this approach, it is difficult to conceive of a principle that would limit congressional power. . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

We now turn to consider whether RFRA can be considered enforcement legislation under § 5 of the Fourteenth Amendment.

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith*. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. . . . To avoid the difficulty of proving such violations, it is said, Congress can simply invalidate any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest. If Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause, . . . then it can do the same, respondent argues, to promote religious liberty.

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. . . . Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one. A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. . . .

. . . The absence of more recent episodes stems from the fact that, as one witness testified, "deliberate persecution is not the usual problem in this country." . . . Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. . . .

Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. . . . Remedial legislation under § 5 "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against." . . .

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

The reach and scope of RFRA distinguish it from other measures passed under Congress' enforcement power, even in the area of voting rights. . . .

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. . . . Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If "'compelling interest' really means what it says . . . many laws will not meet the test. . . . [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the

majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA. Even assuming RFRA would be interpreted in effect to mandate some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens. . . .

When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, James Madison explained that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty." Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. . . .

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis,* and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

It is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference. . . . Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison,* to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed. . . .

Justice Stevens, concurring. . . .

Justice Scalia, with whom ***Justice Stevens*** joins, concurring in part.

Justice O'Connor, with whom ***Justice Breyer*** joins, . . . dissenting.

I dissent from the Court's disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act (RFRA) is a proper exercise of Congress' power to enforce § 5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990), the decision that prompted Congress to enact RFRA as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. . . .

The Court's analysis of whether RFRA is a constitutional exercise of Congress' § 5 power, . . . is premised on the assumption that *Smith* correctly interprets the Free Exercise Clause. This is an assumption that I do not accept. I continue to believe that *Smith* adopted an improper standard for deciding free exercise claims. . . .

Stare decisis concerns should not prevent us from revisiting our holding in *Smith.* . . . I believe that, in light of both our precedent and our Nation's tradition of religious liberty, *Smith* is demonstrably wrong. Moreover, it is a recent decision. As such, it has not engendered the kind of reliance on its continued application that would militate against overruling it. . . .

Accordingly, I believe that we should reexamine our holding in *Smith,* and do so in this very case. In its place, I would return to a rule that requires government to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest. . . .

Justice Souter, dissenting.

To decide whether the Fourteenth Amendment gives Congress sufficient power to enact the Religious Freedom Restoration Act, the Court measures the legislation against the free exercise standard of *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990). . . . I have serious doubts about the precedential value of the *Smith*

rule and its entitlement to adherence. . . . But without briefing and argument on the merits of that rule. . . . I am not now prepared to join Justice O'Connor in rejecting it or the majority in assuming it to be correct. In order to provide full adversarial consideration, this case should be set down for reargument permitting plenary reexamination of the issue. Since the Court declines to follow that course, our free exercise law remains marked by an "intolerable tension," . . . and the constitutionality of the Act of Congress to enforce the free exercise right cannot now be soundly decided. I would therefore dismiss the writ of certiorari as improvidently granted, and I accordingly dissent from the Court's disposition of this case.

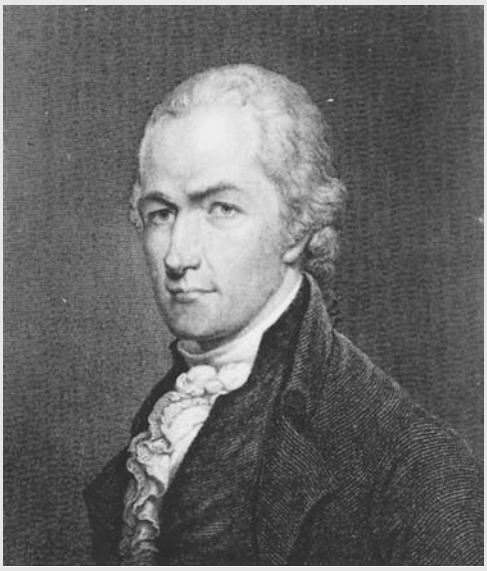
Justice Breyer, dissenting. . . .

3 Constitutional Underpinnings of the Presidency

Chapter Outline

"There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government. . . . Energy in the executive is the leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws, to the protection of property . . . ; [and] to the security of liberty against the enterprises and assaults of ambition, of faction and anarchy."

—Alexander Hamilton, *The Federalist*, No. 70



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Alexander Hamilton: Apostle of presidential power

INTRODUCTION

The text of the Constitution devotes considerably more attention to Congress than to the other branches of government. Most of the Framers expected Congress to be the dominant element of the new national government because, as James Madison recognized in *The Federalist,* No. 51, "in republican government, the legislative authority necessarily predominates." Perhaps Madison's observation was true of a small republic in the late eighteenth century. It does not, however, apply to the experience of the United States after more than two centuries of political development. Without question, the dominant tendency of American constitutional history has been to concentrate power in the executive branch.

The expansion of presidential power has occurred despite a Constitution that provides little to the president by way of specific, enumerated powers. Throughout history, presidents have taken advantage of opportunities to enhance the power of the executive branch, opportunities afforded by crises such as the Civil War, two world wars, the Great Depression, the Cold War and, more recently, the War on Terrorism. In many instances, Congress has facilitated the expansion of presidential power by calling upon the president to act or delegating specific powers to the executive branch. Yet to a greater extent, presidential power has grown because presidents have acted on their own initiative, relying on broad interpretations of specific constitutional powers and even claiming prerogatives inherent in the office. The tendency of presidents to seize power to cope with the exigencies of their times is what led scholar Edward S. Corwin to remark in the mid-1950s that "the history of the Presidency has been a history of aggrandizement."

In the 1970s, in the wake of the Vietnam and Watergate debacles, some observers perceived a significant decline in presidential power and prestige. If a decline occurred, it was short-lived. In the 1980s, the Reagan and Bush administrations regained for the presidency a position comparable to the preeminence that it held prior to the late 1960s. The allegations of misconduct that plagued Bill Clinton's two terms had no lasting negative effect on the presidency. George W. Bush was able to assert effective leadership immediately upon assuming the office of president, in spite of the prolonged and intense battle resulting in his controversial victory in the 2000 election. The devastating terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001 instantly enhanced congressional and popular support for President Bush. Five years later, despite his reelection in 2004, this support had nearly evaporated. Yet, as the occupant of the presidential office, Bush retained tremendous power and prestige. While still depending to some extent on the performance and character of the occupant of the office, the power and prestige of the presidency are largely institutionalized. The president is the personification of the American government around the world and the focal point for the exercise of that government's power.

STRUCTURAL ASPECTS OF THE PRESIDENCY

Some delegates to the Constitutional Convention of 1787 favored a multiple executive, in which power would be exercised simultaneously by three or more individuals. Others insisted on limiting the president to a single term of seven years or to two three-year terms. Still others maintained that the president, in concert with the Supreme Court, should function as a "council of revision," which would in effect review on the constitutionality of acts of Congress.

The Framers, who had recently participated in a successful revolution against the British crown, were understandably wary of creating an executive institution that

could "degenerate" into a monarchy. Widespread recognition that George Washington would assume a central role of leadership greatly reduced these fears. In fact, Washington's daily presence as the presiding officer at the Constitutional Convention probably contributed to the decision to create a single executive.

Presidential Terms

Ultimately, the Framers not only vested power in a single executive, elected for a term of four years, but also refused to limit the number of terms the president might serve. Washington, as the first president, displayed both the leadership and self-restraint that the American people expected. He established an important precedent by refusing to seek a third term, a tradition that survived until Franklin D. Roosevelt was elected to a third term in 1940, followed by a fourth term in 1944. Roosevelt died in office in 1945, and the Republican Party gained control of both houses of Congress after the 1946 elections. Reacting to Roosevelt's break with tradition, Congress then proposed the **Twenty-second Amendment**, ratified in 1951, prohibiting future presidents from being elected to more than two terms. In the aftermath of Ronald Reagan's popular first term and landslide reelection in 1984, some political activists began to urge repeal of the Twenty-second Amendment. The Iran-Contra affair and other problems effectively diverted attention from this issue during Reagan's second term.

The Electoral College

Contemporary Americans look to the quadrennial presidential elections as symbols of a deep national commitment to democracy. Yet the Framers of the Constitution, far less sanguine about "democracy," provided for an indirect method of presidential selection. Under this arrangement, each state was authorized to appoint as many electors as it had senators and representatives in Congress (Article II, Section 1). This **Electoral College**, as it came to be called, was empowered to choose the president, and the person receiving the second highest number of votes would serve as vice president. The Framers assumed that the electors would act independently of the people in making their selections. But with the advent of the two-party system in the late 1790s the electors soon lost this independent role.

The controlling influence of party identity was underscored dramatically in the presidential election of 1800. A majority of the electors supported the Jeffersonian Republican Party and dutifully cast their votes for Thomas Jefferson and his running mate, Aaron Burr. The resulting tie vote in the Electoral College threw the election into the House of Representatives, which after a contentious political battle ultimately elected Thomas Jefferson. In the aftermath of this awkward incident, the Twelfth Amendment was adopted in 1804, placing the offices of president and vice president on separate ballots. The effect of this change was that each party developed its own presidential and vice-presidential "tickets," to which designated slates of electors were pledged. With rare exception, the presidential candidate receiving a plurality of the popular vote in a given state automatically received that state's entire electoral vote. Thus, the Electoral College as a deliberative body became a vestigial organ of American government within less than twenty years after its creation.

Although the Electoral College has lost its significance as a decision making body, it retains tremendous importance in that it represents a highly controversial method of electing the president. To win the presidency, a candidate must receive a majority of electoral votes. These votes are allocated among the states based on the size of states' congressional delegations. Thus, each state has two electoral votes for its two U.S. senators plus a number of electoral votes corresponding to the number of its

U.S. representatives. The total number of electoral votes is 538, which equals the total number of U.S. senators (100), the total number of members of the House of Representatives (435), plus three electoral votes assigned to the District of Columbia.

If no candidate receives a majority of the electoral votes, the House of Representatives chooses the President from the top three candidates. In this scenario, each state, regardless of its population, is allowed to cast only one vote. This awkward method of presidential selection has been required only once in American history. In 1824 the electoral votes were divided among four presidential candidates: John Quincy Adams, Henry Clay, William H. Crawford, and Andrew Jackson. After a bitter struggle in the House of Representatives, Adams, having acquired the electoral votes originally cast for Henry Clay, the fourth runner-up, was elected President, although Jackson had originally received a plurality of the electoral votes. The final vote was Adams 13, Jackson 7, and Crawford 4. Thus Adams received the bare majority that he needed for victory. This result greatly angered Jackson, who accused Adams and Clay of engaging in a "corrupt bargain." Adams in fact appointed Clay to the position of Secretary of State, so the "bargain" charge was probably accurate. This set up Adams for a smashing defeat at Jackson's hands in the 1828 presidential election.

Because the candidate who wins a plurality of the popular vote in a given state wins all of that state's electoral votes (except in Maine and Nebraska, which allocate electoral votes by the outcome of popular vote within congressional districts), it is possible for a candidate who receives fewer votes in the aggregated national popular vote to win the presidency. Students of American history know that this in fact occurred in 1876 and 1888, when the winning candidates, Rutherford B. Hayes and Benjamin Harrison, received fewer popular votes than their principal rivals, Samuel Tilden and Grover Cleveland. One does not have to be an historian to know that this same anomaly occurred in the presidential election of 2000, when Republican George W. Bush edged Democrat Al Gore in the electoral vote despite Gore's "victory" in the national popular vote.

Long a subject of academic debate, the Electoral College system became a national issue in the wake of the disputed presidential election of 2000 (see Chapter 8, Volume II). Critics claim that the system is undemocratic, a vestige of eighteenth century elitism. But the Electoral College is not without defenders. Some argue that it is consistent with the federal system and helps to ensure that small states will not be ignored by candidates seeking only to amass individual votes. Abolition of the Electoral College would obviously require a constitutional amendment, which is, of course, difficult to accomplish even when public support is strong. Given that the Electoral College is currently a partisan issue, with Republicans defending the institution and Democrats calling for its abolition, it is unlikely that a proposed amendment could muster the necessary two-thirds majority in either house of Congress. If it did, it would be even more unlikely that three-fourths of the states would support ratification. It appears that the Electoral College is destined to remain a controversial feature of the American electoral system for the foreseeable future.

Presidential Succession and Disability

The constitutional problem of presidential succession first arose in 1841, when President William Henry Harrison died after only a month in office. The immediate question was whether Vice President John Tyler would assume the full duties and powers of the office for the remaining forty-seven months of Harrison's term or serve merely as an acting president. Unwilling to settle for less than the full measure of presidential authority, Tyler set an important precedent by successfully assuming full presidential powers. The eight other individuals who have succeeded to the office

because of the death or resignation of an incumbent president have followed this practice.

The related problem of presidential disability has proved more perplexing. Several presidents have been temporarily disabled during their terms of office, with resulting uncertainty and confusion as to the locus of actual decision making authority. For example, President Woodrow Wilson was seriously disabled by a stroke in 1919 and for a number of weeks was totally incapable of performing his official duties. No constitutional provision existed at that time for the temporary replacement of a disabled president. The result was that Wilson's wife, Edith, took on much of the responsibility of the office, an arrangement that evoked sharp criticism.

The problem of presidential disability is addressed by the **Twenty-fifth Amendment**, ratified in 1967. This amendment, proposed in the aftermath of the assassination of President John F. Kennedy, establishes, among other things, a procedure under which the vice president may assume the role of acting president during periods of presidential disability. The amendment provides alternative means for determining presidential disability. Section 3 allows the president to transmit to Congress a written declaration that he is unable to discharge the duties of the office, upon which the vice president assumes the role of acting president. The vice president continues in this role unless and until the president is able to transmit a declaration to the contrary. If, however, the president is unable or unwilling to acknowledge the inability to perform the duties of the office, the vice president and a majority of the Cabinet members are authorized to make this determination.

Removal of the Chief Executive

The ultimate constitutional sanction against the abuse of presidential power is **impeachment** and removal from office. The Constitution, in Article II, Section 4, states: "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*" [emphasis added].

Only twice in our history have presidents been impeached, although neither was removed from office. President Andrew Johnson was impeached by the House of Representatives in 1868 but escaped conviction and removal from office by only one vote in the Senate. Bill Clinton was impeached late in 1998 but was acquitted by a fairly comfortable margin.

Andrew Johnson was impeached for overtly political reasons, stemming from his clash with Congress over Reconstruction policy. Specifically, the impeachment was based on the President's violation of the Tenure of Office Act, which had been passed over Johnson's veto. The Act required the President to obtain Senate approval before removing any official who had been originally appointed with the Senate's consent. Johnson, who viewed the Act as an unconstitutional encroachment on the presidential appointment power, fired Secretary of War Edwin M. Stanton without senatorial approval. This triggered a showdown with Congress that culminated in Johnson's impeachment. His ultimate acquittal may have been influenced by the fact that he had not committed indictable offenses, although many in Congress were willing to interpret the "high crimes and misdemeanors" language in the Constitution quite broadly!

Although there were certainly political motivations behind the impeachment of Bill Clinton, there were serious accusations of misconduct on the president's part. On December 11, 1998, the House Judiciary Committee (voting 21–16) approved four articles of impeachment. These articles alleged that President Clinton: I. Gave "perjurious, false and misleading testimony" before a federal grand jury; II. Obstructed justice by delaying, impeding, covering up, and concealing the existence of evidence in the Paula

Jones sexual harassment case; III. Provided "perjurious, false and misleading testimony" in the Paula Jones case; IV. Misused and abused his office by making perjurious statements to Congress in his answers to questions posed by the Judiciary Committee. On December 19, the full House, voting basically along party lines, adopted two of these articles. The article accusing the president of "perjurious, false and misleading testimony" before the federal grand jury was adopted by a vote of 228 to 206. The article alleging obstructing justice in the Paula Jones case was adopted by a vote of 221 to 212.

On February 12, 1999, the Senate voted to acquit President Clinton on both articles of impeachment. The article alleging "perjurious testimony" garnered fifty-five votes, well short of the two-thirds majority necessary for removal. Did the Senate conclude that there was insufficient evidence that the president committed the offenses alleged in the articles of impeachment? Or did senators conclude that the offenses were not sufficiently grave to warrant the president's removal from office? Senators who voted to acquit were divided between these two perspectives.

The important constitutional question raised by the Clinton impeachment is: What constitutes "high crimes and misdemeanors"? The prevailing view appears to be that this phrase refers to criminal misconduct alone. But others would argue that a president could be removed from office for abusing power, subverting the Constitution, or even bringing the presidency into disrepute, regardless of whether indictable offenses have been committed.

Although they were made moot by the president's voluntary departure, similar questions surrounded the possible impeachment of Richard Nixon. Members of the House Judiciary Committee vigorously debated the meaning of "high crimes and misdemeanors." A majority of the committee's members seemed to believe Nixon could be impeached for "undermining the integrity of office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, and adverse impact on the system of government." On the other hand, Nixon's defenders held that the president could be impeached only for specific offenses against the criminal law, offenses for which he could be indicted by a grand jury (for example, obstruction of justice). In light of information currently available regarding Nixon's role in the Watergate scandal, it seems that he could have been impeached, and convicted, under either interpretation of the Constitution.

Is the question of what constitutes "high crimes and misdemeanors" solely a matter for the determination of the House and Senate, or is it appropriately a subject for judicial review? The Supreme Court has not been called on to render an authoritative construction of the "high crimes and misdemeanors" language of Article II. Should it be asked to do so in the future, the Court might well refuse by labeling the issue a "political question." It has been suggested, however, that in light of *Powell v. McCormack* (1969), the Court could define "high crimes and misdemeanors." In *Powell,* the Court refused to view as "political" the question of whether Congress could exclude one of its members for reasons other than residency, age, or citizenship. From a legal standpoint, this argument is compelling, but the Court's decisions reflect more than legal arguments. Realistically, the Court could severely jeopardize the delicate balance of its coequal status were it to intervene between president and Congress in an impeachment controversy. Judicial self-restraint would counsel doing otherwise.

TO SUMMARIZE:

- The Constitution vests presidential power in a single executive elected for a term of four years. The Twenty-second Amendment, ratified in 1951, prohibits the election of any person to more than two consecutive terms.

- The Framers of the Constitution provided for the election of the president, not by the people directly, but by the Electoral College. Today the Electoral College is a vestigial body that merely ratifies the outcome of the popular election. It remains possible, however, for a candidate who receives fewer popular votes than a rival to be elected president by receiving a majority of the electoral vote. If one candidate fails to receive a majority in the Electoral College, the election is conducted by the House of Representatives.
- Persons who have succeeded to the presidency through the death or resignation of the elected incumbent have exercised the full powers of the office. The problem of presidential disability is addressed by the Twenty-fifth Amendment, ratified in 1967. This amendment provides a procedure under which the vice president may assume the role of acting president during periods of presidential disability.
- According to Article II, Section 4, the president, as well as the vice president and other civil officers of the United States, may be impeached by the House of Representatives and removed from office by the Senate for the commission of "Treason, Bribery, or other high Crimes and Misdemeanors." It is debatable whether the phrase "high Crimes and Misdemeanors" is limited to indictable offenses, but it is unlikely that the Supreme Court will render an interpretation of this language.

THEORIES OF PRESIDENTIAL POWER

Article II, Section 1, of the Constitution provides that the "executive Power shall be vested in a President of the United States." Sections 2 and 3 enumerate specific powers granted to the president. These include authority to appoint judges and ambassadors, veto legislation, call Congress into special session, grant pardons, and serve as commander in chief of the armed forces. Each of these designated powers is obviously a part of "executive power," but that general term is not defined in Article II. Thus, it is debatable whether the opening statement of Article II is merely a summary of powers later enumerated in the article or, as many have argued, an independent grant of power to the president.

Enumerated and Inherent Powers

In the early days of the republic, James Madison and Alexander Hamilton engaged in the first of what was to be a long series of sharp disagreements among constitutional theorists about the proper scope of presidential power. Madison argued that presidential power is restricted to those powers specifically enumerated in Article II. By contrast, Hamilton argued for a transcendent conception of presidential power.

Believing the opening statement in Article II to be a grant of power in its own right, he stated that "the difficulty of a complete enumeration of all cases of executive authority would naturally dictate the use of general terms and would render it improbable that a specification of certain particulars was designed as a substitute for the term [executive power]." Thus, Hamilton held that "the general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in that instrument." For Madison, if new exercises of power could be continually justified by invoking **inherent executive power**, "no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative." These competing theories correspond to very different notions of the proper role of the president in the newly

created national government. While Madison envisaged a passive role for the president, who would faithfully execute the laws adopted by Congress, Hamilton viewed the presidency in more activist terms.

The Stewardship Theory of Presidential Power

The debate over the scope of presidential power was by no means confined to the early years of the republic. A vigorous argument occurred early in the twentieth century between those who espoused the **stewardship theory** and those who embraced the **constitutional theory** of presidential power. The constitutional theory, derived from Madison's ideas, finds its best and most succinct expression in the words of President William Howard Taft. In his view, the president can "exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise." The stewardship theory, the modern counterpart to Hamilton's perspective, was best encapsulated by President Theodore Roosevelt. In his view, the Constitution permits the president "to do anything that the needs of the nation [demand] unless such action [is] forbidden by the Constitution or the laws." According to this perspective, the president is a steward of the people empowered to do anything deemed necessary, short of what is expressly prohibited by the Constitution, in the pursuit of the general welfare for which he is primarily responsible.

American constitutional history has, for the most part, vindicated the views of Alexander Hamilton and Theodore Roosevelt. Although some observers advocate scaling down the modern presidency, few really expect such diminution to occur. The exigencies of modernization, the complexities of living in a technological age, and the need for the United States as a superpower to speak to other nations with a unified voice and to respond quickly to threats to the national security have forced us to recognize the stewardship presidency as both necessary and legitimate. The inherent vagueness of Article II has facilitated this recognition.

The Supreme Court Legitimates Stewardship

For the most part, the Supreme Court has been willing to allow expansion of executive power over constitutional objections. It would be somewhat naïve to expect the Court to stem the flow of power into the executive branch, given the fundamental economic, social, technological, and military needs that have promoted the stewardship presidency. There are cases in which the Court has invalidated particular exercises of executive power—for example, the steel seizure case (*Youngstown Sheet & Tube Company v. Sawyer* [1952]) and the Nixon tapes case (*United States v. Nixon* [1974])—but the overall trend has been to legitimize the "history of aggrandizement." Because the Supreme Court generally reacts to issues arising elsewhere, it is odd that one of the first instances in which the Court grappled with abstract notions of executive power was a case that involved the not so abstract issue of the justices' personal safety (*In re Neagle* [1890]). In 1890, a federal marshal named David Neagle was charged with first degree murder by the state of California for having killed a man while attempting to protect the life of a Supreme Court justice. At that time, justices were required to "ride circuit"; that is, while the Supreme Court was not in session, they had to travel extensively over particular geographic areas to conduct trials and hear appeals. During one such excursion to California, the life of Justice Stephen J. Field was threatened by a disgruntled litigant (and prominent member of the California bar) named David Terry. Learning of this threat, the U.S. attorney general assigned Neagle to accompany Justice Field when he next rode circuit in California. Upon Field's return to

that State, he encountered David Terry in a restaurant. Terry struck Justice Field, whereupon Neagle shot Terry dead. Interestingly, no weapon was found on Terry's corpse, raising the question of whether Neagle's response to the attack had been excessive. In any event, Neagle was promptly arrested by California authorities acting on a complaint from the wife of the deceased. Neagle then brought a federal habeas corpus action in order to challenge his arrest and prosecution. Under federal law, Neagle could secure release if he could show that he had acted "in pursuance of a law of the United States."

Unfortunately for Neagle, his assignment to protect Justice Field was not based on any statutory authority. The Supreme Court held, however, that the attorney general's order assigning Neagle to protect Justice Field was tantamount to federal law. Opting essentially for the stewardship view of presidential power, the Court reasoned that the president was not "limited to enforcement of acts of Congress . . . according to their express terms." Rather, because the Constitution vests the government and particularly the executive with the obligation to protect "the peace of the United States," the executive is authorized to do whatever is necessary to fulfill that obligation (and this authorization is equivalent to a law). The president can and must take action to secure the peace, and he appropriately did so in the Neagle case. Thus, Neagle was held to be immune to prosecution by the state of California. In reaching this decision, the Court opted for Alexander Hamilton's broad view of executive power: This power stems not only from specific statutory authorizations or enumerations in Article II of the Constitution—it also derives from the power to protect the public safety implicit in the very nature of executive power.

The Outer Limits of Stewardship

Although the Supreme Court had several opportunities to elaborate on the scope of inherent executive power after *In re Neagle* (see, for example, *In re Debs* [1895], *United States v. Midwest Oil Company* [1915], and *Korematsu v. United States* [1944]), it did not deal with the issue in any real depth until the steel seizure case of 1952 (*Youngstown Sheet & Tube Company v. Sawyer*). In December 1951, President Harry S. Truman was informed that negotiations between labor and management in the steel industry had broken down. Concerned about the possible consequences of a stoppage in steel production, both for the domestic economy and for the Korean War effort, Truman acted to delay a strike by referring the issue to the Wage Stabilization Board for further negotiation.

By April 1952, it became clear that negotiations were fruitless, and the workers announced their plans to strike. To prevent this, Truman ordered Secretary of Commerce Charles Sawyer to seize the steel mills and maintain full production. Not surprisingly, this action was challenged in the courts, and very soon the issue was before the Supreme Court.

Much to President Truman's chagrin, the Supreme Court (splitting 6–3) refused to allow the government to seize and operate the steel plants. Writing for the Court, Justice Hugo Black rejected inherent executive power as a justification for Truman's order. This reflected Justice Black's strong inclination to adhere closely to the language of the Constitution, an inclination characteristic of the interpretivist approach to constitutional adjudication. In a separate concurrence, Justice Robert Jackson took a position more characteristic of the historic mainstream of the Court. Jackson recognized an inherent executive power transcending particular enumerations in Article II but nevertheless found Truman's action to be impermissible. Noting that Congress had already considered and rejected legislation permitting such an executive order, Jackson wrote, "when the President takes measures incompatible with the expressed

or implied will of Congress, his power is at its lowest ebb." From the various opinions rendered in the steel seizure case, it is clear that several justices were swayed by the fact that Truman acted not only without congressional approval but irrespective of implied disapproval. When it was considering the Taft-Hartley bill a few years earlier, Congress had rejected an amendment that would have given the president a power similar to that exercised by Truman in seizing the steel mills. Thus, the steel seizure case was by no means a wholesale repudiation of the stewardship theory of presidential power. Rather, it was a reminder that the steward's authority is neither entirely self-derived nor without limitation. Moreover, the decision served notice to the chief executive that his actions, at least those in the domestic sphere, are subject to judicial scrutiny.

Another important instance in which the Court imposed limits on the stewardship presidency was in the Pentagon papers case of 1971 (*New York Times Company v. United States,* discussed and reprinted in Chapter 3, Volume II). In the most celebrated case arising from the Vietnam controversy, the Court refused to issue an injunction against newspapers that had come into possession of the Pentagon papers, a set of classified documents detailing the history of American strategy in Vietnam. Basing his position on inherent executive power and not on any act of Congress, President Richard M. Nixon sought to restrain the press from disclosing classified information that, he argued, would be injurious to the national security. The Court, obviously skeptical of the alleged threat to national security and sensitive to the values protected by the First Amendment, refused to defer to the president.

It is interesting to speculate whether the results reached in the steel seizure and Pentagon papers cases would have been different in other sociopolitical contexts. Had the nation been engaged in a world war, rather than in limited and divisive conflicts in Korea and Vietnam, it is hard to believe that the Court would have been willing to challenge such assertions of inherent executive power. One must realize that Supreme Court decisions on executive power, as on other constitutional issues, are influenced not simply by legal principles but by complex political forces as well.

TO SUMMARIZE:

- The executive power of the president is formally recognized in Article II of the Constitution, but "executive power" is not defined.
- Under the "stewardship" theory, derived from the writings of Alexander Hamilton, executive power is broadly interpreted to include any actions or initiatives not specifically prohibited by the Constitution. Under the "constitutional" theory, traced to James Madison, any exercise of presidential power must be traceable to a specific grant of authority in the Constitution.
- The stewardship theory has prevailed in the twentieth century and, subject to a few significant limitations, the Supreme Court has legitimated this theory.

THE VETO POWER

Under Article I, Section 7, "[e]very Bill" and "[e]very Order, Resolution or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary" must be presented to the president for approval. There are but three exceptions to this **presentment requirement:** 1) It is not applicable to actions involving a single house, such as the adoption of procedural rules; 2) it does not apply to concurrent resolutions, such as those establishing joint committees or setting a date for

adjournment; 3) it does not apply to constitutional amendments proposed by the Congress.

Until 1983, there was another category of congressional decisions not subject to presidential approval. The so-called legislative veto was a device whereby one or both houses of Congress passed resolutions to veto certain decisions made in the executive branch. In the case of *Immigration and Naturalization Service v. Chadha* (1983), the Supreme Court invalidated the legislative veto partly on the ground that it violated the presentment requirement of Article I (see Chapter 4).

The Pocket Veto

The president has ten days (not counting Sundays) in which to consider legislation presented for approval. The president has several options: (1) Sign the bill into law, which is what usually occurs; (2) **veto** the bill, which can be overridden by a two-thirds majority of both houses of Congress; or (3) neither sign nor veto the bill, thus allowing it to become law automatically after ten days. A major exception applies, however, to the third option: If Congress adjourns before the ten days have expired and the president still has not signed the bill, it is said to have been subjected to a **pocket veto.** The beauty of the pocket veto (at least from the president's standpoint) is that it deprives Congress of the chance to override a formal veto. This device was first used by President James Madison in 1812. The pocket veto has been controversial since its inception. The crucial question is: What constitutes an adjournment of Congress? In the pocket veto case (*Okanogan Indians v. United States* [1929]), the Supreme Court upheld President Calvin Coolidge's authority to pocket-veto a bill between sessions of the same Congress. The Court held that "adjournment" means any congressional break that prevents the return of a bill within the requisite ten-day period.

Questions have persisted about whether adjournments between sessions of the same Congress do in fact prevent the president from returning a bill within the ten-day period. The issue was dramatized during Congress's holiday recess in November 1983, when President Reagan pocket-vetoed a bill linking U.S. aid to El Salvador to that country's progress in the area of human rights. Representative Michael Barnes, the sponsor of the bill, and thirty-two other House Democrats filed suit challenging the president's action. According to these plaintiffs, Congress's break between sessions had not really prevented the president from returning the bill because both the House and Senate had appointed officers to receive presidential messages, and it was possible to reconvene the Congress in short order at the call of the leadership.

Although the administration won the lawsuit at the district court level, a panel of the Court of Appeals for the District of Columbia Circuit reversed, splitting 2 to 1. According to the court of appeals, the holiday recess had not really prevented the president from returning the bill, either signed or vetoed, during the required ten-day period (see *Barnes v. Kline* [1985]). Until the Supreme Court addresses the issue, uncertainty will remain as to whether a pocket veto is limited to the final adjournment of a given Congress or is permissible between sessions of the same Congress and, if the latter, under what circumstances.

The Line-Item Veto

Tradition dictates that the president must accept or veto a bill as a whole. Recent presidents, including Ronald Reagan, George Bush (the elder), Bill Clinton, and George W. Bush, have called for a constitutional amendment providing the president with a **line-item veto,** a power exercised by many state governors. Supporters of this measure argue that such a veto would allow the president to control unnecessary

federal spending. The line-item veto allows the president to defeat the congressional tactic of attaching disagreeable riders to bills the president basically supports. In 1996, Congress passed a statute giving the president line-item veto authority. Because it was accomplished via statute, rather than a constitutional amendment, critics of the line-item veto attacked the constitutionality of the new law. In fact, members of Congress who had opposed the measure went to federal court in an attempt to have the law declared unconstitutional. In the spring of 1997, the federal district court in Washington, D.C., obliged.

After an expedited review, the Supreme Court reversed, saying that the members of Congress who challenged the law lacked standing to sue (see *Raines v. Byrd* [1997], reprinted in Chapter 1). However, in *Clinton v. City of New York* (1998), the Court reached the merits of the dispute and declared the line-item veto law unconstitutional. The Court concluded that the law permitted the president to in effect amend duly enacted legislation.

TO SUMMARIZE:

- The president's veto power is a major check on legislative authority.
- Under Article I, Section 7, "[e]very Bill" and "[e]very Order, Resolution or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary" must be presented to the president within ten days for approval.
- The presentment requirement does not apply to (1) actions involving a single house, (2) concurrent resolutions, and (3) proposed constitutional amendments.
- If Congress adjourns before ten days have expired and the president has not signed a bill, it has been subjected to a pocket veto and cannot become law unless duly enacted in a subsequent session of Congress.
- Presidents have favored a constitutional amendment granting them line-item veto authority. In 1996, Congress opted instead for a statute giving the president this authority. In 1998, the Supreme Court declared this approach unconstitutional.

APPOINTMENT AND REMOVAL POWERS

Long before the advent of the modern stewardship presidency, it was obvious that presidents could not be expected to fulfill their duties alone. As presidential power has expanded, so too has the size and complexity of the executive branch. Originally, Congress provided for three cabinet departments—state, war, and treasury—to assist the president in the execution of policy. Today, there are fifteen cabinet departments, as well as a plethora of agencies, boards, and commissions in the executive establishment. In 1790 fewer than a thousand employees worked for the executive branch; today that number has grown to more than 2 million. Although almost all of these are civil service employees, the president directly appoints more than 3,000 upper-level officials. The power to appoint these officials, as well as federal judges and ambassadors, emanates from Article II, Section 2, which provides that the president:

> 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, 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.

Thus, the Constitution permits some upper-level officials in the executive branch to be selected solely at the discretion of the president and some to be appointed solely by the heads of departments, while the ostensibly more important federal officials are to be appointed by the president with the advice and consent of the Senate. In the case of appointments requiring senatorial consent, the president nominates a candidate, awaits Senate approval by majority vote, and then commissions the confirmed nominee as an "officer of the United States." The Supreme Court has made it clear that this process of nomination, approval, and commission is mandatory and that the nomination aspect of the process belongs solely to the president. Thus, in *Buckley v. Valeo* (1976), the Court struck down a section of the Federal Election Campaign Act of 1972 that provided Congress with a role in the nomination of members of the newly created Federal Election Commission.

In *Morrison v. Olson* (1988), the Court upheld a provision of the Ethics in Government Act of 1978 under which a "Special Division" of the U.S. Court of Appeals for the District of Columbia is empowered to appoint special prosecutors to investigate allegations of misconduct involving high government officials. The Court held that the special prosecutor is an "inferior officer" whose appointment may be assigned to the courts under Article II, Section 2.

The Removal Problem

Although the Constitution is reasonably clear on the subject of the presidential **appointment power**, the issue of the **removal power** has been rather problematic. Obviously, the president has a strong interest in being able to remove those appointees whose performance displeases him. However, the Constitution addresses the question of removal only in the context of the cumbersome impeachment process. It is unlikely that the Framers intended that administrative officials whose performance is unacceptable to the president be subject to removal only by impeachment. Given the difficulty of this method of removal, such a limitation could paralyze government.

Most observers agree that officers of the United States can be removed by means other than impeachment—except for judges, whose life tenure (assuming good behavior) is guaranteed by the Constitution. The problem is the role of Congress in the removal of executive officers. Given that the Constitution requires senatorial consent for certain presidential appointments, is it not reasonable to expect Congress to play a role in the removal of such officials? The Supreme Court first dealt with the question of the president's removal powers in *Myers v. United States* (1926). The *Myers* case arose when President Woodrow Wilson removed Frank Myers, a Portland, Oregon, postmaster, before his term had expired. In removing Myers, Wilson ignored provisions of an 1876 act of Congress requiring Senate approval for the removal of postmasters. Consequently, Myers brought suit to recover wages lost between the time he was fired and the time his term was to expire. In a lengthy opinion for the Court, Chief Justice William Howard Taft (himself a former president) held that the removal of Myers was valid and that the senatorial consent provisions were unconstitutional. Taft's opinion stated that, given the president's constitutional duty to faithfully execute the laws, it would be unreasonable to expect an administration to retain an official on whom it could no longer count to follow orders. The upshot of the *Myers* decision is that purely executive officials performing purely executive functions may be removed at will by the president, unchecked by the Congress.

Dicta in Taft's opinion in *Myers* suggested that the president might also remove at will officials appointed to serve in the independent regulatory agencies, such as the Interstate Commerce Commission. This assertion contradicted the statutes establishing such commissions, which provided that the executive show cause (that

is, malfeasance or neglect of duty) before removing commissioners. After all, the motivation behind the creation of such commissions was to allow for government by experts free of partisan political concerns. Inevitably, the Supreme Court was to decide whether Congress could limit presidential removal power as applied to independent regulatory agencies.

In *Humphrey's Executor v. United States* (1935), the Supreme Court considered whether President Franklin D. Roosevelt could fire a member of the Federal Trade Commission (FTC) solely on policy grounds. In 1931, President Herbert Hoover reappointed William Humphrey to serve on the FTC. According to an act of Congress, Humphrey's seven-year term was subject to presidential curtailment only for malfeasance, inefficiency, or neglect of duty. When Roosevelt took office, he fired Humphrey, believing that the goals of his administration would be better served by people of his own choosing. Although Humphrey died shortly after his removal, the executor of his estate brought suit to recover wages lost between the time of removal and the time of his death.

In *Humphrey,* the Supreme Court narrowed Chief Justice Taft's broad view of executive removal powers expressed in the *Myers* case. The Court maintained the view that purely executive officials performing purely executive functions could be removed at will by the president. However, in the case of regulatory commissions like the FTC, Congress had created a quasi-legislative body designed to perform tasks independent of executive control. Thus, said the Court, Congress could regulate the removal of such officials. At the time, some observers viewed the *Humphrey* decision as a politically motivated departure from the *Myers* precedent. They saw *Humphrey* as part of the larger struggle between the Court and Roosevelt. Although in 1935 this interpretation was quite plausible, a subsequent decision by the Court indicates that the *Humphrey* case was by no means an anomaly created by transitory political forces.

The Supreme Court expanded on the *Humphrey* rationale in *Wiener v. United States* (1958) by holding that the unique nature of independent agencies requires that removal must be for cause, whether or not Congress has so stipulated. The case involved a member of the War Claims Commission who had been appointed by President Harry S. Truman and who was removed for partisan reasons by President Dwight D. Eisenhower. Noting the adjudicatory character of the commission, the Court stated that "it must be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no other reason than that he preferred to have on the Commission men of his own choosing." Thus, the Court's decisions hold that the legality of presidential removal of an official in the executive branch depends on the nature of the duties performed by the official in question. Officials performing purely executive functions may be removed by the president at will; those performing quasi-legislative or quasi-judicial functions can be removed by the president only for cause. Although Congress may determine the basis for removal of such officials, the ultimate power to remove officials in the executive branch belongs to the president. Adhering to this principle, the Court in *Bowsher v. Synar* (1986) held that Congress could not grant executive powers to the comptroller general, since that official was removable by Congress. (For further discussion of the appointment and removal powers as means of presidential control of the bureaucracy, see Chapter 4.)

TO SUMMARIZE:

- Under Article II, Section 2, the president appoints, with the consent of the Senate, federal judges, ambassadors, and officials in the executive branch not designated part of the civil service.

- The most important constitutional questions in this area deal with the scope of presidential authority to remove appointed officials without Senate approval. Officials performing purely executive functions may be removed by the president at will; those performing quasi-legislative or quasi-judicial functions can be removed only for cause.

THE POWER TO GRANT PARDONS

President Gerald Ford's full and unconditional pardon of former President Richard Nixon following the Watergate affair may have been politically unwise, but it was unquestionably constitutional. Article II, Section 2, states that the president shall have the power to "grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Although impeachment proceedings were initiated against Nixon, his sudden resignation foreclosed any possibility of impeachment, let alone conviction by the Senate. Thus, Ford acted constitutionally in issuing the pardon to Nixon. (Lest there be doubt about Nixon's culpability in the Watergate scandal, note that the acceptance of a **presidential pardon** is tantamount to an admission of guilt, for one cannot be pardoned unless one has committed an offense.)

Although President Ford issued a full pardon in the Nixon case, the president may also issue "conditional" pardons. In *Schick v. Reed* (1974), the Supreme Court said: "The plain purpose of the broad [pardoning] power conferred . . . was to allow . . . the President to 'forgive' the convicted person in part or entirely, to reduce a penalty a specified number of years, or to alter it with conditions which are themselves constitutionally unobjectionable."

Maurice Schick had been convicted of murder and sentenced to death by a military tribunal. Subsequently, President Eisenhower commuted Schick's sentence to life imprisonment on the condition he be ineligible for parole. However, in *Furman v. Georgia* (1972), the Supreme Court ruled that the death penalty was in certain instances unconstitutional (see Chapter 5, Volume II). Consequently, Schick went back to court arguing in light of the Court's capital punishment decision, which had been applied retroactively, that his own original death sentence was unconstitutional and that, accordingly, the no-parole provision should likewise be set aside. The Court disagreed, holding that the conditional pardon was lawful when issued and that the later decision in *Furman* did not alter its validity.

An unqualified presidential pardon fully restores any civil rights forfeited on conviction of the crime. In *Ex parte Garland* (1867), the Court held that a pardon restores an individual's innocence as though a crime had never been committed. In the Garland case, this meant that one who had fought for the Confederacy could practice law before the Supreme Court without the need to take an oath that he had not voluntarily borne arms against the United States. The Court held that a full pardon by President Andrew Johnson absolved Garland of the need to take such an oath.

Although a president has seemingly unlimited authority to grant pardons, it is conceivable that a president might commit an impeachable offense by improperly granting a pardon to a contributor. This issue was raised in January 2001 as President Clinton granted a number of very controversial "midnight pardons" as he was leaving office. One of them was to a billionaire named Marc Rich, who was living in Switzerland to avoid prosecution for federal tax violations. Rich's ex-wife Denise was a friend and benefactor to President and Mrs. Clinton. Critics charged that President Clinton in effect "sold" a pardon, which would be a violation of federal law. In a

subsequent congressional investigation of the matter, Denise Rich asserted her Fifth Amendment privilege against self-incrimination. The Bush administration declined to investigate the matter and the controversy subsided. Had the incident taken place prior to the impeachment episode of 1998, another article of impeachment might well have been adopted against President Clinton.

Amnesties

Although the presidential pardon was traditionally thought to be a private transaction between the president and the recipient, this did not prevent President Jimmy Carter from granting an **amnesty** that was, in effect, a blanket pardon to those who were either deserters or draft evaders during the Vietnam War. President Carter's amnesty was not challenged in the courts; neither was it criticized on constitutional grounds, although many considered it to be an insult to those who had fought and died in Vietnam. It should be noted that amnesties have traditionally been granted by Congress to those who deserted or evaded service in America's wars.

TO SUMMARIZE:

- Under Article II, Section 2, the president shall have the power to "grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."
- Although acceptance of a pardon is tantamount to an admission of guilt, a pardon restores an individual's innocence as though the crime had never been committed.
- Presidents may also grant amnesties that are, in effect, blanket pardons. These typically apply to persons who have illegally avoided military service.

EXECUTIVE PRIVILEGE

Beginning with George Washington, presidents have asserted a right to withhold information from Congress and the courts. Known as executive privilege, this "right" has been defended as inherent in executive power. Indeed, it must be defended as such because it is nowhere mentioned in the Constitution. Scholars are divided over whether the Framers envisaged such a power in the presidency, but the point is moot in light of two centuries of history, as well as explicit Supreme Court recognition, supporting this power.

Although the term **executive privilege** was coined during the Eisenhower administration of the 1950s, the practice dates from 1792. In that year, President Washington refused to provide the House of Representatives certain documents it had requested relative to the bewildering defeat of military forces under General Arthur St. Clair by the Ohio Indians. Washington again asserted the privilege in 1795 when the House requested information dealing with the negotiation of the Jay Treaty with England. A few years later, President Thomas Jefferson, once a sharp critic of George Washington's imperious approach to the presidency, would rely on inherent executive power in defying a *subpoena duces tecum* issued during the 1807 trial of Aaron Burr for treason. Later presidents invoked executive privilege primarily to maintain the secrecy of information related to national security. Presidents Truman, Eisenhower, Kennedy, and Johnson all found occasion to invoke the doctrine to protect the confidentiality of their deliberations. However, the power of executive privilege did not become a major point of contention until the Nixon presidency.

The Watergate Tapes Controversy

During his first term (1969–1973), President Nixon invoked executive privilege on four separate occasions; others in the Nixon administration did so in more than twenty instances. But after his landslide reelection in 1972, Nixon and his lieutenants routinely employed executive privilege to evade queries from Congress regarding the Watergate break-in and subsequent cover-up.

Although Nixon was able to use executive privilege to withhold information requested by Congress, he was unable to avoid a *subpoena duces tecum* issued by the federal courts at the request of Watergate special prosecutor Leon Jaworski. Earlier, Nixon had fired Archibald Cox, Jaworski's predecessor, when Cox refused to back down in his efforts to subpoena the infamous tapes on which Nixon had recorded conversations with principals in the Watergate scandal. In an episode that became known as the "Saturday Night Massacre," Nixon fired Attorney General Elliot Richardson and Assistant Attorney General William Ruckelshaus, both of whom refused to follow the president's order to dismiss Cox. Ultimately, Cox was dismissed on the order of Robert H. Bork, who was solicitor general at the time. Although there was no question of Nixon's constitutional authority to dismiss Cox—who was, after all, an employee of the Justice Department—the dismissal was politically disastrous: The Saturday Night Massacre led Congress to consider the possibility of impeachment of the president. Succeeding Cox, Leon Jaworski pursued the Watergate investigation with alacrity. When the federal district court denied Nixon's motion to quash a new *subpoena duces tecum* obtained by Jaworski, the question of executive privilege went before the Supreme Court.

When *United States v. Nixon* reached the Supreme Court, Justice William Rehnquist, who had served in the Justice Department during Nixon's first term, recused himself. In deciding the Nixon tapes case, the other eight justices unanimously ordered that the subpoenaed tapes be surrendered. The opinion of the Court was authored by Chief Justice Warren E. Burger, Nixon's first Supreme Court appointee. Recognizing the legitimacy of executive privilege, Burger nevertheless concluded that the demands of due process of law outweighed the presidential interest in confidentiality in this case. Burger refused to view executive privilege as affording absolute presidential immunity from the judicial process. Thus, the Court asserted the primacy of the rule of law over the power of the presidency. Although Nixon was reportedly tempted to defy the Court's ruling, wiser counsel prevailed, and the tapes were produced. Shortly thereafter, recognizing the inevitable, Richard Nixon resigned the presidency in disgrace.

Executive Privilege after the Nixon Tapes Case

The Supreme Court's ruling in *United States v. Nixon* did not prevent subsequent presidents from exercising executive privilege. Yet the scope of the privilege has never been resolved definitively. In November 1982, President Ronald Reagan issued a memorandum to the heads of all departments and agencies within the executive branch. Citing the need for "confidentiality of some communications," the memo reasserted the power of executive privilege, but indicated that it would be used "only in the most compelling circumstances" and only after "specific Presidential authorization." Presidents Bill Clinton and George W. Bush both reasserted the power of executive privilege and both presidents exercised the privilege in questionable ways.

Bush was criticized extensively for his issuance in November 2001 of Executive Order 13233, which asserted a "presidential communications privilege" and an "attorney work product privilege." Advocates of openness in government objected to

what they perceived as an attempt to expand the cloak of secrecy over the White House and the executive branch generally. For the most part, the courts have stayed out of the ongoing controversy over the scope of executive privilege, viewing it essentially as a "political question" to be resolved in the give and take of the political process.

TO SUMMARIZE:

- Although "executive privilege" is not mentioned in the Constitution, presidents since George Washington have asserted a right to withhold information from Congress and the courts.
- In *United States v. Nixon* (1974), the Supreme Court accorded constitutional status to executive privilege, but rejected the proposition that the privilege is absolute.

PRESIDENTIAL IMMUNITY

In addition to a limited power of executive privilege, the Supreme Court has held that presidents enjoy nearly absolute immunity against private civil suits involving claims stemming from official presidential actions. Not surprisingly, the recent cases in which the Court was asked to decide the scope of **presidential immunity** stemmed from controversies that began during the Nixon administration. Morton Halperin, a political scientist, was a staff member of the National Security Council during the Nixon administration. After learning that his home telephone had been illegally wiretapped, Halperin brought suit seeking monetary damages against Nixon, his secretary of state, Henry Kissinger, and his attorney general, John Mitchell. In *Kissinger v. Halperin* (1981), the Court divided 4–4 (Justice Rehnquist not participating), thus letting stand a lower federal court decision upholding President Nixon's susceptibility to lawsuit.

In *Nixon v. Fitzgerald* (1982), the Court was able to reach majority agreement on the question of presidential immunity. The case involved A. Ernest Fitzgerald, a former management analyst with the Air Force. Fitzgerald had attracted much attention in 1968 when he embarrassed the Department of Defense by revealing huge cost overruns on the C-5A transport plane. In 1970, Fitzgerald was dismissed, ostensibly as part of a departmental reorganization. Later, the Civil Service Commission found that Fitzgerald had been illegally removed for his whistle-blowing on the Pentagon. Following the commission's decision, Fitzgerald filed suit in federal court. On appeal, the Supreme Court held that the president was entitled to absolute immunity against private civil suits, at least those stemming from the president's official actions during his time in the White House. Writing for the Court, Justice Lewis Powell opined that "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." Justice Byron White dissented:

> Attaching absolute immunity to the office of the President, rather than to particular activities the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong.

Immunity for Private Misconduct?

In a widely anticipated decision fraught with political ramifications, the Supreme Court in 1997 made it abundantly clear that a sitting president is not above the law.

In *Clinton v. Jones,* the Court permitted a sexual harassment suit to proceed against President Bill Clinton, despite the administration's claim that allowing the suit to go forward would hamper the president's performance of his official duties. The lawsuit was brought by Paula Jones, a former Arkansas state employee who claimed that Bill Clinton had made an offensive sexual advance toward her when he was governor of Arkansas. The federal district court denied the president's motion to dismiss on immunity grounds, but postponed the trial until after Clinton left office. In what was clearly a major blow to President Clinton, the Supreme Court upheld the district court's refusal to dismiss the case on grounds of immunity, but reversed on the question of delaying the trial. Writing for a unanimous Court, Justice Stevens made it clear that the Constitution does not provide a sitting president immunity from civil suits arising from the president's private conduct. While that holding did not come as a great surprise to the Clinton administration, the Court's refusal to delay the trial until after Bill Clinton left office sent shock waves through the White House. The decision meant that President Clinton had to suffer an indignity that no other president has suffered—being designated as the defendant in a trial alleging private misconduct.

The lurid nature of the charges made the prospect all the more unsettling. Still, the Supreme Court was widely hailed for placing the law above the interests of a sitting president.

TO SUMMARIZE:

- The Supreme Court has held that presidents enjoy broad immunity against civil suits involving claims stemming from their official actions.
- In *Clinton v. Jones* (1997), the Court held that presidential immunity does not extend to suits involving the president's private conduct.

FOREIGN POLICY AND INTERNATIONAL RELATIONS

Scholars have written of the "two presidencies." One presidency, concerned with domestic affairs, is severely limited by the Constitution, the Supreme Court, and Congress. The other presidency, that involving foreign affairs and international relations, is less susceptible to constitutional and political constraints. Although the thesis may have been overstated, the basic point is valid. Throughout American history, Congress, the courts, and the American public have been highly deferential to the president in the conduct of foreign policy. A serious reading of the Constitution indicates to some commentators that the Framers intended for Congress to play a greater role in the foreign policy process; however, the exigencies of history, more than the intentions of the Framers, determine the roles played by the institutions of government.

Another factor contributing to presidential dominance of foreign policy is the distinctive structures of Congress and the executive branch. Congress is composed of 535 members, each representing either a state or localized constituency. On the other hand, the president represents a national constituency. Is it not reasonable that the president alone should speak for the nation in the international arena?

The "Sole Organ" in the Field of International Relations?

In *United States v. Curtiss-Wright Export Corporation* (1936), the Supreme Court placed its stamp of approval on presidential primacy in the realm of foreign affairs. In May

1934, Congress had adopted a joint resolution authorizing the president to prohibit U.S. companies from selling munitions (under such limitations and exceptions as the president might determine) to the warring nations of Paraguay and Bolivia. Additionally, Congress provided for criminal penalties for those violating presidential prohibitions.

Shortly after this resolution was adopted, President Roosevelt issued an executive order imposing an embargo on arms sales to the belligerent countries. In 1936, the Curtiss-Wright Export Corporation was indicted for conspiring to sell arms to Bolivia in violation of the embargo. Curtiss-Wright sought to avoid prosecution by arguing that Congress had unconstitutionally delegated its lawmaking power to the president, because the resolution allowed the president to make the specific rules controlling arms shipments.

Despite the fact that just one year earlier it had taken a tough stand on the issue of delegation of legislative power (see *Schechter Poultry Corporation v. United States* [1935], discussed and reprinted in Chapter 4), the Court refused to find anything unconstitutional in the *Curtiss-Wright* case. The Court distinguished between two classes of power—domestic and foreign—and held that the rule against legislative delegation applied only to the former. Furthermore, the Court suggested that the president would have inherent power to impose such an embargo, even without an authorizing resolution from Congress. Expounding on presidential primacy in foreign affairs, the Court referred to the president as the "sole organ of the federal government in the field of international relations." Justice George Sutherland's opinion in *Curtiss-Wright* went so far as to assert that this class of presidential power transcended the Constitution itself.

Even assuming that it is possible to draw a neat distinction between domestic powers and those pertaining to foreign affairs, many scholars would challenge the Court's sweeping endorsement of **presidential power to make foreign policy.** Few would argue that, in making and executing the foreign policy of this nation, the president is subject to no constitutional limitations. Clearly, though, the degree of freedom afforded the president in the field of foreign policy has been substantial indeed. For example, in *Haig v. Agee* (1981), the Court upheld the Reagan administration's decision to revoke the passport of a former agent of the Central Intelligence Agency (CIA) whose activities in foreign countries were deemed a threat to national security. And in *Regan v. Wald* (1984), the Court sustained the Reagan administration's unilateral restrictions on travel to Cuba. Writing for the Court in *Haig v. Agee,* Chief Justice Burger invoked the expansive view of presidential authority in the field of foreign affairs taken by the Court in *Curtiss-Wright.* And, according to Justice Rehnquist's majority opinion in *Regan v. Wald,* matters involving "the conduct of foreign relations . . . are so entirely entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

The Iran-Contra Scandal In the wake of Vietnam and Watergate, and fueled by revelations about covert CIA activities during the 1960s, Congress in the 1970s adopted a series of laws limiting presidential power to employ covert means of pursuing foreign policy objectives. In the 1980s, when Congress learned of CIA efforts to support the Contras battling to overthrow the Marxist government of Nicaragua, it adopted the Boland Amendments, a series of measures restricting the use of U.S. funds to aid the Contras. The Reagan administration attempted an end run around the Boland Amendments by secretly selling weapons to Iran and using the profits to aid the Contras.

When the operation was uncovered, an outraged Congress conducted an investigation that included the testimony of Lt. Col. Oliver North, a staff member of the National

Security Council who was heavily involved in the covert operation. In a later criminal trial, North was convicted of perjury and obstruction of justice. (His conviction was overturned on appeal in 1991. The appeals court held that prosecutors had illegally introduced evidence covered by the grant of immunity under which North had testified before Congress.)

Although the Iran-Contra affair was a blow to the credibility and prestige of the Reagan administration, it remains shrouded in legal uncertainty. It is not clear whether the administration actually violated the Boland Amendments, although there is little doubt that it sought to undermine the policy objective behind them. Second, given the Supreme Court's pronouncements in *United States v. Curtiss-Wright,* there is a serious question about the extent to which Congress may exercise control over presidential actions in the foreign policy sphere. Clearly, Congress may impose restrictions on the expenditure of government funds, since Congress possesses the power of the purse. But can Congress prevent the president from carrying out a foreign policy objective through "creative enterprises," such as the deal to sell weapons to Iran?

Troubling constitutional questions involving the allocation of powers in the field of foreign policy are unlikely to be resolved in the courts of law. Rather, as "political questions," they are apt to be resolved in the court of public opinion. As the underwhelming public response to the Iran-Contra scandal demonstrates, the American people are not particularly squeamish about broad presidential latitude in the foreign policy arena.

Specifics of Conducting Foreign Affairs

Although presidential authority in international relations rests in large part on inherent executive power, the Constitution also enumerates specific powers important in the everyday management of foreign affairs. Article II, Section 3, authorizes the president to receive ambassadors and emissaries from foreign nations. In effect, this provides the president the power to recognize the legitimate governments of foreign nations. This power is of obvious importance in international relations, as attested by Roosevelt's recognition of the Soviet government in the 1930s, Truman's recognition of Israel, Kennedy's severance of ties with Cuba, and Carter's recognition of the People's Republic of China.

Treaties In addition to the authority to recognize foreign governments, the president is empowered by Article II to make treaties with foreign nations, subject to the consent of the Senate. A **treaty** is an agreement between two or more nations containing promises to behave in specified ways. The atmospheric nuclear test-ban treaty negotiated under President Kennedy's leadership, the SALT I treaty reached with the Soviets during the Nixon presidency, and the Panama Canal treaty negotiated during the Carter administration illustrate the foreign policy importance of the treaty making power.

A constitutional problem has arisen from the fact that the terms of a treaty can affect the domestic policy of the nation. This issue was addressed by the Supreme Court in *Missouri v. Holland* (1920). The case stemmed from a treaty between the United States and Canada designed to protect migratory birds. The treaty required both nations to pass laws restricting the hunting of certain species of fowl during their migrations between the United States and Canada. In 1918, Congress adopted a statute to effectuate the treaty. The state of Missouri brought suit, claiming ownership of the protected birds while they were within its borders and that, accordingly, Congress had usurped the powers reserved to the states by the Tenth Amendment.

The Supreme Court, rejecting Missouri's claim of ownership, held the statute valid under the Elastic Clause of Article I, Section 8: "If the treaty is valid there can be no dispute about the validity of the statute . . . as a necessary and proper means to execute the powers of the Government." Addressing the ultimate validity of the treaty, the Court held that "acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." Thus, the Court at once upheld both a treaty and a related statute that probably would not have been upheld in the absence of the treaty.

Missouri v. Holland dramatized the close connection between the foreign and domestic spheres of power and underscored potential problems inherent in a government whose domestic authority supposedly emanates from a constitution but whose power to deal with foreign nations is preconstitutional or metaconstitutional in nature. Indeed, the holding in *Missouri v. Holland* raised the possibility of using treaties as a means of expanding the legislative powers of the national government.

In response to the argument that reliance on treaties might override the limitations of the Constitution, Senator John Bricker (R-Ohio) proposed a constitutional amendment in the early 1950s that would have nullified any treaty provision conflicting with the Constitution. The Bricker amendment was never submitted to the states for ratification, falling one vote short of the necessary two-thirds majority in the Senate.

Nevertheless, interest in the amendment remained strong throughout the decade. Despite the failure of the Bricker amendment, the fears that motivated its supporters have not been borne out by subsequent experience.

Executive Agreements Support for the Bricker proposal was not based wholly on fears that the treaty power would be used to strengthen the national government at the expense of the states. The amendment also sought to curtail the increasing presidential tendency to bypass Congress altogether through the use of **executive agreements.** Like treaties, executive agreements require certain national commitments.

However, such agreements are negotiated solely between heads of state acting independently of their legislative bodies. Most of these agreements involve minor matters of international concern, such as specification of the details of postal relations or the use of radio airwaves. In recent years, however, the executive agreement has emerged as an important tool of foreign policy making. This development was legitimated by the Supreme Court in *United States v. Belmont* (1937) and *United States v. Pink* (1942). Both cases challenged the domestic aspects of the Litvinov Agreements that Franklin Roosevelt had struck with Joseph Stalin without any authorization or approval from the Senate. In addition to providing the Soviet Union with formal recognition, the agreements granted Soviet claims involving Russian companies that had been nationalized but whose assets were in the hands of U.S. banks. A legal controversy arose, however, when the State of New York refused to allow the transfer of assets to the Soviet government. The Supreme Court ultimately overruled the State (*United States v. Belmont*), holding that the executive agreement was legally equivalent to a treaty and thus the supreme law of the land, New York's policy notwithstanding.

The *Belmont* and *Pink* decisions, combined with the inherent uncertainty of treaty ratification, had the effect of making executive agreements all the more enticing to presidents. As the Senate's role in foreign policy making declined, support increased in Congress for the provision of the Bricker amendment that required congressional authorization of executive agreements before they could have any domestic effect.

However, during the late 1950s and early 1960s, many of the forces motivating this proposal had diminished with shifts in international concern, changes in domestic public opinion, and the electoral defeat of Senator Bricker. Although there was some

talk during and after the Vietnam War of reviving the Bricker amendment, no formal proposals were forthcoming.

Perhaps the most dramatic recent use of the executive agreement was President Carter's agreement with Iran that secured the release of fifty-two American hostages in early 1981. The agreement negated all attachments against Iranian assets in the United States and transferred claims against Iran from American to international tribunals. In *Dames & Moore v. Regan* (1981), the Supreme Court upheld the validity of Carter's executive agreement. The Court found in the Emergency Powers Act of 1977 sufficient presidential authority to cancel attachments against Iranian assets.

Finding no statutory authority for the transfer of claims to international tribunals, the Court held that Congress had tacitly approved the president's actions by its traditional pattern of acquiescence to executive agreements. Thus, merely by use, a power arguably in conflict with the Constitution may gain legitimacy.

TO SUMMARIZE:

- In *United States v. Curtiss-Wright Export Corporation* (1936), the Supreme Court recognized presidential primacy in the realm of foreign affairs. By clear implication, the Court greatly circumscribed the role of Congress in this area. Although controversial, this view has not been repudiated by the Court.
- Presidents have authority to make treaties with foreign nations with the advice and consent of the Senate. The broad scope of this power was endorsed by the Supreme Court in *Missouri v. Holland* (1920).
- Presidents often use executive agreements as an alternative to treaties. Unlike treaties, executive agreements do not require the concurrence of the Senate. Valid executive agreements are legally equivalent to treaties.

WAR POWERS

Presidential dominance in international affairs is not limited to or based on the formalities of recognizing and striking agreements with other governments. Integral to the president's foreign policy role is the tremendous power of the U.S. military, over which the Constitution makes the president **commander in chief.** Force is often threatened, and sometimes used, to protect U.S. allies and interests, maintain national security against possible attack, or defend the nation against actual attack.

The success of American foreign policy would be severely limited if the Constitution curbed the nation's ability to respond effectively to threats against its interests or security. On the other hand, the Constitution was designed as a limitation on the power of our government. Should not such limitations apply (as Justice Black said in the Pentagon papers case) "to prevent the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell"?

The Framers of the Constitution did attempt to provide some limitation on the war making power, as they did with respect to government power generally, by dividing power between the president and Congress. Although Article II recognizes the president as commander in chief, Article I provides Congress with the authority to declare war. Certainly the military conflicts in Vietnam and Korea qualify as wars, yet in neither case was there a formal declaration by Congress.

Presidential power to commit military forces to combat situations has a long heritage. It was first exercised at the international level in 1801, when Thomas Jefferson

sent the U.S. Marines to "the shores of Tripoli" to root out the Barbary pirates. In 1846, James K. Polk sent American troops to instigate a war with Mexico that Congress formally approved by declaring war. In 1854, Franklin Pierce authorized a show of American force that led to the total destruction of an entire city in Central America. In none of these instances, however, did the Supreme Court have the opportunity to decide the scope of the president's power as commander in chief.

The Court's opportunity came in 1863 in *The Prize Cases*. These cases involved the disposition of vessels captured by the Union navy during the blockade of Southern ports ordered by President Abraham Lincoln in the absence of a congressional declaration of war. Under existing laws of war, the captured vessels would become the property of the Union navy only if the conflict were a declared war. Given the extremely sensitive politics of the day, the Court could do nothing but find the seizures to be legal, even though Congress had not formally declared war against the Confederacy.

The Court held that "the President is not only authorized, but bound to resist force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." Additionally, Justice Robert C. Grier noted that the "President was bound to meet [the Civil War] in the shape it presented itself, without waiting for the Congress to baptize it with a name; and no name given to it by him or them could change the fact." In *The Prize Cases,* the Court acknowledged the necessity of deferring to the president's decisions in times of crisis.

The Vietnam War

President Lincoln's unprecedented exercise of war powers presaged President Lyndon Johnson's actions in Vietnam a century later. Absent a formal declaration of war by Congress, the Johnson administration maintained that inherent presidential power essentially includes the power to deploy American forces abroad and commit them to military operations when the president decides such action is necessary. Of course, many commentators disagreed with this assessment.

In the Gulf of Tonkin Resolution of 1964, Congress did give limited authority to the president to take whatever actions were necessary to defend the government of South Vietnam and American interests and personnel in the region. The resolution was adopted in response to an alleged attack on American ships operating near North Vietnam. Later evidence indicated that the attack was exaggerated at the very least and was perhaps contrived to force Congress to sanction the growing American involvement in Southeast Asia. It was not long before the war was expanded far beyond anything envisioned by Congress in 1964. In a later development in the Vietnam War, President Nixon's covert war in Cambodia certainly fell beyond any authority granted the president by the Gulf of Tonkin Resolution. Amid the harsh strains of sometimes violent antiwar protest, calmer voices began to be heard questioning the legality of the war effort.

During the Vietnam era, the Supreme Court had ample opportunity to rule on the constitutionality of the war and the concomitant use of presidential power, but it declined to do so, viewing the issue as a "political question" (see *Massachusetts v. Laird* [1970]). The Court drew some criticism for this deferential posture. However, it is likely that the Court would have been more criticized if it had chosen to review the constitutionality of the Vietnam War—and it certainly would have been—had its ruling been adverse to the president. It is beyond question that the influence of the Court over the conduct of wars, foreign or domestic, is minimal at best. The philosophy of judicial self-restraint dictates that the Court maintain a low profile on such issues.

The War Powers Resolution

As the Supreme Court's unwillingness to address the issue became clear, Congress began to question the unbridled conception of **presidential war powers.** In 1973, Congress adopted the **War Powers Resolution** over the veto of President Nixon. The act was designed to limit the president's unilateral power to send troops into foreign combat. It requires the president to make a full report to Congress when sending troops into foreign areas, limits the duration of troop commitment without congressional authorization, and provides a veto mechanism whereby Congress can force the recall of troops at any time. Given the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha* (1983), the legislative veto provision of the War Powers Resolution is presumptively unconstitutional (see Chapter 4). Yet the provision remains on the books.

Since Congress has not yet invoked the War Powers Resolution, the courts have had no occasion to address the specific question of its constitutionality. It is unlikely that the War Powers Resolution will ever be subjected to judicial review, because it is unlikely that it will ever be invoked against the president. Even if it were invoked and litigation resulted, it is probable that the courts would view the matter as a "political question." Aside from the question of its constitutionality, the War Powers Resolution is probably not an effective constraint on the presidential war power. It can be viewed as little more than a symbolic gesture of defiance from a Congress displeased with the conduct of the Vietnam War. The existence of the War Powers Act did not prevent President Reagan from employing military force in pursuit of his foreign policy objectives. Reagan sent the U.S. Marines into Beirut and even used naval gunfire against the rebels in the Lebanese civil war. Reagan employed U.S. troops to topple the Marxist government of Grenada. And he ordered an air strike on Libya to punish the Khadaffi regime for its support of international terrorism. Although President Reagan chose to comply with the War Powers Act in all three cases by notifying Congress of his actions, he still made the decisions to send troops into hostile situations. Congressional disapproval would have made no difference in the cases of Grenada and Libya; the hostilities had practically ceased by the time Congress was notified.

The Persian Gulf War of 1991

Soon after Saddam Hussein's Iraq invaded and annexed tiny Kuwait in August 1990, President Bush (the elder) ordered military forces into Saudi Arabia in a defensive posture. When it became clear that Iraq had no intention of leaving Kuwait, Bush ordered a massive buildup of forces in the region and began to threaten the use of force to remove Iraqi troops from Kuwait. Bush's critics soon suggested that the War Powers Act had been triggered because American troops were in a situation of imminent hostility. Yet Congress did not attempt to "start the clock" under the War Powers Act.

When the president did finally decide to move against Iraq in January 1991, he first obtained a resolution from Congress supporting the use of force. Had Bush refused to obtain congressional approval, it would have been interesting to see whether and how Congress would have asserted itself. There is little question, however, that Bush's decision to seek congressional approval ultimately enhanced political support for the war.

The war was executed with overwhelming force, resulting in minimal losses to allied forces. Iraq, which suffered enormous losses in both life and property, capitulated quickly. In the wake of the war, President Bush's approval ratings soared to levels not seen since the end of World War II. Presidential popularity is a volatile phenomenon, however, and Bush's approval ratings dropped steadily during the remainder of 1991.

The War on Terrorism

For several decades, countries around the globe have been coping with various forms of terrorism. Prior to 1993, the United States did not experience terrorism on its soil. The World Trade Center bombing of 1993, the Oklahoma City bombing of 1995, and the horrendous attacks on the World Trade Center and the Pentagon in September 2001 demonstrated America's vulnerability to terrorism. The events of September 2001, in which some 3,000 people were killed, led President George W. Bush to proclaim a "war on terrorism." Some members of Congress called for a formal declaration of war against the terrorist organizations responsible for the September attacks. Others questioned the appropriateness of a declaration of war where no nation-state had been identified as the enemy. Responding quickly, the Bush administration sought and immediately obtained a congressional resolution authorizing the use of military force. This resolution, adopted on September 14, 2001, passed the Senate and House by votes of 98–0 and 420–1, respectively. The resolution authorized the president to:

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

The resolution went far toward removing any serious questions about the legality of using military power in response to the crisis. By October 2001, American forces were in action against Osama bin Laden's al-Qaeda forces in Afghanistan and the Taliban government that provided sanctuary to these forces. President Bush asked the nation to brace for a protracted war against terrorism, a war that would be waged on numerous fronts and potentially in several countries. Five years later, American forces were still in Afghanistan, attempting to maintain security on behalf of a new democratically elected government.

Detention and Trial of Foreign Nationals Apprehended in the War on Terrorism

The war on terrorism raised other important constitutional questions beyond the president's power to make war. On November 13, 2001, President Bush issued an executive order authorizing the use of military tribunals to try foreign nationals apprehended in the war on terrorism. Although most people conceded that this practice was permissible under the Constitution, many in the media and in Congress were highly critical of Bush's plan. Some complained that although Bush might technically have the power in his role as commander in chief, he should be more specific regarding the circumstances under which tribunals would be used and the procedures they would follow. Others worried that using military commissions to try accused terrorists sent the wrong message to the world: that America was abandoning its historic commitment to the ideal of due process.

In 2002, the military began to incarcerate "enemy aliens" at the American Naval Base at Guantanamo Bay, Cuba. Most of the detainees had been captured by or turned over to American forces in Afghanistan during the operation to topple the Taliban. Detainees were held in solitary confinement in small cells and were not permitted to have any contact with the outside world. No judicial or administrative process was established to determine whether detainees were in fact terrorists or enemies of the United States. The government essentially asserted the authority to detain these inmates indefinitely without trial or recourse to the courts. Eventually, the judiciary

would be called upon to review the situation, as relatives of detainees went to federal district courts seeking writs of habeas corpus. Representing the petitioners in *Rasul v. Bush* (2004), attorney John Gibbons argued that the Bush administration sought to "create a lawless enclave" at Guantanamo. In oral argument before the Supreme Court, Gibbons accused the government of trying to create a "no-law zone where it is not accountable to any judiciary anywhere . . . ." In its opinion in *Rasul v. Bush,* the Supreme Court held only that federal courts had jurisdiction over petitions brought on behalf of the prisoners at Guantanamo. The Court conspicuously avoided comment on the legality of the government's actions or the constitutionality of President Bush's November 2001 executive order.

Following the Court's ruling, the Pentagon created special three-member military panels to review the question of whether the Guantanamo detainees had been properly classified as enemy combatants. Although a number of detainees were released pursuant to these reviews, critics argued that the belated review procedures fell far short of the due process of law required by the Constitution. In January 2006, the government resumed military trials of two Guantanamo detainees who had been formally accused of terrorism based on their activities within the al-Qaeda organization.

In *Hamdan v. Rumsfeld* (2006), a Yemeni national detained at Guantanamo Bay brought suit to challenge the legality and constitutionality of the military tribunal before which he was to be tried. Hamdan's brief to the Supreme Court argued that President Bush had "claimed the unilateral authority to try suspected terrorists wholly outside the traditional civilian and military judicial systems, for crimes defined by the President alone, under procedures lacking basic protections, before judges who are his chosen subordinates." In Hamdan's view, the president's actions "reach far beyond any war power ever conferred upon the Executive, even during declared wars."

On June 29, 2006, the final day of the Term, the Supreme Court issued its historic ruling in *Hamdan v. Rumsfeld*. Dividing 5-to-3 (Chief Justice Roberts not participating because he had previously voted in the case at the court of appeals level) the Court held that the Bush Administration's plan to try Guantanamo Bay detainees before military commissions was unauthorized by statute and violated international law. In 2005 Congress had passed the Detainee Treatment Act, in effect barring federal jurisdiction to review the cases of Guantanamo Bay detainees. The majority, in a lengthy opinion by Justice Stevens, held that this Act did not bar federal court review of pending cases, including that of Hamdan. Nor were the military tribunals sanctioned by the Congressional Resolution of September 14, 2001, Authorizing the Use of Military Force in the aftermath of the 9/11 attacks. The overarching rationale of the Court's decision is summed up by Justice Stevens's assertion that: "Even assuming that Hamdan is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment." The majority indicated that Congress could, through appropriate legislation, provide for the use of military tribunals to try Guantanamo Bay detainees.

In a concurring opinion Justice Breyer observed that "Congress [had] not issued the Executive a blank check." He added that "nothing prevents the President from returning to Congress to seek the authority he believes necessary." Early indications were that the Bush Administration would work with Congress in formulating legislation regarding military tribunals that would withstand judicial scrutiny.

Justices Scalia, Thomas, and Alito filed dissenting opinions in this important case. Justice Scalia spoke for all three dissenters in insisting that as of December 30, 2005, the date on which the Detainee Treatment Act took effect, "no court had jurisdiction to hear or consider" Hamdan's petition for habeas corpus. He found the Court's conclusion to the contrary "patently erroneous." In essence, Scalia would have followed

the long-abandoned *McCardle* precedent by recognizing the power of Congress to withdraw the Supreme Court's jurisdiction in a pending case.

The War in Iraq

The Persian Gulf War of 1991 had left Saddam Hussein in power in Iraq. Throughout the 1990s Hussein was held at bay by American and British air power, which patrolled the northern and southern regions of Iraq. During this time, the Iraqi people suffered tremendously, both as the result of Hussein's dictatorial rule and the economic sanctions imposed on Iraq by the United Nations. Many observers feared that Hussein was maintaining stockpiles of chemical and biological weapons and might well use them against his own people or neighbors in the region. After 9/11, President George W. Bush adopted a new policy with regard to Iraq. Rather than continue to contain Saddam Hussein, America and its allies would use military force to overthrow the dictator and attempt to establish a democratic government in Iraq. In building public and congressional support for military action, President Bush stressed the need to eliminate Iraq's presumed weapons of mass destruction. Ultimately, the concern about Iraq's WMDs would prove to be unfounded, but in the aftermath of 9/11, the mere possibility that an enemy of the United States might have stockpiles of such weapons was enough to generate strong support for military action.

At President Bush's urging, Congress in October 2002 authorized military action against Iraq. President Bush praised the resolution, declaring that "America speaks with one voice" on Iraq. But Americans were far from united on this issue. Invoking painful memories of the Vietnam War, Senator Robert Byrd (D-W.Va.) asserted, "This is the Tonkin Gulf resolution all over again. Let us stop, look and listen. Let us not give this president or any president unchecked power. Remember the Constitution." In March of 2003, American and British forces invaded Iraq and rapidly toppled Saddam Hussein's government. Replacing that government with a democratically elected one and providing security for that new government would prove to be a far more difficult task.

The fact that no stockpiles of chemical or biological weapons were found in Iraq after American troops captured the country took a tremendous toll on President Bush's credibility. Had those weapons been found in Iraq, the President's decision to go to war would have been largely vindicated, and he might well have been politically unassailable. Instead, as violence raged in Iraq and American soldiers continued to die, criticism mounted and the president's approval ratings declined. Although Bush was able to secure reelection in 2004, continuing problems in securing and rebuilding Iraq caused his public and congressional support to deteriorate badly during 2005 and 2006. As the 2006 mid-term elections approached, Bush's public approval rating was at an all-time low (at one point under 30%) and even many Republicans in Congress had abandoned the president. Some of the president's more extreme critics went so far as to call for Bush's impeachment for allegedly deceiving Congress and the American people and launching what they believed to be an illegal war. Yet Bush continued to insist that his decision to topple Saddam Hussein had been lawful, justified, and in the best interests of the United States. Although in 2006 the political judgment of Bush's decision was decidedly negative, history might well judge the president's actions more favorably, depending on their long-term consequences.

Domestic Affairs during Wartime

Although there is a serious constitutional question over who has the power to make war, an equally difficult question arises regarding the extent of presidential power in the domestic sphere during wartime. Does the president's inherent power and duty to

protect national security override express constitutional limitations and the rights of citizens? The Supreme Court's answer to the question has been mixed.

Civil War Cases One of the early cases raising the question of individual rights versus presidential power during wartime was *Ex parte Merryman* (1861). Although it was not a Supreme Court decision, it did involve Chief Justice Roger B. Taney, acting in his capacity as circuit judge. John Merryman, a resident of Maryland, was a well-known advocate of secession. Fearing that Merryman's statements and potential actions would adversely affect the Union cause, military officials arrested him in May 1861, under the authority of a presidential directive. As a civilian, Merryman asserted that his arrest and detention by the military were illegal. He sought a writ of habeas corpus from Chief Justice Taney, who was "riding circuit" in Baltimore at the time. Earlier, President Lincoln had issued an order authorizing military commanders to suspend habeas corpus, thus facilitating military arrest and detention of civilians. However, Chief Justice Taney believed that only Congress could suspend the habeas corpus privilege (see Article I, Section 9). Taney issued the writ ordering Merryman's release, but it was ignored at Fort McHenry, where Merryman was in custody. Infuriated, Taney wrote an indignant letter to the president. The letter was widely publicized in the press. Although Lincoln never replied directly to Taney, he did ask Congress for legislation suspending habeas corpus, and in 1863, Congress complied with this request. Eventually, Merryman was turned over to civilian authorities.

Although the *Merryman* case never reached the Supreme Court, the justices eventually had an opportunity to rule on the constitutional limits of executive power during wartime. Lambdin P. Milligan, a civilian residing in Indiana, was an active collaborator with the Confederacy. In 1864, he was arrested and tried for treason by a military commission established by order of President Lincoln. Milligan was convicted and sentenced to death, but the sentence was not carried out. In 1866, some time after hostilities had ceased, the Supreme Court reviewed the conviction. Its landmark decision in *Ex parte Milligan* was a ringing endorsement of civil liberties. The Supreme Court took note of the fact that the civilian courts were open and operating in Indiana when Milligan was arrested and tried by the military. In ordering Milligan's release, the Court condemned Lincoln's directive establishing military jurisdiction over civilians outside of the immediate war area. It strongly affirmed the fundamental right of a civilian to be tried in a regular court of law, with all the procedural safeguards that characterize the criminal process. It must be remembered that this strong assertion of constitutional principles occurred a year after the close of the Civil War and the assassination of Abraham Lincoln. Viewed in this light, *Ex parte Milligan* may be more aptly described as an admission of judicial weakness during time of war than as a bold pronouncement of constitutional limits on presidential power.

The "Relocation" of Japanese-Americans Early in the Second World War, President Roosevelt issued orders authorizing the establishment of "military areas" from which ostensibly dangerous persons could be expelled or excluded. Congressional legislation supported Roosevelt's orders by establishing criminal penalties for violators. Under these executive and congressional mandates, General J. L. DeWitt, who headed the Western Defense Command, proclaimed a curfew and issued an order excluding all **Japanese Americans** from a designated West Coast military area. The exclusion order led first to the imprisonment of some 120,000 persons in barbed wire–enclosed "assembly centers." Later, these persons were removed to "relocation centers" in rural areas as far inland as Arkansas. Although these actions were defended at the time on grounds of military necessity, overwhelming evidence indicates that they were in fact based on the view that all Japanese Americans were "subversive" members of an

"enemy race." In spite of the blatant racism reflected in these policies, the Supreme Court upheld both the curfew and the exclusion order (*Hirabayashi v. United States* [1943] and *Korematsu v. United States* [1944]). While recognizing that racial classifications are inherently suspect (a term discussed in detail in Chapter 7, Volume II), a majority of the justices concluded that, under the pressure of war, the government had a compelling interest justifying such extreme measures. The *Korematsu* case stands for the sobering proposition that in time of war, the Supreme Court will defer to presidential assessments of threats to national security, whether real or imaginary.

It has now been well established that the forced relocation of thousands of Japanese Americans was not justified on grounds of military necessity and was motivated chiefly by racial animus. In 1988, Congress belatedly acknowledged the government's responsibility for this gross miscarriage of justice by awarding reparations to survivors of the internment camps. Yet, after the terrorist attacks on America in September 2001, many began to wonder whether such extreme measures might someday be employed again. How far would President Bush and the military go in the prosecution of the war on terrorism? Would the American people support infringements of the constitutional rights of Americans suspected of aiding or supporting terrorists? If so, would the courts resist such measures?

Peacetime Threats to National Security

During peacetime, presidential responses to perceived domestic threats to the national security are not as likely to win judicial approval. A good example is the Supreme Court's decision in *United States v. U.S. District Court* (1972). Reflecting Richard Nixon's deep-seated suspicions of the motives and affiliations of political opponents, the government had engaged in extensive wiretapping and other forms of electronic surveillance directed at U.S. citizens. The Supreme Court held that these activities, which were conducted without probable cause or judicial approval, offended the Fourth Amendment prohibition against unreasonable searches. The Court rejected the Nixon administration's argument that inherent executive power permitted the government to take these actions to obtain intelligence regarding foreign agents acting in the domestic sphere. In 1978, Congress buttressed the Court's decision by adopting the Foreign Intelligence Surveillance Act, which requires government agents to obtain a warrant from the Foreign Intelligence Surveillance Court before subjecting U.S. citizens to electronic surveillance for the purpose of gathering foreign intelligence.

Foreign Intelligence Surveillance and the War on Terrorism Shortly after 9/11, President Bush authorized the National Security Agency, located within the Department of Defense, to intercept telephone calls between the parties in the United States and parties outside the country where one or both of parties were suspected members or affiliates of al-Qaeda or similar terrorist groups. In authorizing what the White House later referred to as the "terrorist surveillance program," the president permitted the NSA to bypass the warrant requirement of the Foreign Intelligence Surveillance Act. To facilitate its program, the NSA began collecting from telecommunications companies vast amounts of data on the phone numbers that were being contacted through conventional and cellular telephone calls. When the program became public through a "leak" to the media, critics immediately assailed what they believed to be an assault on privacy and an illegal end-run around the FISA statute. Many critics suggested that the president had ignored the Supreme Court's admonitions in *United States v. U.S. District Court*. In defending the program, the Bush Administration invoked Title II of the USA PATRIOT Act, entitled "Enhanced Surveillance Procedures," as well as inherent executive power to protect the national security. Although the law in this area is less than crystal clear, most legal scholars rejected the Administration's arguments. Some went

so far as to suggest that in authorizing the NSA program, President Bush had committed an impeachable offense. In a widely published interview on December 20, 2005, Georgetown University law professor Jonathan Turley observed:

> The president's dead wrong. It's not a close question. Federal law is clear. When the president admits that he violated federal law, that raises serious constitutional questions of high crimes and misdemeanors.

In a White House press release dated May 11, 2006, President Bush publicly defended the NSA wiretapping program:

> First, our international activities strictly target al Qaeda and their known affiliates. Al Qaeda is our enemy, and we want to know their plans. Second, the government does not listen to domestic phone calls without court approval. Third, the intelligence activities I authorized are lawful and have been briefed to appropriate members of Congress, both Republican and Democrat. Fourth, the privacy of ordinary Americans is fiercely protected in all our activities.

The fact that, when polled, most Americans supported the president on this issue probably prevented Congress from considering seriously the suggestion that Bush had committed an impeachable offense. In early 2006, the Electronic Frontier Foundation filed a federal class action against AT&T Corporation, accusing the telecommunications giant of collaborating with the NSA to violate federal law and its customers' constitutional rights. The American Civil Liberties Union and the Center for Constitutional Rights also filed lawsuits challenging the legality and constitutionality of the NSA program. The government moved for a dismissal of these cases, arguing that they could not be litigated without the introduction into evidence of "state secrets" that the government would refuse to disclose. [Note: At the time this edition was going to press, these cases were still pending before federal district courts.]

TO SUMMARIZE:

- Although Article I grants Congress the authority to declare war, Article II recognizes the president as commander in chief.
- Historically, this role has enabled presidents to commit military forces abroad without congressional approval.
- Congress attempted to limit presidential authority in this area by enacting the War Powers Resolution in 1973. Although the Supreme Court has never ruled on the matter, the constitutionality of the War Powers Resolution has been widely questioned.
- In the 2006 decision of *Hamdan v. Rumsfeld* the Supreme Court held that the Bush Administration's plan to try Guantanamo Bay detainees before military commissions lacked statutory authorization and violated international law.
- Another difficult constitutional question involves the extent of presidential power in the domestic sphere during wartime, especially as it relates to the rights of American citizens. The Supreme Court has given mixed answers to this question.

CONCLUSION

American constitutional development has witnessed the transformation of the presidency into the most powerful executive position in the world. The American president possesses awesome powers, most notably the authority to command the world's most formidable military. Yet the presidency is not without constitutional and statutory constraints, as dictated by the principle of checks and balances. Ultimately,

though, the power of the presidency is less determined by congressional or judicial action than by public opinion and world events.

Although the presidency occasionally experiences setbacks—as in the aftermath of the Iran-Contra scandal of 1986 and 1987—such reverses tend to be short-lived. The American people simply demand too much from the presidency to allow it to sink to a position of institutional inferiority. The Hamiltonian conception of the presidency has become institutionalized to the extent that neither the personality of the occupant nor the occasional crisis of credibility can produce any significant dismantling of the office.

As America wages war on terrorism, the presidency has emerged once again as the preeminent branch of American government. Whether this preeminence is maintained will depend more on the vicissitudes of world events and the tides of American public opinion than on the decisions of courts of law.

KEY TERMS

Twenty-second Amendment
Electoral College
Twenty-fifth Amendment
impeachment
inherent executive power
stewardship theory
constitutional theory
presentment requirement
veto
pocket veto
line-item veto
appointment power
removal power
presidential pardon
amnesty
executive privilege
presidential immunity
presidential power to make foreign policy
treaty
executive agreements
commander in chief
presidential war powers
War Powers Resolution
Japanese-Americans

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Case

YOUNGSTOWN SHEET & TUBE COMPANY V. SAWYER

343 U.S. 579; 72 S.Ct. 863; 96 L.Ed. 1153 (1952)
Vote: 6–3

To prevent a stoppage in steel production during the Korean War due to an imminent strike by the steelworkers union, President Harry Truman ordered Secretary of Commerce Charles Sawyer to seize the nation's steel mills and maintain full production. Youngstown Sheet & Tube Company, a steel producer, filed suit challenging the legality of the President's order.

Mr. Justice Black delivered the opinion of the Court.

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States. The issue emerges here from the following series of events:

In the latter part of 1951, a dispute arose between the steel companies and their employees over terms and conditions that should be included in new collective bargaining agreements. Long-continued conferences failed to resolve the dispute. On December 18, 1951, the employees' representative, United Steelworkers of America, C.I.O., gave notice of an intention to strike when the existing bargaining agreements expired on December 31. The Federal Mediation and Conciliation Service then intervened in an effort to get labor and management to agree. This failing, the President on December 22, 1951, referred the dispute to the Federal Wage Stabilization Board to investigate and make recommendations for fair and equitable terms of settlement. This Board's report resulted in no settlement. On April 4, 1952, the Union gave notice of a nation-wide strike called to begin at 12:01 A.M., April 9. The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. Reciting these considerations for his action, the President, a few hours before the strike was to begin, issued Executive Order 10340. . . . The order directed the Secretary of Commerce to take possession of most of the steel mills and keep them running. The Secretary immediately issued his own possessory orders, calling upon the presidents of the various seized companies to serve as operating managers for the United States. They were directed to carry on their activities in accordance with regulations and directions of the Secretary. The next morning the President sent a message to Congress reporting his action. . . . Twelve days later he sent a second message. . . . Congress has taken no action.

Obeying the Secretary's orders under protest, the companies brought proceedings against him in the District Court. Their complaints charged that the seizure was not authorized by an Act of Congress or by any constitutional provisions. The District Court was asked to declare the orders of the President and the Secretary invalid and to issue preliminary and permanent injunctions restraining their enforcement. Opposing the motion for preliminary injunctions, the United States asserted that a strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had "inherent power" to do what he had done—power "supported by the Constitution, by historical precedent, and by court decisions." The Government also contended that in any event no preliminary injunction should be issued because the companies had made no showing that their available legal remedies were inadequate or that their injuries from seizure would be irreparable. Holding against the Government on all points, the District Court on April 30 issued a preliminary injunction restraining the Secretary from "continuing the seizure and possession of the plants . . . and from acting under the purported authority of Executive Order No. 10340." . . . On the same day the Court of Appeals stayed the District Court's injunction. . . . Deeming it best that the issues raised be promptly decided by this Court, we granted certiorari on May 3 and set the cause for argument on May 12. . . .

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be

implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. There are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. The Government refers to the seizure provisions of one of these statutes . . . (the Defense Production Act) as "much too cumbersome, involved, and time-consuming for the crisis which was at hand."

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling-off periods. All this failing, unions were left free to strike after a secret vote by employees as to whether they wished to accept their employers' final settlement offer.

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President. . .."; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof." The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand. . . .

Mr. Justice Frankfurter [concurring]. . . .

Mr. Justice Douglas, concurring. . . .

Mr. Justice Jackson, concurring in the judgment and opinion of the Court.

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. . . . The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.

A judge, like an executive advisor, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And other decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent power, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . .

Into which of these classifications does this executive seizure of the steel industry fit? It is eliminated from the first by admission, for it is conceded that no congressional authorization exists for this seizure. . . .

Can it then be defended under flexible tests available to the second category? It seems clearly eliminated from that class because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure. . . .

This leaves the current seizure to be justified only by the severe tests under the third grouping. . . . In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress. Thus, this Court's first review of such seizures occurs under circumstances which leave presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.

I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. . . . Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation of changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism. . . .

[One] clause on which the Government . . . relies is that "The President shall be Commander in Chief of the Army and Navy of the United States. . . ." These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. . . .

That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. . . .

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role. What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment. . . .

The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.

Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "incidental" powers, "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings.

The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. . . .

In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.

As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an eighteenth-century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution. . . .

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers. . . .

Mr. Justice Burton, concurring. . . .

Mr. Justice Clark, concurring in the judgment of the Court. . . .

Mr. Chief Justice Vinson, with whom ***Mr. Justice Reed*** and ***Mr. Justice Minton*** join, dissenting.

. . . In passing upon the question of Presidential powers in this case, we must first consider the context in which those powers were exercised.

Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from devastation of World War II has been forced to face the threat of another and more terrifying global conflict.

Accepting in full measure its responsibility in the world community, the United States was instrumental in securing adoption of the United Nations Charter. . . . In 1950, when the United Nations called upon member nations "to render every assistance" to repel aggression in Korea, the United States furnished its vigorous support. . . .

Further efforts to protect the free world from aggression are found in the congressional enactments of the Truman Plan for assistance to Greece and Turkey and the Marshall Plan for economic aid needed to build up the strength of our friends in Western Europe. In 1949, the Senate approved the North Atlantic Treaty under which each member nation agrees that an armed attack against one is an armed attack against all. . . . The concept of mutual security recently has been extended by treaty to friends in the Pacific. . . .

Even this brief review of our responsibilities in the world community discloses the enormity of our undertaking. Success of these measures may, as has often been observed, dramatically influence the lives of many generations of the world's peoples yet unborn. Alert to our responsibilities, which coincide with our own self-preservation through mutual security, Congress has enacted a large body of implementing legislation. . . .

[Chief Justice Vinson here discusses these legislative acts as well as the seizure authorizations included in the statutes. In addition, he chronicles instances of seizures, both based on these statutes and deriving their legitimacy from other sources.]

Focusing now on the situation confronting the President on the night of April 8, 1952, we cannot but conclude that the President was performing his duty under the Constitution to "take Care that the Laws be faithfully executed." . . .

The President reported to Congress the morning after the seizure that he acted because a work stoppage in steel production would immediately imperil the safety of the Nation by preventing execution of the legislative programs for procurement of military equipment. And, while a shutdown could be averted by granting the price concessions requested by [Youngstown Sheet & Tube Company], granting such concessions would disrupt the price stabilization program also enacted by Congress. Rather than fail to execute either legislative program, the President acted to execute both.

Much of the argument in this case has been directed at straw men. We do not now have before us the case of a President acting solely on the basis of his own notions of the public welfare. Nor is there any question of unlimited executive power in this case. The President himself closed the door to any such claim when he sent his Message to Congress stating his purpose to abide by any action of Congress, whether approving or disapproving his seizure action. Here, the President immediately made sure that Congress was fully informed of the temporary action he had taken only to preserve the legislative programs from destruction until Congress could act.

The absence of a specific statute authorizing seizure of the steel mills as a mode of executing the laws—both the military procurement program and the anti-inflation program—has not until today been thought to prevent the President from executing the laws. . . . Flexibility as to mode of execution to meet critical situations is a matter of practical necessity. . . .

[A]s of December 22, 1951, the President had a choice between alternate procedures for settling the threatened strike in the steel mills: one route [the Taft-Hartley Act] created to deal with peacetime disputes; the other route [the Defense Production Act] specially created to deal with disputes growing out of the defense and stabilization program. There is no question of bypassing a statutory procedure because both of the routes available to the President in December were based upon statutory authorization. Both routes were available in the steel dispute. The Union, by refusing to abide by the defense and stabilization program, could have forced the President to invoke Taft-Hartley at that time to delay the strike a maximum of 80 days. Instead, the Union agreed to cooperate with the defense program and submit the dispute to the Wage Stabilization Board [WSB]. . . .

When the President acted on April 8, he had exhausted the procedures for settlement available to him. Taft-Hartley was a route parallel to, not connected with, the WSB procedure. The strike had been delayed 99 days as contrasted with the maximum delay of 80 days under Taft-Hartley. There had been a hearing on the issue in dispute and bargaining which promised settlement up to the very hour before seizure had broken down. Faced with immediate national peril through stoppage in steel production on the one hand and faced with destruction of the wage and price legislative programs on the other, the President took temporary possession of the steel mills as the only course open to him consistent with his duty to take care that the laws be faithfully executed.

. . . The President's action has thus far been effective, not in settling the dispute, but in saving the various legislative programs at stake from destruction until Congress could act in the matter.

The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court.

The broad executive power granted by Article II to an officer on duty 365 days a year cannot, it is said, be invoked to avert disaster. Instead, the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon. There is no judicial finding that the executive action was unwarranted because there was in fact no basis for the President's finding of the existence of an emergency for, under this view, the gravity of the emergency and the immediacy of the threatened disaster are considered irrelevant as a matter of law.

Seizure of [the steel companies'] property is not a pleasant undertaking. Similarly unpleasant to a free country are

the draft which disrupts the home and military procurement which causes economic dislocation and compels adoption of price controls, wage stabilization and allocation of materials. The President informed Congress that even a temporary Government operation of [the steel mills] was "thoroughly distasteful" to him, but was necessary to prevent immediate paralysis of the mobilization program. Presidents have been in the past, and any man worthy of the Office should be in the future, free to take at least interim action necessary to execute legislative programs essential to survival of the Nation. A sturdy judiciary should not be swayed by the unpleasantness or unpopularity of necessary executive action, but must independently determine for itself whether the President was acting, as required by the Constitution, to "take Care that the Laws be faithfully executed."

As the District Judge stated, this is no time for "timorous" judicial action. But neither is this a time for timorous executive action. Faced with the duty of executing the defense programs which Congress had enacted and the disastrous effects that any stoppage in steel production would have on these programs, the President acted to preserve those programs by seizing the steel mills. There is no question that the possession was other than temporary in character and subject to congressional direction—either approving, disapproving or regulating the manner in which the mills were to be administered and returned to the owners. The President immediately informed Congress of his action and clearly stated his intention to abide by the legislative will. No basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case. On the contrary, judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution. Accordingly, we would reverse the order of the District Court.

Case

UNITED STATES V. NIXON

418 U.S. 683; 94 S.Ct. 3090; 41 L.Ed. 2d 1039 (1974)
Vote: 8–0

In this celebrated decision that spelled the end of the Nixon presidency, the Supreme Court considers the President's assertion of executive privilege as the basis for his refusal to comply with a subpoena duces tecum obtained by the Special Prosecutor investigating the Watergate scandal.

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

. . . [This case presents] for review the denial of a motion, filed on behalf of the President of the United States, . . . to quash a third-party *subpoena duces tecum* issued by the United States District Court for the District of Columbia. . . . The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction. . . . The President appealed to the Court of Appeals. We granted the United States' petition for certiorari before judgment . . . because of the public importance of the issues presented and the need for their prompt resolution. . . .

. . . [W]e turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisers that it would be inconsistent with the public interest to produce." . . . The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the *subpoena duces tecum*.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its power by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* . . . that "[i]t is emphatically the province and duty of the judicial department to say what the law is." . . .

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential presidential communications for use in a criminal prosecution, but other exercises of powers by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. . . . Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has

authority to interpret claims with respect to powers alleged to derive from enumerated powers.

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." . . .

Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art. III, Sec. 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. . . . We therefore reaffirm that it is the province and the duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case. . . .

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process. Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of confidentiality of Presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere . . . insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. . . . To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

Since we conclude that the legitimate needs of the judicial process may outweigh presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the judiciary from according high respect to the representations made on behalf of the President. . . .

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. . . .

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. . . . We have elected to employ an adversary system of criminal

justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. . . .

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities. . . .

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. . . .

[***Justice Rehnquist*** did not participate in this decision.]

Case

CLINTON V. JONES

520 U.S. 681; 117 S.Ct. 1636; 137 L.Ed. 2d 945 (1997)
Vote: 9–0

In this case the Court considers the issue of presidential immunity in the context of a sexual harassment suit brought against President Bill Clinton, stemming from alleged conduct while he was governor of Arkansas.

Justice Stevens delivered the opinion of the Court.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation

until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President's submissions, we conclude that they must be rejected.

Petitioner, William Jefferson Clinton, was elected to the Presidency in 1992, and re-elected in 1996. His term of office expires on January 20, 2001. In 1991 he was the Governor of the State of Arkansas. Respondent, Paula Corbin Jones, is a resident of California. In 1991 she lived in Arkansas, and was an employee of the Arkansas Industrial Development Commission.

On May 6, 1994, she commenced this action in the United States District Court for the Eastern District of Arkansas by filing a complaint naming petitioner and Danny Ferguson, a former Arkansas State Police officer, as defendants. The complaint alleges two federal claims, and two state law claims over which the federal court has jurisdiction because of the diverse citizenship of the parties. As the case comes to us, we are required to assume the truth of the detailed but as yet untested factual allegations in the complaint.

Those allegations principally describe events that are said to have occurred on the afternoon of May 8, 1991, during an official conference held at the Excelsior Hotel in Little Rock, Arkansas. The Governor delivered a speech at the conference; respondent working as a state employee staffed the registration desk. She alleges that Ferguson persuaded her to leave her desk and to visit the Governor in a business suite at the hotel, where he made "abhorrent" sexual advances that she vehemently rejected. She further claims that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances. Finally, she alleges that after petitioner was elected President, Ferguson defamed her by making a statement to a reporter that implied she had accepted petitioner's alleged overtures, and that various persons authorized to speak for the President publicly branded her a liar by denying that the incident had occurred.

Respondent seeks actual damages of $75,000, and punitive damages of $100,000. Her complaint contains four counts. The first charges that petitioner, acting under color of state law, deprived her of rights protected by the Constitution. . . . The second charges that petitioner and Ferguson engaged in a conspiracy to violate her federal rights, also actionable under federal law. . . . The third is a state common law claim for intentional infliction of emotional distress, grounded primarily on the incident at the hotel. The fourth count, also based on state law, is for defamation, embracing both the comments allegedly made to the press by Ferguson and the statements of petitioner's agents. Inasmuch as the legal sufficiency of the claims has not yet been challenged, we assume, without deciding, that each of the four counts states a cause of action as a matter of law. With the exception of the last charge, which arguably may involve conduct within the outer perimeter of the President's official responsibilities, it is perfectly clear that the alleged misconduct of petitioner was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office.

In response to the complaint, petitioner promptly advised the District Court that he intended to file a motion to dismiss on grounds of Presidential immunity, and requested the court to defer all other pleadings and motions until after the immunity issue was resolved. . . .

The District Judge denied the motion to dismiss on immunity grounds and ruled that discovery in the case could go forward, but ordered any trial stayed until the end of petitioner's Presidency. . . .

Both parties appealed. A divided panel of the Court of Appeals affirmed the denial of the motion to dismiss, but because it regarded the order postponing the trial until the President leaves office as the "functional equivalent" of a grant of temporary immunity, it reversed that order. . . .

The President, represented by private counsel, filed a petition for certiorari. The Solicitor General, representing the United States, supported the petition, arguing that the decision of the Court of Appeals was "fundamentally mistaken" and created "serious risks for the institution of the Presidency." In her brief in opposition to certiorari, respondent argued that this "one-of-a-kind case is singularly inappropriate" for the exercise of our certiorari jurisdiction because it did not create any conflict among the Courts of Appeals, it "does not pose any conceivable threat to the functioning of the Executive Branch," and there is no precedent supporting the President's position.

While our decision to grant the petition expressed no judgment concerning the merits of the case, it does reflect our appraisal of its importance. The representations made on behalf of the Executive Branch as to the potential impact of the precedent established by the Court of Appeals merit our respectful and deliberate consideration. . . .

Petitioner's principal submission that "in all but the most exceptional cases," . . . the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office cannot be sustained on the basis of precedent.

Only three sitting Presidents have been defendants in civil litigation involving their actions prior to taking office. Complaints against Theodore Roosevelt and Harry Truman had been dismissed before they took office; the dismissals were affirmed after their respective inaugurations. Two companion cases arising out of an automobile

accident were filed against John F. Kennedy in 1960 during the Presidential campaign. After taking office, he unsuccessfully argued that his status as Commander in Chief gave him a right to a stay under the Soldiers' and Sailors' Civil Relief Act of 1940. . . . The motion for a stay was denied by the District Court, and the matter was settled out of court. Thus, none of those cases sheds any light on the constitutional issue before us.

The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct.

In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability. . . .

. . . [W]hen defining the scope of an immunity for acts clearly taken within an official capacity, we have applied a functional approach. "Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office." . . . Hence, for example, a judge's absolute immunity does not extend to actions performed in a purely administrative capacity. . . . As our opinions have made clear, immunities are grounded in "the nature of the function performed, not the identity of the actor who performed it." . . .

Petitioner's effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent.

Petitioner's strongest argument supporting his immunity claim is based on the text and structure of the Constitution. He does not contend that the occupant of the Office of the President is "above the law," in the sense that his conduct is entirely immune from judicial scrutiny. The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law. His argument is grounded in the character of the office that was created by Article II of the Constitution, and relies on separation of powers principles that have structured our constitutional arrangement since the founding.

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties. He submits that given the nature of the office the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed.

We have no dispute with the initial premise of the argument. . . .

It does not follow, however, that separation of powers principles would be violated by allowing this action to proceed. The doctrine of separation of powers is concerned with the allocation of official power among the three co-equal branches of our Government. The Framers "built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." . . . Thus, for example, the Congress may not exercise the judicial power to revise final judgments, . . . or the executive power to manage an airport. . . . Similarly, the President may not exercise the legislative power to authorize the seizure of private property for public use. . . . And, the judicial power to decide cases and controversies does not include the provision of purely advisory opinions to the Executive, or permit the federal courts to resolve nonjusticiable questions. Of course the lines between the powers of the three branches are not always neatly defined. . . . But in this case there is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as "executive." Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies. Whatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch. The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power.

Rather than arguing that the decision of the case will produce either an aggrandizement of judicial power or a narrowing of executive power, petitioner contends that as a by-product of an otherwise traditional exercise of judicial power burdens will be placed on the President that will hamper the performance of his official duties. We have recognized that "[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." . . . As a factual matter, petitioner contends that this particular case as well as the potential additional litigation that an affirmance of the Court of Appeals judgment might spawn may impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office.

Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. As we have already noted, in the more than 200-year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions. . . . If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed

by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time.

Of greater significance, petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions. . . . The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution. Two long-settled propositions, first announced by Chief Justice Marshall, support that conclusion.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe. . . . Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law. Our holding was an application of the principle established in *Marbury v. Madison* . . . (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." . . .

Second, it is also settled that the President is subject to judicial process in appropriate circumstances. Although Thomas Jefferson apparently thought otherwise, Chief Justice Marshall, when presiding in the treason trial of Aaron Burr, ruled that a *subpoena duces tecum* could be directed to the President. . . . We unequivocally and emphatically endorsed Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides. . . . Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty. . . .

If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions. We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.

The reasons for rejecting such a categorical rule apply as well to a rule that would require a stay "in all but the most exceptional cases." . . . Indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the "exceptional case" subcategory. In all events, the question whether a specific case should receive exceptional treatment is more appropriately the subject of the exercise of judicial discretion than an interpretation of the Constitution. Accordingly, we turn to the question whether the District Court's decision to stay the trial until after petitioner leaves office was an abuse of discretion.

The Court of Appeals described the District Court's discretionary decision to stay the trial as the "functional equivalent" of a grant of temporary immunity. . . . Concluding that petitioner was not constitutionally entitled to such an immunity, the court held that it was error to grant the stay. . . . Although we ultimately conclude that the stay should not have been granted, we think the issue is more difficult than the opinion of the Court of Appeals suggests.

Strictly speaking the stay was not the functional equivalent of the constitutional immunity that petitioner claimed, because the District Court ordered discovery to proceed. Moreover, a stay of either the trial or discovery might be justified by considerations that do not require the recognition of any constitutional immunity. The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket. . . . As we have explained, "[e]specially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." . . . Although we have rejected the argument that the potential burdens on the President violate separation of powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery. Nevertheless, we are persuaded that it was an abuse of discretion for the District Court to defer the trial until after the President leaves office. Such a

lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial. The complaint was filed within the statutory limitations period albeit near the end of that period and delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party.

The decision to postpone the trial was, furthermore, premature. The proponent of a stay bears the burden of establishing its need. . . . In this case, at the stage at which the District Court made its ruling, there was no way to assess whether a stay of trial after the completion of discovery would be warranted. Other than the fact that a trial may consume some of the President's time and attention, there is nothing in the record to enable a judge to assess the potential harm that may ensue from scheduling the trial promptly after discovery is concluded. We think the District Court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office. If and when that should occur, the court's discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President's duties would not occur. But no such impingement upon the President's conduct of his office was shown here.

We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance.

We are not persuaded that either of these risks is serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. . . .

Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment. History indicates that the likelihood that a significant number of such cases will be filed is remote. Although scheduling problems may arise, there is no reason to assume that the District Courts will be either unable to accommodate the President's needs or unfaithful to the tradition especially in matters involving national security of giving "the utmost deference to Presidential responsibilities." Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security. . . . In short, we have confidence in the ability of our federal judges to deal with both of these concerns.

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation. . . .

As petitioner notes in his brief, Congress has enacted more than one statute providing for the deferral of civil litigation to accommodate important public interests. . . . If the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it. But our holding today raises no barrier to a statutory response to these concerns.

The Federal District Court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition of her claims. Accordingly, the judgment of the Court of Appeals is affirmed.

Justice Breyer, concurring in the judgment.

I agree with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct. Nor does the "doctrine of separation of powers . . . require federal courts to stay" virtually "all private actions against the President until he leaves office." . . . Rather, as the Court of Appeals stated, the President cannot simply rest upon the claim that a private civil lawsuit for damages will "interfere with the constitutionally assigned duties of the Executive Branch . . . without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit." . . . To obtain a postponement the President must "bea[r] the burden of establishing its need." . . .

In my view, however, once the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes. At that point, the Constitution permits a judge to schedule a trial in an ordinary civil damages action (where postponement normally is possible without overwhelming damage to a plaintiff) only within the constraints of a constitutional principle—a principle that forbids a federal judge in such a case to interfere with the President's discharge of his public duties. I have no doubt that the Constitution contains such a principle applicable to civil suits, based upon Article II's vesting of the entire "executive Power" in a single individual, implemented through the Constitution's structural separation of powers, and revealed both by history and case precedent.

I recognize that this case does not require us now to apply the principle specifically, thereby delineating its contours; nor need we now decide whether lower courts are to apply it directly or categorically through the use of presumptions or rules of administration. Yet I fear that to disregard it now may appear to deny it. I also fear that the majority's description of the relevant precedents deemphasizes the extent to which they support a principle of the President's independent authority to control his own time and energy. . . . Further, if the majority is wrong in predicting the future infrequency of private civil litigation

against sitting Presidents, . . . acknowledgement and future delineation of the constitutional principle will prove a practically necessary institutional safeguard. . . . [T]he Constitution's text, history, and precedent support this principle of judicial noninterference with Presidential functions in ordinary civil damages actions.

The Constitution states that the "executive Power shall be vested in a President." . . . This constitutional delegation means that a sitting President is unusually busy, that his activities have an unusually important impact upon the lives of others, and that his conduct embodies an authority bestowed by the entire American electorate. He (along with his constitutionally subordinate Vice President) is the only official for whom the entire Nation votes, and is the only elected officer to represent the entire Nation both domestically and abroad.

This constitutional delegation means still more. Article II makes a single President responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch, or the entire Judiciary for those of the Judicial Branch. It thereby creates a constitutional equivalence between a single President, on the one hand, and many legislators, or judges, on the other.

The Founders created this equivalence by consciously deciding to vest Executive authority in one person rather than several. They did so in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability. They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many. . . .

For present purposes, this constitutional structure means that the President is not like Congress, for Congress can function as if it were whole, even when up to half of its members are absent, . . . It means that the President is not like the Judiciary, for judges often can designate other judges, e.g., from other judicial circuits, to sit even should an entire court be detained by personal litigation. It means that, unlike Congress, which is regularly out of session, . . . the President never adjourns.

More importantly, these constitutional objectives explain why a President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it. And the related constitutional equivalence between President, Congress, and the Judiciary, means that judicial scheduling orders in a private civil case must not only take reasonable account of, say, a particularly busy schedule, or a job on which others critically depend, or an underlying electoral mandate. They must also reflect the fact that interference with a President's ability to carry out his public responsibilities is constitutionally equivalent to interference with the ability of the entirety of Congress, or the Judicial Branch, to carry out their public obligations. . . .

. . . Case law, particularly, *Nixon v. Fitzgerald,* strongly supports the principle that judges hearing a private civil damages action against a sitting President may not issue orders that could significantly distract a President from his official duties. . . .

This case is a private action for civil damages in which, as the District Court here found, it is possible to preserve evidence and in which later payment of interest can compensate for delay. The District Court in this case determined that the Constitution required the postponement of trial during the sitting President's term. It may well be that the trial of this case cannot take place without significantly interfering with the President's ability to carry out his official duties. Yet, I agree with the majority that there is no automatic temporary immunity and that the President should have to provide the District Court with a reasoned explanation of why the immunity is needed; and I also agree that, in the absence of that explanation, the court's postponement of the trial date was premature. For those reasons, I concur in the result.

Case

UNITED STATES V. CURTISS-WRIGHT EXPORT CORPORATION

299 U.S. 304; 57 S.Ct. 216; 81 L.Ed. 255 (1936)
Vote: 7–1

In this case the Court considers the constitutionality of a particular delegation of power from Congress to the president. The case is interesting in light of Schechter Poultry Corporation v. United States (1935), in which the Court reasserted the rule against delegations of legislative power by Congress. More relevant to the issues addressed in this chapter, though, is Justice Sutherland's discussion of the powers of the presidency in the field of foreign affairs.

Mr. Justice Sutherland delivered the opinion of the Court.

On January 27, 1936, an indictment was returned in the court below, the first count of which charges that [Curtiss-Wright], beginning with the 29th of May, 1934, conspired to sell in the United States certain arms of war, namely fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by . . . the resolution. . . . [The United States District Court for the Southern District of New York sustained Curtiss-Wright's demurrer to the indictment, and the federal government appealed directly to the Supreme Court.]

The Joint Resolution . . . follows:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.
>
> . . . Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both.

The President's proclamation [May 28, 1934] . . . after reciting the terms of the Joint Resolution [barred the sale of arms to Bolivia and Paraguay]. . . .

On November 14, 1935, this proclamation was revoked. . . .

. . . It is contended that by the Joint Resolution, the going into effect and continued operation of the resolution was conditioned (a) upon the President's judgment as to its beneficial effect upon the reestablishment of peace between the countries engaged in armed conflict in the Chaco; (b) upon the making of a proclamation, which was left to his unfettered discretion, thus constituting an attempted substitution of the President's will for that of Congress; (c) upon the making of a proclamation putting an end to the operation of the resolution, which again was left to the President's unfettered discretion; and (d) further, that the extent of its operation in particular cases was subject to limitation and exception by the President, controlled by no standard. In each of these particulars, [Curtiss-Wright urges] that Congress abdicated its essential functions and delegated them to the Executive.

Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the law-making power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the Federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the Federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the Federal government, leaving those not included in the enumerations still in the states. . . . That this doctrine applies only to powers which the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce

and to do all other Acts and Things which Independent States may of right do."

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. . . .

The union existed before the Constitution, which was ordained and established among other things to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. . . .

It results that the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality. . . .

Not only . . . is the federal power over external affairs in origin and in essential character different from that over internal affairs, but participation in the exercise of power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. . . .

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. . . .

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, disclosed the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. . . .

In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day. . . .

Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress

authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs. . . .

The result of holding that the joint resolution here under attack is void and unenforceable as constituting an unlawful delegation of legislative power would be to stamp this multitude of comparable acts and resolutions as likewise invalid. And while this court may not and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all rational doubt it finds them to be so, an impressive array of legislation such as we have just set forth, enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight, in the process of reaching a correct determination of the problem. A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or on both combined. . . .

The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.

. . . It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly; and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject. . . .

The judgment of the court below must be reversed and the cause remanded for further proceedings in accordance with the foregoing opinion.

Mr. Justice McReynolds does not agree. He is of the opinion that the court below reached the right conclusion and its judgment ought to be affirmed.

Mr. Justice Stone took no part in the consideration or decision of this case.

Case

DAMES & MOORE V. REGAN

453 U.S. 654; 101 S.Ct. 2972; 69 L.Ed. 2d 918 (1981)
Vote: 8–1

In November 1979, Iranian revolutionaries seized the American Embassy in Tehran and took the embassy personnel hostage. In response, President Jimmy Carter issued an order blocking the removal or transfer of all Iranian assets in this country. On January 20, 1981, the hostages were released as part of an agreement worked out between the Carter administration and the revolutionary government of Iran. The agreement called for the creation of a special tribunal to resolve, through binding arbitration, a number of legal disputes between American firms and the Islamic Republic of Iran. Dames & Moore, an American firm, had won a substantial judgment against Iran in a breach of contract lawsuit in federal district court. In response to the agreement between the United States and Iran, the federal district court stayed execution of the judgment in the Dames & Moore case. In April 1981, Dames & Moore filed suit in district court, seeking to prevent enforcement of the executive orders and Treasury Department regulations implementing the agreement with Iran.

Justice Rehnquist delivered the opinion of the Court.

As we . . . turn to the factual and legal issues in this case, we freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal, and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances. . . .

The parties and the lower courts, confronted with the instant questions, have all agreed that much relevant analysis is contained in *Youngstown Sheet & Tube Company v. Sawyer* (1952). Justice Black's opinion for the Court in that case, involving the validity of President Truman's effort to seize the country's steel mills in the wake of a nationwide strike, recognized that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." . . . Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing Presidential authority to act in any given case. When the President acts pursuant

to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case, the executive action would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it. . . . When the President acts in the absence of congressional authorization, he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." . . . In such a case, the analysis becomes more complicated, and the validity of the President's action, at least so far as separation of powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence." . . . Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." . . .

Although we have in the past found, and do today find, Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes's admonition . . . that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white." . . . Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping," . . . and it is doubtless the case that executive action in any particular instance falls not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail. . . .

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization (the International Emergency Economic Powers Act), it is supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

. . . Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden. A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President . . . and that we are not prepared to say.

Although we have concluded that the [International Emergency Economic Powers Act] constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets, there remains the question of the President's authority to suspend claims pending in American courts. Such claims have, of course, an existence apart from the attachments which accompanied them. In terminating these claims through Executive Order No. 12294, the President purported to act under authority of both the IEEPA and . . . the so-called "Hostage Act." . . .

We conclude that, although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not, in themselves, transactions involving Iranian property or efforts to exercise any rights with respect to such property. An *in personam* lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages, and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question. . . .

. . . Although the broad language of the Hostage Act suggests it may cover this case, there are several difficulties with such a view. The legislative history indicates that the Act was passed in response to a situation unlike the recent Iranian crisis. Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad and repatriating such citizens against their will. . . . These countries were not interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment "in violation of the rights of American citizenship." Although the Iranian hostage-taking violated international law and common decency, the hostages were not seized out of any refusal to recognize their American citizenship—they were seized precisely because of their American citizenship. The legislative history is also somewhat ambiguous on the question whether Congress contemplated Presidential action such as that involved here, or rather simply reprisals directed against the offending foreign country and its citizens. . . .

Concluding that neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims, however, is not to say that these statutory provisions are entirely irrelevant to the question of the validity of the President's action. We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case. . . . [T]he IEEPA delegates broad authority to the President to act in times of national emergency with respect to

property of a foreign country. The Hostage Act similarly indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns. . . .

Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress's legislation in this area in trying to determine whether the President is acting alone, or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take, or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. . . . On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite measures on independent presidential responsibility." . . . At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President. It is to that history which we now turn.

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. . . . To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." . . . Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement, without the advice and consent of the Senate. Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States claimants themselves, since a claimant's only hope of obtaining any payment at all might lie in having his Government negotiate a diplomatic settlement on his behalf. But it is also undisputed that the United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole. . . . It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least 10 binding settlements with foreign nations, including an $80 million settlement with the People's Republic of China.

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. . . .

In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. In *United States v. Pink* . . . (1942), for example, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement whereby the Soviet Union assigned to the United States amounts owed to it by American nationals so that outstanding claims of other American nationals could be paid. The Court explained that the resolution of such claims was integrally connected with normalizing United States' relations with a foreign state. . . .

. . . [Dames & Moore] insists that the President, by suspending its claims, has circumscribed the jurisdiction of the United States courts in violation of Art. III of the Constitution. We disagree. In the first place, we do not believe that the President has attempted to divest the federal courts of jurisdiction. [The] Executive Order purports only to "suspend" the claims, not divest the federal court of "jurisdiction." . . .

In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to [the] Executive Order. . . .

. . . In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.

Our conclusion is buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an alternative forum, the Claims Tribunal which is capable of providing meaningful relief. The Solicitor General also suggests that the provision of the Claims Tribunal will actually enhance the opportunity for claimants to recover their claims, in that the Agreement removes a number of jurisdictional and procedural impediments faced by claimants in United States

courts. . . . Although being overly sanguine about the chances of United States claimants before the Claims Tribunal would require a degree of naiveté which should not be demanded even of judges, the Solicitor General's point cannot be discounted. Moreover, it is important to remember that we have already held that the President has the statutory authority to nullify attachments and to transfer the assets out of the country. The President's power to do so does not depend on his provision of a forum whereby claimants can recover on those claims. The fact that the President has provided such a forum here means that the claimants are receiving something in return for the suspension of their claims, namely, access to an international tribunal before which they may well recover something on their claims. Because there does appear to be a real "settlement" here, this case is more easily analogized to the more traditional claim settlement cases of the past.

Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate committee has stated that the establishment of the Tribunal is "of vital importance to the United States. . . ." We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.

Finally, we reemphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims. . . .

We do not think it appropriate at the present time to address petitioner's contention that the suspension of claims, if authorized, would constitute a taking of property in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation. Both petitioner and the Government concede that the question whether the suspension of the claims constitutes a taking is not ripe for review. . . .

Justice Stevens, concurring in part.

In my judgment, the possibility that requiring this petitioner to prosecute its claim in another forum will constitute an unconstitutional "taking" is so remote that I would not address the jurisdictional question considered in . . . the Court's opinion. However, I join the remainder of the opinion.

Justice Powell, concurring in part and dissenting in part.

I join the Court's opinion except its decision that the nullification of the attachments did not effect a taking of property interests giving rise to claims for just compensation. . . .

. . . The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution. . . .

Case

The Prize Cases

2 Black (67 U.S.) 635; 17 L.Ed. 459 (1863)
Vote: 5–4

A few days after the Confederate attack on Fort Sumter but before Congress had formally recognized the existence of civil war, President Abraham Lincoln ordered a blockade of Southern ports. Owners of ships seized by the blockade brought suit in federal court challenging the legality of the president's order. From adverse judgments in the lower courts, the owners took an appeal to the Supreme Court.

Mr. Justice Grier [delivered the opinion of the Court].

. . . By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. . . .

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. . . .

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local

unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. . . .

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the Government of the United States of America and certain States styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is stopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious sophisms. . . .

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and exclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case. . . .

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress . . . in anticipation of such astute objections, passing an act "approving legalizing, and making valid all the acts, proclamations, and orders of the President, as if they had been issued and done under the precious express authority and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress . . . this ratification has operated to perfectly cure the defect. . . .

The objection made to this act of ratification, that it is *ex post facto,* and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question, therefore, we are of the opinion that the President had a right . . . to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

We come now to the consideration of the second question. What is included in the term "enemies' property"?

The appellants contend that the term "enemy" is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. . . .

They contend, also, that insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offense, and finally that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national Government, and consequently that the Constitution and Laws of the United States are still operative over persons in all the States for punishment as well as protection.

This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battlefield or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to

support the war, cannot be made the subject of capture under the laws of war, because it is "unconstitutional." Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights. . . . Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar Constitution of this Government, although the citizens owe supreme allegiance to the Federal government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have acted as States claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. . . .

Mr. Justice Nelson, dissenting.

. . . The truth is, this idea of the existence of any necessity for clothing the President with the war power, under the Act of 1795, is simply a monstrous exaggeration; for, besides having the command of the whole of the army and navy, Congress can be assembled within any thirty days, if the safety of the country requires that the war power shall be brought into operation.

The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon the ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war . . . convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the State can be punished in his person or property, unless he has committed some offence against a law of Congress passed before the act was committed, which made it a crime, and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted. . . .

Mr. Justice Taney, Mr. Justice Catron, and ***Mr. Justice Clifford*** concurred in the dissenting opinion of ***Mr. Justice Nelson.***

Case

KOREMATSU V. UNITED STATES

323 U.S. 214; 65 S.Ct. 193; 89 L.Ed. 194 (1944)
Vote: 6–3

In this case the Court considers the constitutionality of an executive order under which the military "relocated" thousands of Japanese Americans from their homes on the West Coast during the Second World War.

Mr. Justice Black delivered the opinion of the Court.

The petitioner [Korematsu], an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 . . . which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to [Korematsu's] loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometime justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of [Korematsu] was begun by information charging violation of an Act of Congress, of March 21, 1942, . . . which provides that . . . "whoever shall enter, remain in, leave, or commit any act

in any military area or military zone prescribed, under the authority of an Executive order of the President, . . . contrary to the restrictions applicable to any such area or zone . . . shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which [Korematsu] knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066. . . . That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities." . . .

One of the series of orders and proclamations, a curfew order, . . . subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 P.M. to 6 A.M. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi v. United States* (1943) we sustained a conviction obtained for violation of the curfew order. . . .

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. . . .

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 P.M. to 6 A.M. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case [Korematsu] challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case, . . . " . . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have grounds for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it." . . .

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the entire group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when [Korematsu] violated it. . . . In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. . . . But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and

in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. . . .

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confused the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified. . . .

Mr. Justice Frankfurter, concurring. . . .

Mr. Justice Roberts [dissenting]. . . .

Mr. Justice Murphy, dissenting.

. . . The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. . . . Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast "all persons of Japanese ancestry, both alien and non-alien," clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law. . . .

That this forced exclusion was the result in good measure of [the] erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies . . . at large today" along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. . . .

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relations between the group characteristics of Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation. A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. . . .

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy,

from which it is inferred that the entire group of Japanese Americans could not be or remain loyal to the United States. . . . But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. . . . To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. . . .

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

Mr. Justice Jackson, dissenting.

. . . [I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it. . . .

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. . . .

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not. . . .

. . . [O]nce a judicial opinion rationalizes . . . an order [such as the Civilian Exclusion Order] to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case. . . .

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy. . . . My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution.

I would reverse the judgment and discharge the prisoner.

Case

HAMDAN V. RUMSFELD

548 U.S. ___; 126 S. Ct. 2749; 165 L.Ed. 2d 723 (2006)
Vote: 5–3

On November 13, 2001, President Bush issued an executive order authorizing the use of military tribunals to try foreign nationals apprehended in the war on terrorism. Salim Ahmed Hamdan, a Yemeni national detained at the American military base at Guantanamo Bay, Cuba, brought suit to challenge the legality and constitutionality of the military tribunal before which he was to be tried. Hamdan argued that President Bush had "claimed the unilateral authority to try suspected terrorists wholly outside the traditional civilian and military judicial systems, for crimes defined by the President alone, under procedures lacking basic protections, before judges who are his chosen subordinates." In Hamdan's view, the president's actions "reach far beyond any war power ever conferred upon the Executive, even during declared wars."

Justice Stevens announced the judgment of the Court. . . .

For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ (Uniform Code of Military Justice) and the Geneva Conventions. Four of us also conclude . . . that the offense with which Hamdan has been charged is not an "offens[e] that by . . . the law of war may be tried by military commissions." . . .

I

Congress responded [to the September 11th, 2001 attacks] by adopting a Joint Resolution [the Authorization for Use of Military Force, or AUMF] authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." . . . Acting pursuant to the AUMF, and having determined that the Taliban regime had supported al Qaeda, the President ordered the Armed Forces of the United States to invade Afghanistan. In the ensuing hostilities, hundreds of individuals, Hamdan among them, were captured and eventually detained at Guantanamo Bay . . . While the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order . . . [applied to] any noncitizen for whom the President determines "there is reason to believe" that he or she (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States . . . Any such individual "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death." . . . The [Presidential] Order vested in the Secretary of Defense the power to appoint military commissions to try individuals . . . [T]he President [then] announced his determination that Hamdan and five other detainees at Guantanamo Bay were subject to the November 13 Order and thus triable by military commission . . .

II

. . . [W]e granted certiorari to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings. . . .

III

[In this section of the opinion, Justice Stevens addresses the Government argument that the recently enacted Detainee Treatment Act of 2005 (DTA), which contains several provisions regulating the types of challenges that can be brought by persons tried by military commissions, had the effect of divesting the federal courts of all pending challenges, including Hamdan's. The Government also argued under principles announced in Schelsinger v. Councilman (1975), that civilian courts should await the outcome of "on-going military proceedings before entertaining an attack on those proceedings." Stevens rejects both arguments and proceeds to the merits of the dispute before the Court.]

IV

. . . Exigency alone, of course, will not justify the establishment and use of penal tribunals . . . unless some other part of that document authorizes a response to the felt need. And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war . . .

. . . The Government would have us . . . find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military

commissions. First, while we assume that the AUMF activated the President's war powers . . . and that those powers include the authority to convene military commissions in appropriate circumstances . . . there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.

Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Article 21 or the AUMF, was enacted after the President had convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. The DTA obviously "recognize[s]" the existence of the Guantanamo Bay commissions in the weakest sense . . . because it references some of the military orders governing them and creates limited judicial review of their "final decision[s]," . . . But the statute also pointedly reserves judgment on whether "the Constitution and laws of the United States are applicable" in reviewing such decisions and whether, if they are, the "standards and procedures" used to try Hamdan and other detainees actually violate the "Constitution and laws." . . .

Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is . . . to decide whether Hamdan's military commission is so justified. . . .

V

[Part V of Justice Stevens's opinion is a plurality opinion, in which four justices conclude that the charges against Hamdan—that is, conspiracy to commit crimes that occurred before the attacks of September 11, 2001, and the enactment of the AUMF—are not triable by military commission.]

. . . [It] is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge "properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction*." . . . The question is whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.

The charge against Hamdan . . . alleges a conspiracy extending over a number of years, from 1996 to November 2001 . . . Neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.

These facts alone cast doubt on the legality of the charge and, hence, the commission; . . . the offense alleged must have been committed both in a theater of war and *during,* not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore—indeed are symptomatic of—the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission . . .

At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction . . . and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war. . . . [I]t is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt . . .

. . . Because the charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan . . .

VI

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations," . . . including, *inter alia,* the four Geneva Conventions signed in 1949 . . . The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws . . .

Hamdan raises both general and particular objections to the procedures set forth . . . His general objection is that the procedures' admitted deviation from those governing courts-martial itself renders the commission illegal. Chief among his particular objections are that he may, under the Commission Order, be convicted based on evidence he has not seen or heard, and that any evidence admitted against him need not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings . . .

One of Hamdan's complaints is that he will be, and *indeed already has been,* excluded from his own trial . . . Under these circumstances, review of the procedures in advance of a "final decision"—the timing of which is left

entirely to the discretion of the President under the DTA—is appropriate . . .

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it . . . . Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ—however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.

Hamdan argues . . . that the procedures described . . . are inconsistent with the UCMJ and that the Government has offered no explanation for their deviation from the procedures governing courts-martial . . . Among the inconsistencies Hamdan identifies is [the] exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances, and the UCMJ's requirement that "[a]ll . . . proceedings" other than votes and deliberations by courts-martial "shall be made a part of the record and shall be in the presence of the accused." Hamdan also observes that the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.

. . . [W]e conclude that the "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. Subsection (b) [of Article 36 of the UCMJ] . . . demands that the rules applied in courts-martial, provost courts, and military commissions—whether or not they conform with the Federal Rules of Evidence—be "uniform *insofar as practicable*." Under the . . . provision, then, the rules set forth . . . must apply to military commissions unless impracticable.

The President here has determined, pursuant to subsection (a), that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts," to Hamdan's commission. We assume that complete deference is owed that determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial . . . [and] . . . the requirements . . . are not satisfied here.

Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case . . . [I]t is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.

The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter . . . Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections . . . That Article not having been complied with here, the rules specified for Hamdan's trial are illegal.

The procedures adopted to try Hamdan also violate the Geneva Conventions . . .

. . . [T]here is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories . . .

. . . Common Article 3 . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning . . .

. . . [T]he official commentaries accompanying Common Article 3 . . . make clear "that the scope of the Article must be as wide as possible" . . .

Common Article 3 . . . requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The commentary accompanying a provision of the Fourth Geneva Convention . . . defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." . . .

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." . . . [T]his phrase is not defined in the text of the Geneva Conventions . . . But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law.

We agree . . . that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any "evident practical need," . . . and for that reason, at least, fail to afford the requisite guarantees. We add only that . . . various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him . . . That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted . . . But, at

least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

VII

We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge . . . that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction . . .

The Chief Justice took no part in the consideration or decision of this case.

Justice Breyer, concurring.

. . . The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.

Justice Kennedy, concurring in part.

Military Commission Order No. 1, which governs the military commission established to try petitioner Salim Hamdan for war crimes, exceeds limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military courts. This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.

. . . [T]he circumstances of Hamdan's trial present no exigency requiring special speed or precluding careful consideration of evidence . . . [T]he Court is correct to conclude that the military commission the President has convened to try Hamdan is unauthorized . . .

. . . [T]he structure and composition of the military commission deviate from conventional court-martial standards. Although these deviations raise questions about the fairness of the trial, no evident practical need explains them . . .

. . . [A]s presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority [through] the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.

There should be reluctance, furthermore, to reach unnecessarily the question whether, as the plurality seems to conclude . . . [that] the Geneva Conventions is binding law . . . For all these reasons, and without detracting from the importance of the right of presence, I would rely on other deficiencies noted here and in the opinion by the Court—deficiencies that relate to the structure and procedure of the commission and that inevitably will affect the proceedings—as the basis for finding the military commissions lack authorization . . . and fail to be regularly constituted under Common Article 3 . . .

Justice Scalia, dissenting.

On December 30, 2005, Congress enacted the Detainee Treatment Act (DTA). It unambiguously provides that, as of that date, "no court, justice, or judge" shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee. Notwithstanding this plain directive, the

Court today concludes that, on what it calls the statute's *most natural* reading, *every* "court, justice, or judge" before whom such a habeas application was pending on December 30 has jurisdiction to hear, consider, and render judgment on it. This conclusion is patently erroneous. And even if it were not, the jurisdiction supposedly retained should, in an exercise of sound equitable discretion, not be exercised . . .

Justice Thomas, dissenting.

For the reasons set forth in Justice Scalia's dissent, it is clear that this Court lacks jurisdiction to entertain petitioner's claims . . . The Court having concluded otherwise, it is appropriate to respond to the Court's resolution of the merits of petitioner's claims because its opinion openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs. The Court's evident belief that *it* is qualified to pass on the "[m]ilitary necessity," of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered. I respectfully dissent.

After seeing the plurality overturn longstanding precedents in order to seize jurisdiction over this case . . . and after seeing them disregard the clear prudential counsel that they abstain in these circumstances from using equitable powers, . . . it is no surprise to see them go on to overrule one after another of the President's judgments pertaining to the conduct of an ongoing war . . . The plurality's willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both unprecedented and dangerous . . . function, and thus operates pursuant to different procedures.

Justice Alito, dissenting.

There is no reason why a court that differs in structure or composition from an ordinary military court must be viewed as having been improperly constituted. Tribunals that vary significantly in structure, composition, and procedures may all be "regularly" or "properly" constituted . . .

Insofar as respondents propose to conduct the tribunals according to the procedures of Military Commission Order No. 1 and orders promulgated thereunder—and nobody has suggested respondents intend otherwise—then it seems that petitioner's tribunal, like the hundreds of others respondents propose to conduct, is very much regular . . .

. . . If a particular accused claims to have been unfairly prejudiced by the admission of particular evidence, that claim can be reviewed in the review proceeding for that case. It makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case . . .

Case

UNITED STATES V. U.S. DISTRICT COURT

407 U.S. 297; 92 S.Ct. 2125; 32 L. Ed. 2d 752 (1972)
Vote: 8–0

Three defendants were charged with conspiracy to destroy government property. One of them, Plamondon, was also charged with the bombing of a CIA office in Ann Arbor, Michigan. Defendants filed a pretrial motion to compel disclosure of information the government had obtained through electronic surveillance that had not been judicially approved. The government asserted that the surveillance was lawful as a reasonable exercise of the president's power to protect national security. The U.S. District Court for the Eastern District of Michigan held that the government's surveillance violated the Fourth Amendment prohibition against unreasonable searches and seizures. The U.S. Court of Appeals for the Sixth Circuit agreed.

Mr. Justice Powell delivered the opinion of the Court.

. . . Title III of the Omnibus Crime Control and Safe Streets Act authorizes the use of electronic surveillance for classes of crimes carefully specified in 18 U.S.C. § 2516. Such surveillance is subject to prior court order. Section 2518 sets forth the detailed and particularized application necessary to obtain such an order as well as carefully circumscribed conditions for its use. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in *Berger v. New York* . . . (1967) and *Katz v. United States* . . . (1967).

Together with the elaborate surveillance requirements in Title III, there is the following proviso, 18 U.S.C. § 2511 (3):

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power. . . .

The Government relies on § 2511 (3). It argues that "in excepting national security surveillances from the Act's warrant requirement Congress recognized the President's authority to conduct such surveillances without prior judicial approval." The section thus is viewed as a recognition or affirmance of a constitutional authority in the President to conduct warrantless domestic security surveillance such as that involved in this case.

We think the language of § 2511 (3), as well as the legislative history of the statute, refutes this interpretation. The relevant language is that: "Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect . . ." against the dangers specified. At most, this is an implicit recognition that the President does have certain powers in the specified areas. Few would doubt this, as the section refers—among other things—to protection "against actual or potential attack or other hostile acts of a foreign power." But so far as the use of the President's electronic surveillance power is concerned, the language is essentially neutral.

Section 2511 (3) certainly confers no power, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them. This view is reinforced by the general context of Title III. Section 2511 (1) broadly prohibits the use of electronic surveillance "except as otherwise specifically provided in this chapter." Subsection (2) thereof contains four specific exceptions. In each of the specified exceptions, the statutory language is as follows: "It shall not be unlawful . . . to intercept" the particular type of communication described.

The language of subsection (3), here involved, is to be contrasted with the language of the exceptions set forth in the preceding subsection. Rather than stating that warrantless presidential uses of electronic surveillance "shall not be unlawful" and thus employing the standard language of exception, subsection (3) merely disclaims any intention to "limit the constitutional power of the President." . . .

The legislative history of § 2511 (3) supports this interpretation. . . .

. . . If we could accept the Government's characterization of § 2511 (3) as a congressionally prescribed exception to the general requirement of a warrant, it would be necessary to consider the question of whether the surveillance in this case came within the exception and, if so, whether the statutory exception was itself constitutionally valid. But viewing § 2511 (3) as a congressional disclaimer and expression of neutrality, we hold that the statute is not the measure of the executive authority asserted in this case. Rather, we must look to the constitutional powers of the President. It is important at the outset to emphasize the limited nature of the question before the Court. This case raises no constitutional challenge to electronic surveillance as specifically authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Nor is there any question or doubt as to the necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest. . . . Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country. The Attorney General's affidavit in this case states that the surveillances were "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government." There is no evidence of any involvement, directly or indirectly, of a foreign power. . . .

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, "to preserve, protect, and defend the Constitution of the United States." Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the

Government. The use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946. Herbert Brownell, Attorney General under President Eisenhower, urged the use of electronic surveillance both in internal and international security matters on the grounds that those acting against the Government "turn to the telephone to carry on their intrigue. The success of their plans frequently rests upon piecing together shreds of information received from many sources and many nests. The participants in the conspiracy are often dispersed and stationed in various strategic positions in government and industry throughout the country." . . .

Though the Government and respondents debate their seriousness and magnitude, threats and acts of sabotage against the Government exist in sufficient number to justify investigative powers with respect to them. The covertness and complexity of potential unlawful conduct against the Government and the necessary dependency of many conspirators upon the telephone make electronic surveillance an effective investigatory instrument in certain circumstances. The marked acceleration in technological developments and sophistication in their use have resulted in new techniques for the planning, commission and concealment of criminal activities. It would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of those very techniques which are employed against the Government and its law-abiding citizens.

It has been said that "the most basic function of any government is to provide for the security of the individual and of his property." . . . And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered. . . .

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy. Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance. . . . Our decision in *Katz* refused to lock the Fourth Amendment into instances of actual physical trespass. Rather, the Amendment governs "not only the seizure of tangible items, but extends as well to the recording of oral statements without any technical trespass under . . . local property law." . . . That decision implicitly recognized that the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards.

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." . . . History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. Senator Hart addressed this dilemma in the floor debate on § 2511 (3): "As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government." . . . The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression. If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.

Though the Fourth Amendment speaks broadly of "unreasonable searches and seizures," the definition of "reasonableness" turns, at least in part, on the more specific

commands of the warrant clause. Some have argued that "the relevant test is not whether it was reasonable to procure a search warrant, but whether the search was reasonable." . . . This view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead language. Rather it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in the courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." . . .

Over two centuries ago, Lord Mansfield held that common law principles prohibited warrants that ordered the arrest of unnamed individuals whom the officer might conclude were guilty of seditious libel. "It is not fit," said Mansfield, "that the receiving or judging of the information ought to be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." . . . Lord Mansfield's formulation touches the very heart of the Fourth Amendment directive: that where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. Inherent in the concept of a warrant is its issuance by a "neutral and detached magistrate." . . . The further requirement of "probable cause" instructs the magistrate that baseless searches shall not proceed.

These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the executive branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate and to prosecute. . . .

But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. It may well be that, in the instant case, the Government's surveillance of Plamondon's conversations was a reasonable one which readily would have gained prior judicial approval. But this Court "has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." . . .

The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government. . . . The independent check upon executive discretion is not satisfied, as the Government argues, by "extremely limited" post-surveillance judicial review. Indeed, post-surveillance review would never reach the surveillances which failed to result in prosecutions. Prior review by a neutral and detached magistrate is the time tested means of effectuating Fourth Amendment rights. . . .

It is true that there have been some exceptions to the warrant requirement. . . . But those exceptions are few in number and carefully delineated; in general they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." . . .

The Government argues that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. It is urged that the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security. We are told further that these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions. It is said that this type of surveillance should not be subject to traditional warrant requirements which were established to govern investigation of criminal activity, not on-going intelligence gathering.

The Government further insists that courts "as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security." These security problems, the Government contends, involve "a large number of complex and subtle factors" beyond the competence of courts to evaluate.

As a final reason for exemption from a warrant requirement, the Government believes that disclosure to a

magistrate of all or even a significant portion of the information involved in domestic security surveillances "would create serious potential dangers to the national security and to the lives of informants and agents. . . . Secrecy is the essential ingredient in intelligence gathering; requiring prior judicial authorization would create a greater danger of leaks . . . , because in addition to the judge, you have the clerk, the stenographer and some other official like a law assistant or bailiff who may be apprised of the nature of the surveillance." . . .

These contentions in behalf of a complete exemption from the warrant requirement, when urged on behalf of the President and the national security in its domestic implications, merit the most careful consideration. We certainly do not reject them lightly, especially at a time of worldwide ferment and when civil disorders in this country are more prevalent than in the less turbulent periods of our history. There is, no doubt, pragmatic force to the Government's position.

But we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete exemption of domestic security surveillance from prior judicial scrutiny. Official surveillance, whether its purpose be criminal investigation or on-going intelligence gathering, risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent. We recognize, as we have before, the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment. In this case we hold that this requires an appropriate prior warrant procedure.

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of ordinary crime. If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering. The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases. . . . Whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the Government itself to provide the necessary clerical assistance.

Thus, we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values. Nor do we think the Government's domestic surveillance powers will be impaired to any significant degree. A prior warrant establishes presumptive validity of the surveillance and will minimize the burden of justification in post-surveillance judicial review. By no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.

We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents. . . .

As the surveillance of Plamondon's conversations was unlawful, because conducted without prior judicial approval, the courts below correctly held that . . . [precedent] requires disclosure to the accused of his own impermissibly intercepted conversations. As stated in Alderman, "the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect." . . .

The ***Chief Justice*** concurs in the result.

Mr. Justice Rehnquist took no part in the consideration or decision of this case.

Mr. Justice Douglas, concurring. . . .

Mr. Justice White, concurring in the judgment. . . .

4 The Constitution and The Modern Administrative State

Chapter Outline

"The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."

—Chief Justice Warren E. Burger, Writing for the Court in *Immigration and Naturalization Service v. Chadha* (1983)

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INTRODUCTION

Even a cursory examination of American constitutional history reveals that the role of the federal government has changed dramatically in the two centuries since the Constitution was adopted. In the early days of the republic, the scope of the national government essentially followed the classical liberal dictum that "that government is best which governs least." For the most part, the national government left such functions as social welfare and education to state and local governments and concerned itself with the regulation of foreign trade, internal improvements such as canals and post roads, and the protection of the national security. State and local governments, in turn, tended to leave matters of social welfare and education to neighborhoods, churches, and families. Perhaps most fundamentally, individuals were regarded as responsible for their own problems as well as their own good fortune.

For many years, the national government was seen neither as "big brother" nor *parens patriae*. In the wake of post–Civil War industrialization and the emergence of an economy dominated by giant corporations, the limited role of the national government began to change. A new ethos emerged, one in which the public looked to government to solve social and economic problems. With the passage of the Interstate Commerce Act in 1887 and the concomitant establishment of the Interstate Commerce Commission, the relatively unobtrusive government envisaged by the founders began to evolve in the direction of ever more complex and intrusive regulation. The era of Progressive reform and the subsequent New Deal contributed mightily to the growth of such regulation.

The years elapsing since the New Deal have witnessed the institutionalization of the **modern administrative state.** The administrative state is the sum total of all the agencies that comprise the executive branch of the contemporary federal government. These include the fifteen major executive departments (see Table 4.1) and more than sixty "independent" agencies variously denominated as boards, administrations,

TABLE 4.1 The Fifteen Cabinet-Level Departments

Department	Year Established (in present form)
State	1789
Treasury	1789
Interior	1849
Agriculture	1862
Justice	1870
Labor	1913
Commerce	1913
Defense	1949
Housing and Urban Development	1965
Transportation	1966
Energy	1977
Education	1979
Health and Human Services	1979
Veterans Affairs	1989
Homeland Security	2002

commissions, bureaus, institutes, councils, services, authorities, and foundations. Charged with running programs, making and enforcing regulations, and even adjudicating disputes, these departments and independent agencies carry out the day-to-day work of the federal government. They also play an important role in the development and implementation of public policy.

From Classical to Modern Liberalism

Whereas classical liberals such as John Locke and Thomas Jefferson espoused minimal government as consistent with the ideal of individual freedom, liberal theorists of the late nineteenth and early twentieth centuries sought to justify a broader role for government. Social theorists such as John Dewey advocated an expanded governmental role in part to realize the ideal of socioeconomic equality in an industrialized economy in which gross disparities existed between rich and poor. For modern liberal economists such as John Maynard Keynes, a greater degree of government intervention was necessary to smooth off the rough edges of the business cycle in order to avoid the wild swings between periods of dramatic growth and periods of recession or even depression. According to the Keynesian perspective—dominant during the New Deal era—the very survival of capitalism depended on successful governmental management of the economy. In the decades following the New Deal, the American intellectual community, as exemplified in the work of the economist John Kenneth Galbraith, embraced the concept of "proactive" government—that is, government committed to progress through regulation, redistribution, and planning.

Today, the national government is regarded by most Americans as responsible for the social and economic well being of the nation. No doubt, this expanded role of government has been reinforced by the ideas of Dewey, Keynes, and Galbraith. As a practical matter, however, the influence of pluralist politics has been even more conspicuous. One need only consider the success of numerous interest groups in shaping, perpetuating, and often enlarging government programs created (in theory) to advance the public interest. Students of American politics have long recognized that government regulators are apt to be more influenced by the interests of those who are to be regulated than by abstract notions of responsible government.

The existence of the modern administrative state poses serious questions of constitutional law—questions involving the foundational principles of limited government, the rule of law, separation of powers, federalism, and individual liberty. This chapter is concerned primarily with separation of powers; the problems of legislative, presidential, and judicial control of the federal bureaucracy; and the relationship between bureaucratic power and individual rights.

THE DELEGATION OF LEGISLATIVE POWER

The expansive role now played by the national government renders the legislative task of Congress considerably more difficult. In an increasingly complex society characterized by technological sophistication and economic interdependence, the sheer magnitude of problems demanding congressional attention and the practical difficulties of regulation obviously limit the ability of Congress to legislate comprehensively, much less effectively. Indeed, this complexity and attendant impracticability, coupled with the pluralistic politics of the legislative process, make it difficult for Congress to fashion rules that can be enforced with any degree of certainty or predictability.

At the same time, the deliberate, tortoise-like pace of the legislative process makes it all but impossible for Congress to respond promptly to changing objective conditions,

making meaningful, relevant regulations almost inconceivable. Thus, given the expansive scope of government, the nature of the legislative process, and the fact that many of the subjects of regulation are both complex and esoteric, Congress has come to rely more and more on "experts" for the development as well as the implementation of regulations. These experts are found in a host of government departments, commissions, agencies, boards, and bureaus that comprise the modern administrative state.

Through a series of broad delegations of legislative power, Congress has transferred to the **federal bureaucracy** much of the responsibility for making and enforcing the rules and regulations deemed necessary for a technological society. The Food and Drug Administration (FDA), the Nuclear Regulatory Commission (NRC), the Federal Aviation Administration (FAA), the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and the Securities and Exchange Commission (SEC) are just a few of the myriad government agencies to which Congress has delegated broad authority to make public policy.

Frequently, the enabling legislation creating these agencies provides little more than vague generalities to guide agency **rule making.** For example, in 1970 Congress gave OSHA the power to make rules that are "reasonably necessary or appropriate to provide safe and healthful employment and places of employment." The rules promulgated by OSHA as "necessary" or "appropriate" take on all the force of law.

An excellent example of legislative delegation is seen in the Americans with Disabilities Act (ADA) of 1990. The ADA, which built on the existing body of federal civil rights law, mandates the elimination of discrimination against individuals with disabilities. A number of federal agencies—including the Department of Justice, the Department of Transportation, the Equal Employment Opportunity Commission (EEOC), and the Federal Communications Commission (FCC)—are given extensive regulatory and enforcement powers under the act. As one of the many regulations that have been adopted in support of the statute, the Department of Justice published in the *Federal Register* a final rule prohibiting discrimination on the basis of disability in the provision of state and local government services. Twenty-nine pages of the *Federal Register* of July 26, 1991, are devoted to this one rule. Hundreds of pages of the *Code of Federal Regulations* are devoted to regulations implementing this act alone.

It is argued that broad delegations of legislative power are necessary so that agencies can develop the programs required to deal with targeted problems. These delegations of power may be to a great extent desirable or even inevitable, but they do raise serious questions of constitutional theory.

Concern for Representative Government

Although various factors have prompted Congress to delegate degrees of legislative power to the executive branch and to the **independent agencies,** the practice does not comport well with a traditional understanding of the Constitution. Specifically, two constitutional values are arguably infringed by legislative delegation. The first is the principle of representative government that lies within the grant of legislative power to Congress, whose members are chosen by the people. The constitutional grant of legislative power to an elected institution reflects the fundamental national commitment to the idea of democracy, albeit in a form limited by constitutional strictures. The **delegation of legislative power** to unelected bureaucrats can be viewed as antithetical to the ideal of **representative government.** Indeed, John Locke, the political philosopher whose ideas were most influential on America's founders, observed in his *Second Treatise of Government* (1690) that: "The *Legislative cannot transfer the Power of Making Laws* to any other hands. For it being but a delegated Power from the People, they who have it, cannot pass it over to others."

Concern for the Separation of Powers

Furthermore, delegation is difficult to square with the principle of **separation of powers** implicit in the very structure of the Constitution. Article I vests all legislative power in the Congress. Thus, when Congress delegates legislative power to the executive branch, it can be viewed as violating the implicit constitutional principles of representative government and separation of powers, as well as the express language of Article I. In *J. W. Hampton & Company v. United States* (1928), Chief Justice William Howard Taft recognized the constitutional problem raised by legislative delegation: "[I]n carrying out that Constitutional division into three branches it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law attempts to vest itself of either executive or judicial power."

Taft's essential point was that if the Constitution imposes meaningful limitations on government, then Congress must be very careful in transferring its own power to the other branches. On the other hand, we have already noted the radical change to a political ethos in which active, affirmative government is regarded as legitimate and even essential. Is it possible to have both an effective separation of powers and proactive government? As our system has evolved, the primary responsibility for reconciling political reality with constitutional principle has come to rest with the Supreme Court. Unfortunately, the Court has seldom been able to harmonize theory and reality in this context. Thus, it can be argued that the Court's decisions do not reflect a coherent constitutional theory justifying the modern administrative state.

Delegation in the Context of Foreign Affairs

The Supreme Court first encountered the issue of delegation of legislative power in *Brig Aurora v. United States* (1813). The case arose in connection with American efforts to remain neutral during the Napoleonic Wars. One measure designed to ensure this neutrality was the Non-Intercourse Act of 1809. The act granted to the president the power to impose an embargo against either Great Britain or France, depending on the president's determination of specific facts. If the president found that either nation ceased "to violate neutral commerce" involving American ships, he was free to impose an embargo on the remaining offender. President James Madison determined that France was the first to comply and thus initiated an embargo against Great Britain. The Supreme Court sustained the act against a constitutional challenge, holding that the president's role was merely one of fact finding, rather than lawmaking. Thus, in the Court's view, no unconstitutional delegation of power had taken place.

The Supreme Court handed down a similar ruling some eighty years later in *Field v. Clark* (1892). In this case, the Court upheld the Tariff Act of 1890, which imposed tariffs on certain imports if, in the president's judgment, the exporting country placed "reciprocally unequal and unreasonable" tariffs on American products. Here again the Court viewed the president's role as one of fact finder, rather than lawmaker, and thus upheld the challenged act. Speaking for the majority, Justice John M. Harlan (the elder) noted that:

> The Act . . . does not in any real sense invest the President with the power of legislation. . . . Legislative power was exercised when Congress declared that [enforcement of the tariffs] should take effect upon a named contingency.

In 1928, however, the Court sustained "contingency" tariff legislation that not only allowed presidential discretion as to when to apply a tariff but also granted the

president the power to alter the tariff rate. In *J. W. Hampton & Company v. United States,* the Court expanded the permissible scope of legislative delegations by holding that: If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.

It should be noted that the challenged delegations in *Brig Aurora, Field v. Clark,* and *Hampton* dealt primarily with foreign affairs. In *United States v. Curtiss-Wright Export Corporation* (1936) (discussed and reprinted in the previous chapter), the Supreme Court made it clear that delegations of legislative power in the field of foreign affairs must be assessed on different grounds from delegations involving domestic matters.

Since the executive branch has been recognized as "the sole organ of the Federal government in the field of international relations," no clear standards govern delegations of power to the president in this area. In *Zemel v. Rusk* (1965), the Court elaborated on this view by saying that "Congress—in giving the Executive broad authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic affairs."

Delegation in the Domestic Context

Although the Supreme Court has expressed more reservations about congressional delegation in the domestic sphere, the end result has been essentially the same—that is, to rationalize and uphold vast transfers of power from Congress to other branches and agencies of government. Implicitly acknowledging this "bottom-line" similarity, the Court has applied the **intelligible principle standard** of the *Hampton* case in assessing delegations of congressional power on the domestic side, as well as in foreign policy contexts. In fact, this parallel appeared in the Court's earliest decisions regarding delegation in the domestic sphere.

The first challenge to such a delegation of power occurred in *Wayman v. Southard* (1825). There, the Supreme Court upheld a congressional grant of power to the Court to determine its own rules of procedure. Given his desire to maximize the independence and power of the Supreme Court, it is not surprising that Chief Justice John Marshall held this delegation to be constitutional. In Marshall's view, the transfer of power was justified because (1) the subject was of "less interest" to the Congress than to the Court, and (2) the Court was merely "filling in the details" of a more general congressional provision. Of Marshall's two justifications, the latter survived to guide subsequent Court decisions in this area. This was essentially the position taken by the Court in the *Hampton* case, when the Court allowed delegations as long as executive discretion was guided by an "intelligible principle." In two significant cases during the New Deal era, the Supreme Court demonstrated that the **nondelegation doctrine** could be more than a mere exhortation to Congress.

In *Panama Refining Company v. Ryan* (1935) and *Schechter Poultry Corporation v. United States* (1935), the Court struck down provisions of the National Industrial Recovery Act (NIRA) on grounds of nondelegability. In *Panama v. Ryan,* also known as the hot oil case, the Court invalidated the NIRA's grant of power to President Franklin D. Roosevelt to exclude from interstate commerce oil produced in violation of state regulation. In striking down this provision, the Court noted that the Congress requires "flexibility and practicality . . . to perform its function in laying down principles and establishing standards." The Court also acknowledged that Congress often must delegate to "selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." Yet, while it was willing to allow limited delegations of power to the executive branch, the majority in the hot oil case viewed the NIRA as granting

broad legislative power to the president, "without standard or rule, to be dealt with as he pleased." As such, it was an unacceptable delegation.

In *Schechter,* commonly known as the sick chicken case, the Court invalidated a key section of the NIRA that allowed the executive branch to promulgate "codes of fair competition" for a broad range of industries. These codes, developed in some cases in cooperation with targeted industries, were enforceable by criminal and civil penalties established by Congress. The Schechter Poultry Corporation was convicted on several counts of violating the Live Poultry Code developed by the National Recovery Administration (NRA). The development of this code was obviously based on a broad delegation of legislative power. The crucial issue was whether the delegation was accompanied by standards sufficiently clear to pass constitutional muster.

Although the preamble of the National Industrial Recovery Act had announced such general purposes as curbing unfair competition, increasing productivity, and otherwise rehabilitating industry, the grant of power to establish codes did not carry standards satisfactory to the Court. Rather, the Court asserted that the NIRA granted "virtually unfettered" discretion to the president to enact "laws for the government of trade and industry throughout the country." As such, the NIRA could not pass the nondelegation test.

The Permissiveness of the Modern Court

The *Panama Refining Company* and *Schechter* cases stand out as the only two instances in which the Supreme Court has invalidated federal statutes on grounds that Congress impermissibly delegated its lawmaking power to the executive branch. It must be recognized that these cases were part and parcel of a larger battle between the Court and the Roosevelt administration over the New Deal. Many of the Court's critics were inclined to see the decisions in *Panama Refining Company* and *Schechter* as political attacks on the New Deal, rather than neutral applications of constitutional principle. It is noteworthy that since the mid-1930s, the Court has not invoked the nondelegation doctrine to strike down any act of Congress, despite many sweeping delegations of power to the executive branch.

The permissiveness of the post–New Deal Supreme Court in this area was clearly manifested in *Yakus v. United States* (1944). Here, the Court upheld the Emergency Price Control Act of 1942, which established the Office of Price Administration and vested it with wide latitude to control prices and rents. The Court's decision in *Yakus* might be viewed as turning on the temporary nature of the act and the fact that the nation was at war. Subsequent decisions have made it clear, however, that *Yakus* was no fluke but rather represented a trend of judicial tolerance toward congressional delegations of power.

Perhaps the best example of the permissive approach the Court has taken toward legislative delegation is *Arizona v. California* (1963). In this case, the Court sustained an extremely vague delegation of power to the Secretary of the Interior under the Boulder Canyon Act of 1928. The act gave the secretary almost unlimited discretion to allocate the water of the Colorado River (which had been dammed to create reservoirs) among seven states. In making such allocations, the secretary was to follow legislative priorities indicated in the act: "first, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights . . . ; and third, for [electrical] power." On the basis of these guidelines, it was difficult to determine whether the secretary was in fact acting within the "principles" established by Congress. The Court, however, gave Congress the benefit of the doubt, although not without a sharp dissent from Justice John M. Harlan (the younger). "Under the Court's construction of the Act," wrote Harlan,

"Congress has made a gift to the Secretary of almost one million, five hundred thousand acre feet of water a year, to allocate virtually as he pleases. . . . " No doubt aware of the inherent vagueness of the delegation it had sustained, the Court suggested that if the Secretary of the Interior acted in a fashion not consistent with congressional intent, Congress could reduce his power through subsequent legislation. Certainly this is not the approach to legislative delegations manifested in the *Hampton, Panama Refining Company,* and *Schechter* decisions.

In the 1970s, some members of the Court seemed ready to put the antidelegation doctrine to rest once and for all. For example, in *National Cable Association v. United States* (1974), Justice Thurgood Marshall's concurring opinion characterized the antidelegation rule as a remnant of a bygone era, the period before the "constitutional revolution" of 1937. According to Justice Marshall, the antidelegation rule "is surely as moribund as the substantive due process approach of the same era." Marshall's comments notwithstanding, a number of scholars have called for the revival of the nondelegation doctrine. In his influential book *The End of Liberalism* (1979), political scientist Theodore Lowi made a strong argument for resurrection of the *Schechter* rule.

In the early 1980s, certain members of the Supreme Court in fact indicated a desire to scrutinize legislative delegations more carefully. For example, in *Industrial Union Department v. American Petroleum Institute* (1980), the Court considered a challenge to an OSHA regulation that limited workers' exposure to benzene, a toxic chemical. Under law, OSHA was empowered to set exposure limits for toxic agents in the workplace so as to ensure "to the extent feasible" that employees would not suffer adverse health effects. The parties to the case differed on the meaning of the phrase "to the extent feasible." The American Petroleum Institute argued that the law required OSHA to demonstrate that the benefits of the regulation outweighed its costs. A four-member plurality of the Court did not reach this issue, however, because OSHA had not made the necessary determination that benzene posed a significant health risk at the prohibited level of exposure. In a concurring opinion, Justice William Rehnquist opined that the statutory provisions before the Court offended the nondelegation doctrine. The plurality, as well as the four dissenters, avoided the delegation issue altogether.

The very next term, in *American Textile Manufacturers Institute v. Donovan* (1981), the Court sustained an OSHA "cotton dust" regulation against a challenge from the textile industry. Here, Justice Rehnquist dissented, joined by Chief Justice Warren Burger. Rehnquist reiterated his view that the OSHA Act of 1970 "unconstitutionally delegated to the Executive Branch the authority to make the 'hard policy choices' properly the task of the legislature." Rehnquist elaborated:

> In believing . . . [the challenged provision of the OSHA statute] . . . amounts to an unconstitutional delegation . . . , I do not mean to suggest that Congress, in enacting a statute, must resolve all ambiguities or must "fill in all the blanks." Even the neophyte student of government realizes that legislation is the art of compromise, and that an important, controversial bill is seldom enacted by Congress in the form in which it is first introduced. It is not unusual for the various factions supporting or opposing a proposal to accept some departure from the language they would prefer. . . . But that sort of compromise is a far cry from this case, where Congress simply abdicated its responsibility for the making of a fundamental and most difficult policy choice.

In *Bowsher v. Synar* (1986), the Supreme Court was provided an excellent opportunity to revitalize the *Schechter* rule. The case raised the question of legislative delegation in the context of the spending power of Congress, clearly one of the most important legislative functions. In coping with the politically sensitive issue of the massive federal deficit, Congress adopted the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act.

This legislation required automatic cuts in federal spending in order to achieve a balanced budget. A constitutionally dubious provision of the law required such cuts to be made by the comptroller general if Congress proved unwilling or unable to legislate such cuts within a given timetable. Arguably, this represented a delegation of Congress's spending power to an unaccountable bureaucrat. To use language from Justice Rehnquist's dissent in *American Textile Manufacturers v. Donovan,* it could be argued that Congress, in delegating spending authority to the comptroller general, had "simply abdicated its responsibility for the making of a fundamental and most difficult policy choice." Only a few hours after President Reagan signed Gramm-Rudman-Hollings into law, a legal challenge was filed in federal court by Oklahoma Representative Mike Synar, joined by eleven other members of Congress. Their major objection to Gramm-Rudman-Hollings was the delegation of legislative power to unelected bureaucrats.

While Representative Synar ultimately won his lawsuit, the rationale adopted by the Supreme Court for invalidating the key provision of Gramm-Rudman-Hollings was quite different from that advanced by the plaintiff. Rather than holding that Congress had unconstitutionally delegated its spending power, the Court ruled 7 to 2 that since the comptroller general was an agent of Congress, not of the executive branch, Congress had encroached on the president's duty to "faithfully execute the laws." In the final opinion of his judicial career, Chief Justice Burger expressed the Court's view:

> Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch. Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch. . . . [W]e see no escape from the conclusion that, because Congress had retained removal authority over the Comptroller General, he may not be entrusted with executive powers.

Thus, the Court's rationale was nearly the inverse of the argument made by Representative Synar. According to the Court, the Gramm-Rudman-Hollings provision was flawed not because it delegated legislative power to unelected officials but because it vested an agent of Congress with powers of implementation properly belonging to the executive branch. In other words, the Court managed to invalidate Gramm-Rudman-Hollings on separation of powers grounds without invoking the antidelegation doctrine. In adopting this approach, the Court was simply following the *Ashwander* rules (see Chapter 1), which counsel the justices to adopt the narrowest possible grounds in striking down legislation. Had the Court chosen the broader nondelegation rationale, the entire statutory basis of the modern administrative state might have been called into question. Obviously, some critics of bureaucratic government would like nothing better. But given the realities of modern society, it seems highly unlikely that the Supreme Court will move very far in that direction.

The Court's long-standing reluctance to invoke the nondelegation doctrine was reaffirmed in its 1989 ruling upholding Congress's creation of the U.S. Sentencing Commission and recognizing the constitutionality of detailed sentencing guidelines promulgated by the commission in 1987 (*Mistretta v. United States* [1989]). Eight members of the Court rejected the argument that Congress had impermissibly delegated its power to prescribe ranges of criminal sentences that federal judges were required to impose on persons convicted of crimes. The Court also rejected the argument that Congress had violated the separation of powers principle by placing the sentencing commission within the judicial branch and authorizing it to establish legally binding sentencing guidelines. In a lone dissent, Justice Antonin Scalia asserted that the separation of powers principle had been violated, concluding that the new sentencing commission amounted to a "junior varsity Congress with extensive lawmaking power."

The contemporary Court's unwillingness to revive the nondelegation doctrine is illustrated by a 2001 decision upholding the broad regulatory authority of the Environmental Protection Agency. The EPA is perhaps the most powerful of the independent regulatory agencies of the federal government. Congress has delegated enormous responsibility to the EPA to deal with matters of air pollution, water pollution, environmental reclamation, and the transportation and disposal of hazardous chemicals and waste products. Accordingly, the EPA has long been a target for those who believe that the courts should more strictly apply the nondelegation doctrine. In *Whitman v. American Trucking Associations* (2001), the Supreme Court was afforded such an opportunity. The American Trucking Associations and other business interests challenged new EPA limits on ozone and soot, arguing, among other things, that the Clean Air Act under which the EPA promulgated the regulations constituted an impermissible delegation of legislative power. To the surprise of many observers, the Court was unanimous in rejecting the challenge to the EPA's authority. Writing for the Court, Justice Scalia observed that "[t]he scope of discretion [the challenged provision] allows is in fact well within the outer limits of our nondelegation precedents." Some Court watchers were surprised by Scalia's position, given his dissent in *Mistretta*. Quoting his *Mistretta* dissent, Scalia noted that "a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." The *Whitman* decision suggests strongly that the nondelegation doctrine, while officially viable, is not likely to be invoked to upset the institutional arrangements that have come to characterize the modern administrative state.

TO SUMMARIZE:

- Through a series of broad delegations of legislative power, Congress has transferred to the federal bureaucracy much of the responsibility for making and enforcing rules and regulations. Such delegations have been criticized on constitutional grounds. The nondelegation doctrine holds that Congress may not delegate the legislative power vested in it by the Constitution.
- In *Schechter Poultry Corporation v. United States* (1935), the Court struck down the National Industrial Recovery Act of 1933 on the ground that Congress had improperly delegated its legislative power to the executive branch. Since then, despite numerous opportunities, the Court has declined to invoke the nondelegation doctrine to invalidate any act of Congress.
- The position of the contemporary Supreme Court on the nondelegation doctrine is well illustrated by its unanimous decision in *Whitman v. American Trucking Associations* (2001), in which the Court upheld the Environmental Protection Agency's broad regulatory authority conferred by the Clean Air Act.

ADDITIONAL SEPARATION OF POWERS CONCERNS

The delegation of legislative power to the executive branch is not the only separation of powers problem arising from the structure of the modern administrative state. Congress has invested a number of agencies with **quasi-judicial authority** as well as quasi-legislative power. Numerous agencies have the power to adjudicate disputes involving the rights of private parties. Among the more obvious examples are the Nuclear Regulatory Commission and the Federal Communications Commission, both of which have the power to issue and revoke licenses necessary to operate enterprises thoroughly regulated by the federal government. Similarly, when a federal agency

holds a hearing before an **administrative law judge (ALJ)** on whether a particular claimant is entitled to a particular benefit, the agency is exercising quasi-judicial power. If an agency has the power to promulgate regulations, enforce those regulations, and decide the rights and duties of particular parties with respect to those regulations, then the agency is exercising all three of the basic functions that the Framers of the Constitution divided among three separate branches of government. In *The Federalist,* No. 47, James Madison observed that "accumulation of all powers, legislative, executive, and judiciary, in the same hands may justly be pronounced the very definition of tyranny."

How can the fusion of governmental powers in regulatory agencies be reconciled with the basic constitutional norm of separation of powers? Many would argue that it cannot, however, the Supreme Court has taken a pragmatic (some would say "permissive") view of the issue. In *Mistretta v. United States* (1989), the Court observed that "the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." The Court's approach with respect to the simultaneous exercise of legislative, executive, and judicial power by regulatory agencies appears to be one of insisting that agencies are subject to appropriate checks and balances exercised by Congress, the White House, and the courts.

In only a few instances has the Court overturned particular institutional arrangements based on the separation of powers doctrine. One such instance is the 1991 decision in *Metropolitan Washington Airports Authority (MWAA) v. Citizens for the Abatement of Aircraft Noise (CAAN)*. There the Court held that Congress had violated the separation of powers principle by authorizing the establishment of a board of review, consisting exclusively of members of Congress, with authority to veto decisions made by MWAA, an entity created by a compact between Virginia and Washington, D.C. The Court, in effect, saw the board of review as an agent of Congress and was not impressed by the formal requirement that board members act "in their individual capacities as representatives of airport users nationwide." Relying heavily on its recent precedents in the legislative veto case (discussed below) and *Bowsher,* the Court struck down an arrangement in which Congress was seeking to exercise control over an ostensibly independent regulatory entity through nonlegislative means. The MWAA case suggests that, contrary to the expectations of some scholars, the legislative veto and *Bowsher* decisions were not mere anomalies. The Court continued to recognize the separation of powers principle as an important and practical limitation on the prerogatives of Congress.

TO SUMMARIZE:

- In general, the modern Supreme Court takes a pragmatic or permissive view of the separation of powers doctrine as it relates to the modern administrative state. The Court does on occasion, however, invalidate particular institutional arrangements on this basis, which helps to maintain the separation of powers doctrine as a viable, if somewhat strained, element of modern constitutional law.

CONGRESSIONAL CONTROL OF ADMINISTRATIVE ACTIONS

Although Congress has found it necessary or expedient to delegate much of its legislative authority to the executive branch, it has attempted to maintain control over executive decisions arising out of the exercise of delegated authority. It must be realized that

executive agencies in many cases do not merely promulgate but also implement and enforce regulations, the traditional concept of separation of powers notwithstanding. Thus, Congress, through a variety of mechanisms, has attempted to retain control over agency discretion. These attempts include informal means as well as more formal mechanisms, such as attaching riders to agency appropriations bills, conducting **oversight hearings,** and reducing agency budgets. Of course, if Congress is extremely dissatisfied with the performance of a particular agency, it may rewrite the statute that created the agency in the first instance. By amending the appropriate statute(s), Congress may enlarge or contract the agency's jurisdiction, as well as the nature and scope of its rule making authority.

The Legislative Veto

One of the more interesting, and certainly the most controversial, of the mechanisms by which Congress has sought to control the bureaucracy is the **legislative veto.** In existence since the early 1930s, the legislative veto is a device whereby Congress, one house of Congress, or even one congressional committee can "veto" agency decisions made pursuant to delegated authority. A legislative veto provision is written into the original act delegating legislative power to an executive agency. While such original legislation is adopted in the ordinary fashion, involving bicameral passage and presentment to the president, legislative veto resolutions are not subject to the formal requirements of Article I. For example, the seminal case of *Immigration and Naturalization Service v. Chadha* (1983) involved a resolution adopted by the House of Representatives reversing a deportation decision reached by the Immigration and Naturalization Service. This veto resolution was based on authority given to both houses of Congress by the Immigration and Nationality Act of 1952. As allowed under the act, the House veto resolution was neither submitted to the Senate nor presented to the president for approval. Indeed, the Supreme Court cited these reasons in striking down this legislative veto in the *Chadha* case.

In *Chadha,* the Supreme Court majority chose to view the veto as a legislative act subject to the requirements of Article I. In adopting this approach, the Court not only invalidated the veto provision actually before it, but rendered some 230 similar statutory provisions presumptively unconstitutional. Thus, the *Chadha* case can be viewed as the most sweeping exercise of judicial review in the history of the Supreme Court.

Reacting to the breadth of the majority opinion, Justice Lewis Powell wrote a concurring opinion in which he parted company with the Court's rationale. Like the majority, Powell found the legislative veto at issue invalid, but for an entirely different reason. For him, the provision was unconstitutional not because it violated the Presentment Clause and the principle of bicameralism but because it authorized Congress to exercise a power that could not properly be considered "legislative" in nature. Powell viewed the exercise of the veto by the House as more judicial in character, in that the House was essentially deciding on the interests of particular individuals (such as Mr. Chadha), rather than making legislative pronouncements on policy questions. In Powell's view, judicial self-restraint dictated the narrower approach, leaving as an open question the constitutionality of other legislative veto provisions, such as that contained in the War Powers Resolution (see Chapter 3).

In his dissenting opinion, Justice Byron White defended the legislative veto as an innovation in keeping with the principle of checks and balances. White regarded the legislative veto as an "indispensable political invention" and saw its invalidation as "regrettable." White's perspective can be fairly characterized as pragmatic or

functionalist, in contrast to the formalistic majority opinion authored by Chief Justice Burger. Indeed, these two opinions represent sharply contrasting philosophies of constitutional interpretation.

The *Chadha* decision places the Court in an anomalous situation with respect to the modern administrative state. On one hand, the Court permits broad and vague delegations of power from Congress to the executive branch, notwithstanding obvious constitutional problems. On the other hand, it refuses to allow Congress to create a device by which it may check the exercise of the very power it delegated. How can the Court be so permissive in its interpretation of the Constitution on the delegation issue and so strict on the issue of the legislative veto? It is clear that the Court is not operating from a coherent theoretical perspective in this area of constitutional law.

Although the *Chadha* decision can be faulted on several grounds, it should not be viewed as tremendously destructive of congressional oversight of the executive bureaucracy. Several mechanisms (discussed earlier) allow Congress to exercise a measure of control. But *Chadha* did represent a symbolic loss for the Congress and, by the same token, a symbolic victory for the executive branch and, in particular, the presidency. Indeed, one might view the *Chadha* case as representing a "hidden agenda" to rebuild a presidency "damaged" by such decisions as *United States v. Nixon* (1974) and *Train v. City of New York* (1975) (see Chapter 3). It is also interesting, and perhaps somewhat surprising, that the Court chose to announce the *Chadha* ruling at the height of anti-Court attacks in Congress aimed at the curtailment of the Court's appellate jurisdiction in certain constitutional areas.

A further indication of the limited practical effect of the *Chadha* decision is seen in the retention of the many legislative veto provisions in existing legislation and the inclusion of legislative veto provisions in a number of statutes passed since *Chadha* was decided. Some of these provisions require executive agencies to obtain approval of certain actions by congressional committees. Others authorize Congress to approve or disapprove agency decisions made pursuant to delegated authority. Thus, although presumptively invalid, the legislative veto survives, at least in the statute books.

Congress has also developed a new device to replace the legislative veto. The Congressional Review of Agency Decisionmaking Act of 1996 requires federal agencies to submit all newly issued rules to Congress before they can take effect. The Act prevents rules that impose significant costs on the economy from becoming effective until sixty days after their submission to Congress. In the meantime Congress may, if it wishes, adopt a joint resolution disapproving the rule. The resolution must be adopted in identical form by both houses of Congress and presented to the president for signature or veto; thus, it satisfies the requirements of the *Chadha* decision. If the resolution is adopted, the rule "shall be treated as though such rule had never taken effect."

TO SUMMARIZE:

- Congress retains control over agency discretion by attaching riders to agency appropriations bills, conducting oversight hearings, reducing agency budgets, and rewriting enabling legislation.
- The legislative veto, a modern device used to control agency actions, was declared unconstitutional in *Immigration and Naturalization Service v. Chadha* (1983).
- Despite the *Chadha* decision, Congress has ample means of controlling the exercise of power by the executive bureaucracy.

PRESIDENTIAL CONTROL OF THE BUREAUCRACY

Because he is "chief executive," the president has the constitutional responsibility to maintain control over all executive agencies. Indeed, the Constitution explicitly mandates such control. Article II, Section 3, requires the president to "take care that the laws be faithfully executed." There are three principal sources of power by which the president can exercise this control: (1) the appointment and removal powers; (2) the power to issue executive orders; and (3) the president's role in the budgetary process.

Appointment and Removal Powers

Under the U.S. Constitution the president has primary responsibility for the appointment of high executive officials. The appointment power is an important mechanism for controlling the bureaucracy and has over the years been a source of disagreement between Congress and the president. Article III, Section 2, of the Constitution provides that the president "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 . . . ." But it also provides that "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." This power to appoint officers affords the president the opportunity to shape the administrative policy of the federal government. The line between "Officers of the United States" and "inferior officers" is not a clear one and remains to be defined by the Supreme Court on a case-by-case basis.

In *Buckley v. Valeo* (1976) the Supreme Court invalidated federal legislation creating the Federal Election Commission (FEC) that provided that four of the six voting members of the FEC would be appointed by the speaker of the house and the president pro tem of the Senate. The Court held that the Appointments Clause applies to all officers who exercise significant authority pursuant to the laws of the U.S. such as rule making, adjudication, or enforcement functions, but noted it would have reached a different conclusion if the FEC had merely been assigned investigative and informative powers.

In *Morrison v. Olson* (1988) the Supreme Court upheld the constitutionality of the Ethics in Government Act in which Congress authorized appointment of a special prosecutor (independent counsel) by a federal court of appeals to investigate allegations of criminal wrongdoing by high officials of the Executive Branch. Referring to the Appointments Clause, the Court observed, "[T]he inclusion of 'as they think proper' seems clearly to give Congress significant discretion to determine whether it is 'proper' to vest the appointment of, for example, executive officials in the courts of Law."

Except for impeachment the Constitution does not address circumstances under which agency personnel may be removed from office. Heads of "executive agencies" (e.g., Cabinet departments) serve at the pleasure of the president. Presidents not only appoint their Cabinet officers and heads of executive agencies, they frequently reorganize executive agencies and fill key positions with officials sympathetic to the approach of their administration. On the other hand, commissioners of independent federal agencies are appointed for fixed terms and statutory law protects them from arbitrary removal during their terms of office. In *Humphrey's Executor v. United States* (1935) (discussed in the previous chapter), the Supreme Court held that a statutory removal-for-cause limit prevented President Franklin Roosevelt from removing Humphrey as the chair of the FTC. Similarly, in *Wiener v. United States* (1958) (also discussed in the previous chapter) the Court rejected President Dwight D. Eisenhower's

attempt to remove a member of an independent commission. The Court's decisions in this area suggest that the legality of presidential removal of an official in the executive branch depends on the nature of the duties performed by the official in question. Officials performing purely executive functions may be removed by the president at will; those performing quasi-legislative or quasi-judicial functions can be removed by the president only for cause, assuming that is what Congress has provided by statute. Although Congress may determine the basis for removal of officials in independent agencies, the ultimate power to remove officials in the executive branch belongs to the president. In practice the president exercises considerable authority over independent agencies because the president's request for an administrator's resignation is generally honored.

Executive Orders

An executive order is a presidential directive to officials and agencies. Although there is no specific language in the Constitution authorizing presidents to issue executive orders, the Supreme Court has recognized the constitutionality of executive orders as an inherent power of the president (see *In re Neagle* [1890]; *Korematsu v. United States* [1944]). Of course, this power is not unlimited, and the Supreme Court has shown its willingness to strike down executive orders that impinge on the rights of private parties (see *Youngstown v. Sawyer* [1952]).

Presidents have used the power of executive order to reorganize executive agencies, set their agendas, and even alter their procedures. In 1981 President Reagan issued Executive Order 12291 instructing federal agencies, "to the extent permitted by Law," to take regulatory action only if "the potential benefits to society for the regulation outweigh the potential costs to society." In 1993 President Clinton replaced the Reagan approach with Executive Order 12866. Although it retained the basic framework of regulatory review established in 1981, the new order effected several changes in response to criticisms that had been voiced against the Reagan/Bush programs. One of the changes directed the Office of Management and Budget (OMB) to focus its review on the most important rules. President Clinton charged Vice President Albert Gore with heading the National Performance Review (NPR), which sought to "reinvent government" by making agencies act more like businesses in dealing with customers.

Shortly after taking office in 2001, President George W. Bush issued two controversial executive orders designed to increase involvement of religious organizations in furnishing services under various programs administered by the federal government. Executive Order 13198 concerns agency responsibilities with respect to faith-based and community initiatives. Executive Order 13199 established within the Executive Office of the President the Office of Faith-Based and Community Initiatives. These orders were based on the president's general executive power, not on specific statutory authority. Following the issuance of these orders, federal agencies moved to eliminate regulations that barred religiously oriented charities from receiving federal grants and contracts for the delivery of social services. Critics charged that the new policy toward faith-based organizations breached the wall of separation between church and state.

The Executive Role in the Budgetary Process

Although, constitutionally speaking, the creation of an annual budget for the federal government is primarily a legislative function, the president plays a pivotal role in the process. The Budget and Accounting Act of 1921 requires the president to submit a budget to the Congress by February 1 each year. The president's budget proposal is essentially a statement of the administration's priorities and is an important means of

controlling the bureaucracy. Agencies whose activities are consistent with presidential philosophy are typically rewarded with budget increases, while those that displease the president often find their budgets reduced. Of course, Congress may disagree with the president's priorities, as well as with his assessment of the performance of particular agencies.

To assist the president in performing the budgetary function, Congress created the Bureau of the Budget (BOB) in 1921. Prior to that time executive branch agencies made their budget requests directly to Congress. Centralizing this process under an agency under presidential control improved the efficiency of the budget process but resulted in a significant shift of power to the Executive Branch. In 1970 Congress created the Office of Management and Budget (OMB) from the BOB.

The OMB develops the president's annual budget for submission to Congress. Agencies submit their budgets to the OMB, which attempts to shape their proposals to reflect the president's priorities. In assisting the president in formulating a budget proposal, OMB evaluates the effectiveness of agency programs, policies, and procedures. It also ensures that agency reports, rules, testimony, and proposed legislation are consistent with the president's budgetary priorities and with the president's policies. OMB is widely regarded as one of the most powerful agencies within the Executive Branch and exerts significant influence over public policy.

The Power of Impoundment

A more dramatic means of presidential fiscal control is **impoundment**—the refusal to allow expenditure of funds appropriated by Congress. The first instance occurred in 1803, when President Jefferson withheld $50,000 that Congress had allocated to build gunboats to defend the Mississippi River. Jefferson's purpose was merely to delay the expenditure, primarily because the Louisiana Purchase, which was transacted shortly after Congress appropriated the money for gunboats, minimized the need for defenses along the Mississippi. During the remainder of the nineteenth century, presidents rarely invoked Jefferson's precedent. In 1905, Congress gave the president statutory authority to engage in limited impoundments to avoid departmental deficits. And in 1921, Congress extended this authority to allow the president to withhold funds to save money should Congress authorize more than was needed to secure its goals.

Although Congress provided for a limited power of impoundment, these concessions to the president did not significantly undermine Congress's basic "power of the purse." President Franklin D. Roosevelt consistently spent less than Congress appropriated. After Roosevelt, presidents increasingly used impoundment to pursue policy goals. Presidents Truman, Eisenhower, and Johnson used impoundment in the area of defense spending, justifying their actions on the basis of the president's role as commander in chief. Although these actions produced some criticism in Congress, they were not of sufficient magnitude to produce legislation or constitutional litigation. Richard Nixon, however, extended the power of impoundment beyond limits acceptable to either Court or Congress. Nixon not only used impoundment to suit his fiscal preferences, but he also attempted to dismantle certain programs of which he disapproved. The most notorious example was his attempt to shut down the Office of Economic Opportunity (OEO) by refusing to spend any of the funds Congress had designated for it. (Congressional and public pressures forced Nixon to capitulate on the OEO issue.) In one of his far-reaching uses of the impoundment power, Nixon ordered the head of the Environmental Protection Agency, Russell Train, to withhold a substantial amount of money allocated for sewage treatment plants under the Water Pollution Control Act of 1972. Particularly disturbing to some members of Congress was the fact that Nixon had originally vetoed the act and Congress had overridden

the veto. Thus, Nixon was seeking to have his way, a two-thirds majority of Congress to the contrary notwithstanding, by using the power to impound funds. In *Train v. City of New York* (1975), the Supreme Court invalidated Nixon's impoundment effort, concluding that the president did not possess a "seemingly limitless power to withhold funds from allotment and obligation."

Prior to the Court's decision in the *Train* case, Congress adopted the Congressional Budget and Impoundment Control Act of 1974. Although the act recognizes a limited presidential power to impound funds, it requires the president to inform Congress of the reasons for an intended impoundment and provides for a bicameral legislative veto to prevent the president from proceeding. However, the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha* (1983) rendered the legislative veto provision of the impoundment act presumptively unconstitutional.

All presidents, regardless of political party, struggle to control the federal bureaucracy. The bureaucracy is so massive, so complex, and so involved in so many different programs and activities at home and abroad, that it is impossible for any president to know exactly what is going on in every agency at any point in time. That is why presidents rely so heavily on staff and on key support agencies such as the Office of Management and Budget.

TO SUMMARIZE:

- Article II, Section 2, of the Constitution allows the president to appoint, with the consent of the Senate, officials in the executive branch not designated part of the civil service. This affords the President the opportunity to shape the administrative policy of the federal government. Officials performing purely executive functions may be removed by the president at will; those performing quasi-legislative or quasi-judicial functions can be removed only for cause.
- Presidents have implicit constitutional authority to issue executive orders to regulate the operations of the executive branch. Presidents have used the power of executive order to reorganize executive agencies, set their agendas, and even alter their procedures.
- By formulating an annual budget proposal to Congress, the president exercises substantial control over agencies within the executive branch. The president is aided in this regard by the Office of Management and Budget, which monitors expenditures and evaluates programs throughout the executive branch.
- "Impoundment" refers to the president's power to disallow expenditure of funds appropriated by Congress. Although not explicitly enumerated in the Constitution, the exercise of this power dates from the Jefferson administration. Responding to perceived abuse of this power, Congress has sought to impose limits on such presidential action through passage of the Congressional Budget and Impoundment Control Act of 1974. The act requires the president to inform Congress of the reasons for an intended impoundment and provides for a bicameral legislative veto to prevent the president from proceeding. The legislative veto component of this statute is rendered presumptively unconstitutional by *Immigration and Naturalization Service v. Chadha* (1983).

JUDICIAL OVERSIGHT OVER THE ADMINISTRATIVE STATE

Like Congress, the federal courts play an important role in supervising the federal bureaucracy. However, judicial oversight of the bureaucracy takes place within the

context of particular cases challenging agency rules, orders or procedures. Before a federal court will review any agency decision, threshold criteria such as "standing to sue," "exhaustion of remedies," and "ripeness" must be met (see Chapter 1).

Interpreting Statutory Authority

A fundamental question arising in many cases is whether an agency has acted beyond the scope of its authority as defined by Congress. For example, in *National Association for the Advancement of Colored People v. Federal Power Commission* (1976), the Supreme Court said that the Federal Power Act and the Natural Gas Act did not endow the Federal Power Commission (FPC) with the authority to promulgate a rule requiring the electrical power industry to follow nondiscriminatory employment practices. Writing for the Court, Justice Potter Stewart said:

> The question is not whether Congress could authorize the Federal Power Commission to combat such discrimination. It clearly could. The question is simply whether or to what extent Congress did grant the Commission such authority. . . . [T]he parties point to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation.

Of course, had Congress wished to provide the FPC with the authority to promulgate rules against employment discrimination, it could merely have amended the statutes that created the agency and defined its authority. In 1977, Congress abolished the FPC and assigned its regulatory functions to a new agency, the Federal Energy Regulatory Commission.

A more recent example of the Court's willingness to limit bureaucratic authority by recognizing limitations imposed by statutory provisions is *Food and Drug Administration v. Brown & Williamson Tobacco Corporation* (2000). In 1996, the FDA promulgated regulations designed to limit young people's access to tobacco products. These regulations were immediately challenged by the tobacco industry. Affirming a court of appeals decision, the Supreme Court held in a 5–4 ruling that the FDA did not have statutory authority to adopt the regulations at issue. Writing for the Court, Justice Sandra Day O'Connor acknowledged that tobacco use is "one of the most troubling public health problems facing our Nation today," but concluded that Congress did not intend for the FDA to exercise authority over tobacco products. O'Connor observed:

> Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." . . . And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Another recent instance in which the Supreme Court struck down agency action as contrary to the will of Congress is *Gonzales v. Oregon* (2006). In 2001, Attorney General John Ashcroft issued a rule interpreting the federal Controlled Substances Act (CSA) to the effect that doctors would be prohibited from prescribing lethal doses of drugs to terminally ill patients who wished to end their lives. Ashcroft's rule was an effort to counter Oregon's Death with Dignity Act, which permits doctor-assisted suicide within a state regulatory framework. The Supreme Court found that the CSA did not confer on the Attorney General the authority to issue this rule. The Court further found that the CSA does not prohibit doctors from prescribing drugs for the purpose

of medically assisted suicide. Writing for the Court, Justice Anthony Kennedy rejected the notion that the CSA "delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality." In dissent, Justice Clarence Thomas questioned how the Court could adopt this view of the CSA in light of its decision in *Gonzales v. Raich* (2005) holding that the CSA could be constitutionally applied to prohibit possession of marijuana for medical use despite a state statute authorizing such use. While the two issues may be distinguishable legally, some commentators wondered how the Court could allow the federal government to impede state policy in the case of medical marijuana but disallow it from intervening in the case of state-sanctioned doctor-assisted suicide.

Due Process of Law

In addition to the substantive issues of agency jurisdiction and rule making authority, there are significant procedural questions regarding administrative actions. Not only are federal regulatory agencies empowered to promulgate rules, they also have substantial powers to enforce those rules, as well as **quasi-judicial authority** to provide hearings and issue binding orders in individual cases. It is important that agency decisions follow procedural guidelines so as to prevent arbitrary and capricious action and to safeguard the rights of parties.

The Due Process Clauses of the Fifth and Fourteenth Amendments are among the most important constitutional restraints on the bureaucracy. Because government agencies affect people's lives in so many ways, parties challenging administrative actions often invoke the protections of due process. Courts have interpreted the Due Process Clauses to require agencies to abide by basic standards of procedural regularity and fundamental fairness. However, administrative decisions are constrained by the Due Process Clauses only if they in some meaningful way deprive an individual of "life, liberty, or property." Assuming the Due Process Clauses do apply, the court must determine what "process" is due.

Federal agency procedures are generally based on statutory requirements, most notably the **Administrative Procedure Act** (APA) of 1946. The APA has been called the "Magna Carta of administrative law." It deals with the two basic types of agency decision making—rule making and adjudication—and specifies proper procedures for each. In regard to rule making, the Supreme Court has tended to rely on the Administrative Procedure Act as an adequate framework for agency procedures. For example, in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.* (1978), the Supreme Court considered the adequacy of procedures used by the Atomic Energy Commission (now the Nuclear Regulatory Commission) for the licensure of nuclear power plants. Of particular concern was the agency's procedure in promulgating a rule governing spent nuclear fuel. The procedure in question included the scheduling of hearings prior to adoption of the rule, as required by the APA. These hearings were somewhat informal, however, and did not include full adjudicatory procedures, such as discovery and cross-examination. The U.S. Court of Appeals for the District of Columbia Circuit held that the existing procedure was inadequate under the Due Process Clause of the Fifth Amendment. The Supreme Court reversed without a dissenting vote. In his opinion for the Court, Justice Rehnquist sharply criticized the court of appeals decision, complaining that "this sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress."

Due process is more directly applicable to agency adjudication and enforcement actions than it is to rule making for it is through adjudication and enforcement that

agencies take actions that directly affect the interests of private parties. Historically, the courts were very deferential to agency procedures in these areas. However, beginning in the 1970s, the Supreme Court handed down a series of landmark decisions applying due process standards to a variety of administrative actions. Lower courts followed suit, and the result was a veritable due process revolution in public administration.

In *Goldberg v. Kelly* (1970), the Supreme Court held that the Fourteenth Amendment Due Process Clause required a state agency to provide an evidentiary hearing before terminating a person's welfare benefits after the agency determined that the individual was no longer eligible for such benefits. However, Justice Brennan's opinion for the Court failed to clarify the nature of the individual's interest (that is, life, liberty, or property) that gave rise to due process rights. Most commentators have assumed that the welfare entitlements involved in *Goldberg v. Kelly* were viewed by the Court as property interests, hence the term **new property** is often used to describe statutory entitlements.

In *Goss v. Lopez* (1975), the Court continued along the path it paved in *Goldberg v. Kelly*. Here the Court, splitting 5-to-4, held that the ten-day suspension of a student from a public school constituted deprivation of property within the meaning of the Due Process Clause. Thus, the school was required to provide elementary procedural safeguards. The dissenting justices objected to the extension of constitutional protection to an interest they regarded as insubstantial in character.

A series of decisions in the early 1970s extended due process protections to a wide variety of claimants, including employees, automobile drivers, prisoners, and debtors. Eventually, something approaching a counterrevolution was to take place in this area of constitutional law. The first signal of this change came in 1976. In *Mathews v. Eldridge,* the Court upheld procedures under which Social Security disability benefits could be initially terminated without a prior evidentiary hearing. George Eldridge, who had been disabled due to "chronic anxiety and back strain," was informed by an official letter that, according to medical reports, his disability no longer existed and that benefit payments would be terminated. Although agency procedures required ample notification and an evidentiary hearing prior to final termination, the payments could be stopped initially without a hearing. Provision was also made for retroactive payments to any recipient whose disability was later determined not to have ended. Eldridge, who was concerned with the initial decision to terminate payments, relied on *Goldberg v. Kelly* in arguing that the Due Process Clause required an evidentiary hearing before any termination of benefits.

Writing for the Court in *Mathews v. Eldridge,* Justice Lewis Powell conceded the existence of a property interest in Social Security benefits and thus the applicability of the Due Process Clause. But Powell said that "due process is flexible and calls for such procedural protections as the particular situation demands." In other words, the degree of procedural safeguards required by the Constitution depends on how much one stands to lose. In this case, the Court distinguished Social Security from welfare benefits and held that the "potential deprivation . . . is generally likely to be less" when Social Security payments are denied than when welfare benefits are terminated. In this way, the Court significantly narrowed the potential application of *Goldberg v. Kelly* without formally overruling it. In *Mathews,* the Court was willing to regard the existing agency procedures as adequate safeguards. To a litigant in Eldridge's position, the distinction between termination of Social Security and welfare benefits was purely academic. Nevertheless, from the Court's perspective, it was irrelevant that the initial termination of Eldridge's benefits resulted in the foreclosure of his mortgage and repossession of his furniture, forcing him and his family to share one bed. For better or worse, such considerations are generally not permitted to influence the Court in its development and application of constitutional principles.

Since *Matthews,* the Supreme Court's decisions in this area have been mixed, but the trend has been toward limiting the scope of due process protections (see, for example, *Federal Deposit Insurance Corporation v. Meyer* [1994]). The doctrinal coherence that was beginning to emerge in the early 1970s has given way to an ad hoc approach. No single set of constitutional principles has gained dominance. As a result, the prediction of outcomes in individual cases in this area is particularly difficult.

TO SUMMARIZE:

- The judicial branch oversees the federal bureaucracy, ensuring that agency decisions conform to applicable provisions of law. Ultimately, the Due Process Clause of the Fifth Amendment provides a basis for judicial review of the adequacy of agency procedures.
- The early Burger Court expanded due process rights of beneficiaries of federal programs, viewing statutory entitlements as a form of "property" within the meaning of the Fifth Amendment. The later Burger Court and the Rehnquist Court contracted, or simply refused to expand, due process rights of individuals vis-à-vis federal agencies.

AGENCY ACTIONS AND INDIVIDUAL RIGHTS

The vast power entrusted to the modern administrative state increases the likelihood that government actions will impinge on individual interests that are protected by the Bill of Rights. For example, FCC regulations of broadcast media have often been challenged on First Amendment grounds (see Chapter 3, Volume II). In the 1930s and 1940s, the most obvious impact of enlarged governmental regulation was on property rights. But it soon became clear that no neat distinction could be drawn between these rights and other personal rights guaranteed by the Constitution. All constitutional rights may, under some circumstances, give way to compelling public interests. The difficulty, of course, lies in determining which public interests are truly compelling. When agency actions are challenged as violations of individual rights, courts must weigh the magnitude of the alleged violation against the public interest the agency is serving.

Fourth Amendment Concerns

Many administrative practices pose threats to rights protected by the Fourth, Fifth, and Sixth Amendments. One of the more controversial examples involves the Immigration and Naturalization Service (INS), which routinely detains without hearings or the benefit of counsel persons suspected of entering this country illegally. In *Wong Wing v. United States* (1896), the Supreme Court ruled that individuals can be detained by immigration authorities without hearings as long as the purpose of the detention is not punitive. For the most part, however, the Court has refrained from reviewing federal immigration laws for compliance with substantive constitutional rights.

Detentions of suspected illegal aliens are not the only administrative actions that threaten constitutionally protected liberties. **Administrative searches** of industrial plants are routinely conducted by such regulatory bodies as the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). Traditionally, the Supreme Court has been more permissive toward administrative searches directed at business and industry than toward police searches directed

at private individuals. For example, in *Frank v. Maryland* (1959) and *Ohio ex rel. Eaton v. Price* (1960), the Supreme Court found no violation of the Fourth Amendment when administrative searches were conducted without notice and without search warrants. In the 1960s and 1970s, the Court became stricter, holding that, as a general rule, warrants must be obtained to justify administrative searches (see, for example, *Camara v. Municipal Court* [1967], overruling *Frank v. Maryland*).

Following this stricter approach, in *Marshall v. Barlow's, Inc.* (1978), the Supreme Court struck down a provision of the Occupational Health and Safety Act of 1970 that allowed OSHA to conduct warrantless searches of the workplace. However, the Court was careful to point out that to obtain administrative search warrants, OSHA inspectors did not have to meet the same strict standards of probable cause that govern the issuance of warrants in criminal investigations. In *Donovan v. Dewey* (1981), the Court refused to invalidate a provision of the Federal Mine Safety and Health Act of 1977 that allowed the Department of Labor to conduct warrantless inspections of mines. The Court attempted to distinguish the case from *Barlow's,* but it seems clear that a majority of the justices preferred the more permissive approach of the pre-*Camara* period.

A decision that epitomizes a permissive approach to the Fourth Amendment as it relates to regulatory agency searches is *Dow Chemical Company v. United States* (1986). Here, the EPA, acting without a warrant, had employed a commercial aerial photographer to take pictures of a Dow chemical plant from an altitude of 1,200 feet. When Dow learned of the photographic flyover, it filed suit in federal court, claiming that the EPA had violated its reasonable expectation of privacy. Splitting 5 to 4, the Supreme Court rejected Dow's claim, holding that the flyover was not a "search" within the meaning of the Fourth Amendment.

Self-Incrimination Concerns

The Self-Incrimination Clause of the Fifth Amendment is another provision of the Bill of Rights potentially endangered by administrative actions. Essentially, this clause protects the individual from being forced to divulge incriminating information. Although the obvious application of the Self-Incrimination Clause is to criminal investigations, the Supreme Court has held that the protection applies in any governmental context that might ultimately lead to criminal prosecution (see *Murphy v. Waterfront Commission* [1964]). However, the Court has distinguished between verbal testimony and physical evidence, holding that the immunity against self-incrimination applies only to the former. Consequently, businesses have no real Fifth Amendment protections in the instance of compulsory production of incriminating business records. As a result of the winnowing of the Self-Incrimination Clause, businesspersons can be compelled to disclose their records to the scrutiny of government agencies. Justice William J. Brennan consistently dissented from this view of the Fifth Amendment, arguing that business records fall within the "zone of privacy" protected by the Self-Incrimination Clause (see, for example, *Andresen v. Maryland* [1976], dissenting opinion).

Public Access to Agency Information

Other potential objections to the actions of the modern administrative state involve access to the tremendous stockpile of information maintained by various government agencies. Although the Supreme Court has never held such access to be a matter of constitutional right, Congress has created a statutory right of public access under the **Freedom of Information Act** and a right of individual access under the

Privacy Act. Although these acts do create exemptions for certain types of secret information, such as sensitive national security material, they nevertheless represent a significant attempt to open up the process of modern governance to the ordinary citizen.

The Rights of Public Employees

The expansion of bureaucracy at all levels of government has increased greatly the number of persons working in the public sector. Today, there are many unresolved issues regarding the constitutional rights of public employees. Among the most difficult are the First Amendment and Fourth Amendment questions. To what extent do public employees surrender their freedom of speech as a condition of working for the government? To what extent do public employees forfeit their privacy rights in the workplace?

Under the Federal Lobbying (Hatch) Act, federal civil servants are barred from actively participating in political campaigns. The Supreme Court upheld this prohibition in *United States v. Harris* (1954) and again in *U.S. Civil Service Commission v. National Association of Letter Carriers* (1973). Writing for the Court in the latter decision, Justice White asserted that it was essential that the political influence of federal government workers be limited in order to maintain the concept of a merit-based civil service. On the other hand, public employees do not forfeit all of their First Amendment rights as a condition of public employment. In *Pickering v. Board of Education* (1968), the Supreme Court said that public employees retain the right to comment publicly about their agencies or the conditions of their employment if these are matters of genuine public concern. This landmark decision allowed "whistleblowers" to reveal information to the public regarding the goings-on of government without fear of reprisal on the job. However, in *Garcetti v. Ceballos* (2006), the Court adopted a more conservative view of whistle-blowers' rights, holding that when public employees make statements as part of their official duties, they are not speaking as *citizens* but as *employees,* and therefore are not entitled to First Amendment protection. (For more discussion of the First Amendment rights of public employees, see Chapter 3, Volume II.)

With respect to privacy rights, the principal issue addressed thus far by the Supreme Court has been that of drug testing. In *National Treasury Employees Union v. Von Raab* (1989), the Supreme Court sustained a Customs Service policy requiring drug tests for persons seeking positions as customs inspectors. Following the *Von Raab* decision, many lower courts have addressed drug testing of public employees in a wide variety of settings, and in most cases such requirements have been sustained.

TO SUMMARIZE:

- When agency actions are challenged as violations of individual rights, courts must weigh the magnitude of the violation against the public interest the agency is serving.
- The Supreme Court has been more permissive toward administrative searches directed at business and industry than toward police searches of private homes.
- Public employees do not shed their constitutional rights as a condition of employment, but the exercise of constitutional rights in the public workplace is somewhat circumscribed.

CONCLUSION

The eminent sociologist Max Weber argued that bureaucracy exists in the modern world because it is the most rational way of organizing efforts toward the achievement of collective goals. Whether or not Weber was right, bureaucracy is an inextricable component of modern government. Clearly, bureaucracy is here to stay, whether one considers the federal government, the governments of the fifty states, or the governments of the nation's major cities. However, the essence of American constitutionalism is that government derives its powers from and must operate within the limitations of the Constitution, the supreme law of the land. The existence of the mammoth federal bureaucracy and similar, if smaller, bureaucracies in all fifty states poses serious problems of constitutional theory. These problems include the delegation of legislative power and the means of legislative and judicial oversight of administrative decision making.

In grappling with these issues, the Supreme Court has not developed a coherent constitutional theory. But one must recognize that no area of constitutional law is fully coherent. In the nature of things political, the Court's decisions are bound to reflect the untidy realities of politics more than the neatness of syllogisms. Yet it is in this particular realm of constitutional law that the eighteenth century ideals of limited government and the rule of law seem to be most out of sync with the realities of twenty-first century political life. As the primary mechanism for fitting constitutional principles with political realities, the Supreme Court faces an especially formidable task in addressing questions of bureaucratic power.

KEY TERMS

modern administrative state
federal bureaucracy
rule making
independent agencies
delegation of legislative power
representative government
separation of powers
intelligible principle standard
nondelegation doctrine
quasi-judicial authority
administrative law judge (ALJ)
oversight hearings
legislative veto
impoundment
Administrative Procedure Act
new property
administrative searches
Freedom of Information Act
Privacy Act

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Case

J. W. Hampton & Company v. United States

276 U.S. 394; 48 S.Ct. 348; 72 L.Ed. 624 (1928)
Vote: 9–0

In this case, the Court considers the issue of delegation of legislative power to the Executive in the context of a "flexible tariff provision."

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

J. W. Hampton, Jr. & Company made an importation into New York of barium dioxide which the collector of customs assessed at the dutiable rate of 6 cents per pound. This was 2 cents per pound more than that fixed by statute. . . . The rate was raised by the collector by virtue of the proclamation of the President . . . issued under . . . authority of . . . the Tariff Act of September 21, 1922, . . . which is the so-called flexible tariff provision. Protest was made and an appeal was taken. . . . The case came . . . before the United States customs court. . . . A majority held the action constitutional. Thereafter the case was appealed to the United States court of customs appeals. On the 16th day of October, 1926, the Attorney General certified that in his opinion the case was of such importance as to render expedient its review by this court. Thereafter the judgment of the United States customs court was affirmed. . . .

The issue here is as to the constitutionality of [the Tariff Act] upon which depends the authority for the proclamation of the President and for 2 of the 6 cents per pound duty collected from [J. W. Hampton]. The contention of the taxpayers is . . . that the section is invalid in that it is a delegation to the President of the legislative power, which by Article 1, Sec. 1 of the Constitution, is vested in Congress, the power being that declared in Sec. 8 of Article 1, that the Congress shall have power to lay and collect taxes, duties, imposts, and excises. . . .

. . . It seems clear what Congress intended by [the act]. Its plan was to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States. It may be that it is difficult to fix with exactness this difference, but the difference which is sought in the statute is perfectly clear and perfectly intelligible. Because of the difficulty in practically determining what that difference is, Congress seems to have doubted that the information in its possession was such as to enable it to make the adjustment accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjustments would be necessary to give effect to the principle on which the statute proceeds. To avoid such difficulties, Congress adopted . . . the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out its policy and plan and to find the changing difference from time to time and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan. As it was a matter of great importance, it concluded to give by statute to the President . . . the function of determining the difference as it might vary. . . .

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

The field of Congress involves all and many varieties of legislative action, and Congress had found it frequently

necessary to use officers of the executive branch, within definite limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations. . . .

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive. . . .

[O]ne of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down that rates shall be just and reasonable considering the service given and not discriminatory. . . .

It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress and authorize such officers in the application of the congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its ratemaking power in interstate commerce by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making-body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose. . . .

Case

SCHECHTER POULTRY CORPORATION V. UNITED STATES

295 U.S. 495; 55 S.Ct. 837; 79 L.Ed. 1570 (1935)
Vote: 9–0

In this landmark case, the Supreme Court considers the constitutionality of the National Industrial Recovery Act of 1933. The Court considers two issues: (1) whether the act constitutes an impermissible delegation of power from Congress to the executive; and (2) whether the act is a valid exercise of Congress's power to regulate interstate commerce. In this excerpt, only the former issue is addressed.

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

[Schechter Poultry Corporation et al.] were convicted in the District Court of the United States for the Eastern District of New York on eighteen counts of an indictment charging violations of what is known as the "Live Poultry Code," and on an additional count for conspiracy to commit such violations. . . .

The Circuit Court of Appeals sustained the conviction on the conspiracy count and on sixteen counts for violation of the code. . . . On the respective applications of the defendants . . . this Court granted writs of certiorari. . . .

The "Live Poultry Code" was promulgated under Sec. 3 of the National Industrial Recovery Act. That section . . . authorizes the President to approve "codes of fair competition." Such a code may be approved for a trade or industry, upon application by one of more trade or industrial associations or groups, if the President finds (1) that such associations or groups "impose no inequitable restrictions on admission to membership therein and are truly representative," and (2) that such codes are not designed "to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy" . . . of the act. Such codes "shall not permit monopolies or monopolistic practices." As a condition of his approval, the President may "impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees and others, and in furtherance of the public interest, and may

provide such exceptions to an exemption from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared." Where such a code has not been approved, the President may prescribe one, either on his own motion or on complaint. Violation of any provision of a code (so approved or prescribed) "in any transaction in or affecting interstate or foreign commerce" is made a misdemeanor punishable by a fine of not more than $500 for each offense, and each day the violation continues is to be deemed a separate offense.

The "Live Poultry Code" was approved by the President on April 13, 1934. . . .

The declared purpose is "To effect the policies of title I of the National Industrial Recovery Act." . . .

The code fixes the number of hours for workdays. It provides that no employee, with certain exceptions, shall be permitted to work in excess of forty (40) hours in any one week, and that no employee, save as stated, "shall be paid in any pay period less than at the rate of fifty (50) cents per hour." . . .

Of the eighteen counts of the indictment upon which the defendants were convicted, aside from the count for conspiracy, two counts charged violations of the minimum wage and maximum hour provisions of the code; . . . ten counts, respectively, were that [Schechter, in selling] to retail dealers and butchers, had permitted "selections of individual chickens taken from particular coops and half coops." Of the other six counts, one charged the sale to a butcher of an unfit chicken; two counts charged the making of sales without having the poultry inspected or approved in accordance with regulations or ordinances of the City of New York; two counts charged the making of false reports or the failure to make reports relating to the range of daily prices and volume and sales for certain periods; and the remaining count was for sales to slaughterers or dealers who were without licenses required by the ordinances and regulations of the City of New York.

First. Two preliminary points are stressed by the government with respect to the appropriate approach to the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution establishes a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. . . .

The further point is urged that the national crisis demanded a broad and intensive cooperative effort by those engaged in trade and industry, and that this necessary cooperation was sought to be fostered by permitting them to initiate the adoption of codes. But the statutory plan is not simply one for voluntary effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities. It involves the coercive exercise of the law-making power. The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes.

Second. The question of the delegation of legislative power[:] . . . the Constitution provides that "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." . . . And the Congress is authorized "to make all laws which shall be necessary and proper for carrying into execution" its general power. . . . The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the National Legislature cannot deal directly. We point out in the Panama Ref. Co. Case [*Panama Refining Company v. Ryan* (1935)] that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But . . . the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. . . .

Accordingly, we look to the statute to see whether Congress has overstepped these limitations—whether Congress in authorizing "Codes of Fair Competition" has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure

to enact such standards, has attempted to transfer that function to others. . . .

What is meant by "fair competition" as the term is used in the act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction and expansion which are stated [in the act]?

The act does not define "fair competition." "Unfair competition" as known to the common law is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. . . . In recent years its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of anther's goods as one's own—to misappropriation of what equitably belongs to a competitor. . . . Unfairness in competition has been predicated on acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law. . . . But it is evident that in its widest range "unfair competition," as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to conduct of that sort. The government does not contend that the act contemplates such a limitation. It would be opposed both to the declared purposes of the act and to its administrative construction.

The Federal Trade Commission Act . . . introduces the expression "unfair methods of competition," which were declared to be unlawful. That was an expression new in the law. Debate apparently convinced the sponsors of the legislation that the words "unfair competition," in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning; that it does not admit of precise definition, its scope being left to judicial determination as controversies arise. . . . What are "unfair methods of competition" are thus to be determined in particular competitive conditions and of what is found to be a specific and substantial public interest. . . . To make this possible Congress set up a special procedure. A commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority. . . .

In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character. But the difference between the code plan of the Recovery Act and the scheme of the Federal Trade Commission Act lies not only in procedure but in subject matter. We cannot regard the "fair competition" of the codes as antithetical to the "unfair methods of competition" of the Federal Trade Commission Act. The "fair competition" of the codes has a much broader range and a new significance. The Recovery Act provides that it shall not be construed to impair the powers of the Federal Trade Commission, but, when a code is approved, its provisions are to be the "standards of fair competition" for the trade or industry concerned, and any violation of such standards in any transaction in or affecting interstate or foreign commerce is to be deemed "an unfair method of competition" within the meaning of the Federal Trade Commission Act. . . .

For a statement of the authorized objectives and content of the "codes of fair competition" we are referred repeatedly to the "declaration of policy" in . . . the Recovery Act. Thus, the approval of a code by the President is conditioned on his finding that it "will tend to effectuate the policy of this title." . . . The President is authorized to impose such conditions "for the protection of consumers, competitors, employees and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared." . . . The "policy herein declared" is manifestly that set forth. . . . That declaration embraces a broad range of objectives. Among them we find the elimination of "unfair competitive practices." But even if this clause were to be taken to relate to practices which fall under the ban of existing law, either common law or statute, it is still only one of the authorized aims described. . . . It is there declared to be "the policy of Congress"—to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and "revive unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

. . . [Under these provisions], whatever "may tend to effectuate" these general purposes may be included in the

"codes of fair competition." We think the conclusion is inescapable that the authority sought to be conferred . . . was not merely to deal with "unfair competitive practices" which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve, or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction and development, according to the general declaration of policy. . . . Codes of laws of this sort are styled "codes of fair competition." . . .

The question, then, turns upon the authority which . . . the Recovery Act vests in the President to approve or prescribe. . . . Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. . . .

Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion. First, the President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code "impose no inequitable restrictions on admission to membership" and are "truly representative." That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. Second, the President is required to find that the code is not "designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." And to this is added a proviso that the code "shall not permit monopolies or monopolistic practices." But these restrictions leave virtually untouched the field of policy envisaged . . . and in what wide field of legislative possibilities the proponents of a code, refraining from monopolistic designs, may roam at will and the President may approve or disapprove their proposals as he may see fit. "That is the precise effect of the further finding that the President is to make—that the code will tend to effectuate the policy of this title." While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the "Declaration of Policy."

Nor is the breadth of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as "in his discretion" he thinks necessary "to effectuate the policy" declared by the act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The act provides for the creation by the President of administrative agencies to assist him, but the action or reports of such agencies, or of his other assistants—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify or reject them as he pleases. . . .

To summarize and conclude upon this point: . . . the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, Sec. 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion. . . . In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the codemaking authority thus conferred is an unconstitutional delegation of legislative power. . . .

[The Court also considered Commerce Clause questions and concluded that the attempted regulation of intrastate activities exceeded the constitutional grant of power to regulate interstate commerce.]

Mr. Justice Cardozo, concurring.

The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. . . .

. . . Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them. . . .

. . . This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it. Nothing less is aimed at by the code now submitted to our scrutiny. . . .

The code does not confine itself to the suppression of methods of competition that would be classified as unfair

according to accepted business standards or accepted norms of ethics. It sets up a comprehensive body of rules to promote the welfare of the industry, if not the welfare of the nation, without reference to standards, ethical or commercial, that could be known or predicted in advance of its adoption. . . . Even if the statute itself had fixed the meaning of fair competition by way of contrast with practices that are oppressive or unfair, the code outruns the bounds of the authority conferred. What is excessive is not sporadic or superficial. It is deep-seated and pervasive. The licit and illicit sections are so combined and welded as to be incapable of severance without destructive mutilation. . . .

I am authorized to state that ***Mr. Justice Stone*** joins in this opinion.

Case

MISTRETTA V. UNITED STATES

488 U.S. 361; 109 S.Ct. 647; 102 L.Ed. 2d 714 (1989)
Vote: 8–1

Under the Sentencing Reform Act of 1984 Congress abolished the system of indeterminate criminal sentencing and parole previously applied in federal cases. Indeterminate sentencing and parole had long been criticized because of wide disparities among similarly situated defendants both in the sentences imposed by judges and in the actual time of imprisonment served prior to release on parole. One of the most controversial provisions of the Sentencing Reform Act called for the establishment of the U.S. Sentencing Commission, an independent body of seven voting members within the judicial branch. All members of the commission were to be appointed by the president, with Senate approval, and were subject to removal by the president for "neglect of duty," "malfeasance in office," or "other good cause." The statute required that at least three members of the sentencing commission be federal judges, chosen from a list of six recommended to the president by the Judicial Conference of the United States. The commission was empowered to promulgate binding sentencing guidelines that federal judges were required to follow. These guidelines prescribed ranges of determinate sentences for all types of federal offenses and defendants, according to detailed specified factors.

A federal grand jury returned a three-count indictment against John Mistretta, resulting from his alleged distribution of cocaine. Mistretta moved to have the sentencing guidelines ruled unconstitutional on the grounds that they represented an excessive delegation of authority by Congress and that they violated the principle of separation of powers. The district court denied his motion and upheld the guidelines. Mistretta then agreed to plead guilty to one count of the indictment (conspiracy to distribute) in exchange for the prosecutors' willingness to dismiss the other two counts. Accepting this negotiated guilty plea, the trial judge applied the sentencing guidelines over Mistretta's constitutional objections and sentenced him to a prison term of eighteen months. Mistretta filed a notice of appeal to the U.S. Court of Appeals for the Eighth Circuit, but both he and the government later petitioned the Supreme Court for certiorari, thus obtaining review by the High Court prior to judgment by the court of appeals. The Court's willingness to grant this expedited review underscored its recognition of the importance of constitutional questions posed by the Sentencing Reform Act.

Justice Blackmun delivered the Opinion of the Court.

. . . Petitioner argues that in delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the Commission excessive legislative discretion in violation of the constitutionally based nondelegation doctrine. We do not agree.

The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," . . . and we long have insisted that "the integrity and maintenance of the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another Branch. . . . We also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. . . .

. . . [O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. . . .

. . . In light of our approval of these broad delegations, we harbor no doubt that Congress's delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements. Congress charged the Commission with three goals: to "assure the

meeting of the purposes of sentencing as set forth" in the Act; to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility to permit individualized sentences," where appropriate; and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." . . . Congress further specified four "purposes" of sentencing that the Commission must pursue in carrying out its mandate: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed . . . correctional treatment." . . .

In addition, Congress prescribed the specific tool—the guidelines system—for the Commission to use in regulating sentencing. More particularly, Congress directed the Commission to develop a system of "sentencing ranges" applicable "for each category of offense involving each category of defendant." . . . Congress instructed the Commission that these sentencing ranges must be consistent with pertinent provisions of Title 18 of the United States Code and could not include sentences in excess of the statutory maxima. Congress also required that for sentences of imprisonment, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." . . . Moreover, Congress directed the Commission to use current average sentences "as a starting point" for its structuring of the sentencing ranges. . . .

To guide the Commission in its formulation of offense categories, Congress directed it to consider seven factors: the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of the harm caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and the current incidence of the offense. . . . Congress set forth 11 factors for the Commission to consider in establishing categories of defendants. These include the offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood. . . . Congress also prohibited the Commission from considering the "race, sex, national origin, creed, and socioeconomic status of offenders," . . . and instructed that the guidelines should reflect the "general inappropriateness" of considering certain other factors, such as current unemployment, that might serve as proxies for forbidden factors. . . .

In addition to these overarching constraints, Congress provided even more detailed guidance to the Commission about categories of offenses and offender characteristics. Congress directed that guidelines require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses, particularly when committed by recidivists. . . . Congress further directed that the Commission assure a substantial term of imprisonment for an offense constituting a third felony conviction, for a career felon, for one convicted of a managerial role in a racketeering enterprise, for a crime of violence by an offender on release from a prior felony conviction, and for an offense involving a substantial quantity of narcotics. . . . Congress also instructed "that the guidelines reflect . . . the general appropriateness of imposing a term of imprisonment" for a crime of violence that resulted in serious bodily injury. On the other hand, Congress directed that guidelines reflect the general inappropriateness of imposing a sentence of imprisonment "in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." . . . Congress also enumerated various aggravating and mitigating circumstances, such as, respectively, multiple offenses or substantial assistance to the Government, to be reflected in the guidelines. . . . In other words, although Congress granted the Commission substantial discretion in formulating guidelines, in actuality it legislated a full hierarchy of punishment—from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the most important offense and offender characteristics to place defendants within these categories.

We cannot dispute petitioner's contention that the Commission enjoys significant discretion in formulating guidelines. The Commission does have discretionary authority to determine the relative severity of federal crimes and to assess the relative weight of the offender characteristics that Congress listed for the Commission to consider. . . . The Commission also has significant discretion to determine which crimes have been punished too leniently, and which too severely. . . . Congress has called upon the Commission to exercise its judgment about which types of crimes and which types of criminals are to be considered similar for the purposes of sentencing.

But our cases do not at all suggest that delegations of this type may not carry with them the need to exercise judgment on matters of policy. . . .

. . . The Act sets forth more than merely an "intelligible principle" or minimal standards. One court has aptly put it: "The statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations." . . .

Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." . . . We have no doubt that in the hands of the Commission "the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose" of the Act. . . .

We conclude that in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Accordingly, we hold that the Act is constitutional.

The judgment of United States District Court for the Western District of Missouri is affirmed. . . .

Justice Scalia, dissenting.

While the products of the Sentencing Commission's labors have been given the modest name "Guidelines," . . . they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed. . . . I dissent from today's decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws. . . . Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence . . . to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, as its name suggests, it is a prescribed structure, a framework, for the conduct of Government. In designing that structure, the Framers themselves considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document. That is the meaning of the statements concerning acceptable commingling made by Madison in defense of the proposed Constitution, and now routinely used as an excuse for disregarding it. When he said, as the Court correctly quotes, that separation of power "d[oes] not mean that these [three] departments ought to have no partial agency in, or no control over the acts of each other," . . . his point was that the commingling specifically provided for in the structure that he and his colleagues had designed—the Presidential veto over legislation, the Senate's confirmation of executive and judicial officers, the Senate's ratification of treaties, the Congress's power to impeach and remove executive and judicial officers—did not violate a proper understanding of separation of powers. He would be aghast, I think, to hear those words used as justification for ignoring that carefully designed structure so long as, in the changing view of the Supreme Court from time to time, "too much commingling" does not occur. Consideration of the degree of commingling that a particular disposition produces may be appropriate at the margins where the outline of the framework itself is not clear; but it seems to me far from a marginal question whether our constitutional structure allows for a body which is not the Congress, and yet exercises no governmental powers except the making of rules that have the effect of laws.

I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress. It may well be that in some circumstances such a Branch would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.

I respectfully dissent from the Court's decision, and would reverse the judgment of the District Court.

Case

WHITMAN V. AMERICAN TRUCKING ASSOCIATIONS

531 U.S. 457; 121 S.Ct. 903; 149 L.Ed. 2d 1 (2001)
Vote: 9–0

In this case the Supreme Court considers whether a provision of the Clean Air Act (CAA) is an impermissible delegation of legislative power to the Environmental Protection Agency.

Justice Scalia delivered the opinion of the Court.

. . . Section 109(a) of the CAA . . . requires the Administrator of the EPA to promulgate national ambient air quality standards [NAAQS] for each air pollutant for which "air quality criteria" have been issued. . . . Once a NAAQS has been promulgated, the Administrator must review the standard (and the criteria on which it is based) "at five-year intervals" and make "such revisions . . . as may be appropriate." . . .

These cases arose when, on July 18, 1997, the Administrator revised the NAAQS for particulate matter (PM) and ozone. . . . American Trucking Associations, Inc., and its co-respondents—which include, in addition to other private companies, the States of Michigan, Ohio, and West Virginia—challenged the new standards in the Court of Appeals for the District of Columbia Circuit. . . .

Section 109(b)(1) of the CAA instructs the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health." . . . The Court of Appeals held that this section as interpreted by the Administrator did not provide an "intelligible principle" to guide the EPA's exercise of authority in setting NAAQS. "[The] EPA," it said, "lack[ed] any determinate criteria for drawing lines. It has failed to state intelligibly how much is too much." . . . The court hence found that the EPA's interpretation (but not the statute itself) violated the nondelegation doctrine. . . . We disagree.

In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." This text permits no delegation of those powers, . . . and so we repeatedly have said that when Congress confers decision making authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." . . . We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.

. . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.

We agree with the Solicitor General that the text of § 109(b)(1) of the CAA at a minimum requires that "[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." . . . Requisite, in turn, "mean[s] sufficient, but not more than necessary." . . .

These limits on the EPA's discretion are strikingly similar to the ones we approved in *Touby v. United States* (1991), which permitted the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was "necessary to avoid an imminent hazard to the public safety." . . . They also resemble the Occupational Safety and Health Act provision requiring the agency to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health"—which the Court upheld in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute* (1980), and which even then-Justice Rehnquist, who alone in that case thought the statute violated the nondelegation doctrine, . . . would have upheld if, like the statute here, it did not permit economic costs to be considered. . . .

The scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition." See *Panama Refining Company v. Ryan* (1935);

A.L.A. Schechter Poultry Corp. v. United States (1935). We have, on the other hand, upheld the validity of § 11(b)(2) of the Public Utility Holding Company Act of 1935, . . . which gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders." *American Power & Light Company v. SEC* (1946). We have approved the wartime conferral of agency power to fix the prices of commodities at a level that "'will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of th[e] Act.'" *Yakus v. United States* (1944). And we have found an "intelligible principle" in various statutes authorizing regulation in the "public interest." . . . In short, we have "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." . . .

It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. . . . While Congress need not provide any direction to the EPA regarding the manner in which it is to define "country elevators," which are to be exempt from new-stationary-source regulations governing grain elevators, . . . it must provide substantial guidance on setting air standards that affect the entire national economy. But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." . . .

In *Touby* [*v. United States* (1991)], for example, we did not require the statute to decree how "imminent" was too imminent, or how "necessary" was necessary enough, or even—most relevant here—how "hazardous" was too hazardous. . . . It is therefore not conclusive for delegation purposes that, as respondents argue, ozone and particulate matter are "nonthreshold" pollutants that inflict a continuum of adverse health effects at any airborne concentration greater than zero, and hence require the EPA to make judgments of degree. "[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." . . .

Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is "requisite"—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.

We therefore reverse the judgment of the Court of Appeals remanding for reinterpretation that would avoid a supposed delegation of legislative power. . . .

Justice Thomas, concurring.

I agree with the majority that § 109's directive to the agency is no less an "intelligible principle" than a host of other directives that we have approved. . . . I write separately, however, to express my concern that there may nevertheless be a genuine constitutional problem with § 109, a problem which the parties did not address.

The parties to this case who briefed the constitutional issue wrangled over constitutional doctrine with barely a nod to the text of the Constitution. Although this Court since 1928 has treated the "intelligible principle" requirement as the only constitutional limit on congressional grants of power to administrative agencies, . . . the Constitution does not speak of "intelligible principles." Rather, it speaks in much simpler terms: "*All* legislative Powers herein granted shall be vested in a Congress." . . .

I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative." As it is, none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.

Justice Stevens, with whom ***Justice Souter*** joins, concurring in part and concurring in the judgment.

Section 109(b)(1) delegates to the Administrator of the Environmental Protection Agency (EPA) the authority to promulgate national ambient air quality standards (NAAQS). . . . [T]he Court convincingly explains why the Court of Appeals erred when it concluded that § 109 effected "an unconstitutional delegation of legislative power." . . . I wholeheartedly endorse the Court's result and endorse its explanation of its reasons, albeit with the following caveat.

The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is "legislative" but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not "legislative power." Despite the fact that there is language in our opinions that supports the Court's articulation of our holding, I am persuaded that it would be both wiser and more faithful to

what we have actually done in delegation cases to admit that agency rulemaking authority is "legislative power." The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it. . . . If the NAAQS that the EPA promulgated had been prescribed by Congress, everyone would agree that those rules would be the product of an exercise of "legislative power." The same characterization is appropriate when an agency exercises rulemaking authority pursuant to a permissible delegation from Congress.

My view is not only more faithful to normal English usage, but is also fully consistent with the text of the Constitution. In Article I, the Framers vested "All legislative Powers" in the Congress, . . . just as in Article II they vested the "executive Power" in the President, . . . Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others. . . .

It seems clear that an executive agency's exercise of rulemaking authority pursuant to a valid delegation from Congress is "legislative." As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it. Accordingly, . . . I would hold that when Congress enacted § 109, it effected a constitutional delegation of legislative power to the EPA.

Justice Breyer, concurring in part and concurring in the judgment. . . .

Case

GONZALES V. OREGON

___U.S. ___; 126 S.Ct. 904; 163 L.Ed.2d 748 (2006)
Vote: 6–3

In this case the Supreme Court held that the federal Controlled Substances Act does not permit the Attorney General to issue a rule forbidding doctors from prescribing drugs for use in physician-assisted suicide. The rule, announced by Attorney General John Ashcroft in 2001, represented an attempt by the federal government to block Oregon's "Death with Dignity Act," which allows doctors in that state to prescribe lethal doses of drugs to terminally ill patients wishing to end their lives. In editing this decision, we have omitted much of the discussion pertaining to statutory interpretation and judicial deference to administrative rule making. We have attempted to retain most of the discussion dealing with the constitutional and public policy aspects of the issue. In reviewing these abbreviated versions of the majority and dissenting opinions, students should consider whether the instant decision can be reconciled with the Court's ruling in Gonzales v. Raich (2005), which is discussed and excerpted in Chapter 2.

Justice Kennedy delivered the opinion of the Court.

. . . In 1994, Oregon became the first State to legalize assisted suicide when voters approved a ballot measure enacting the Oregon Death With Dignity Act [ODWDA]. . . . [The law] exempts from civil or criminal liability state-licensed physicians who, in compliance with the specific safeguards in ODWDA, dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient.

The drugs Oregon physicians prescribe under ODWDA are regulated under a federal statute, the Controlled Substances Act (CSA or Act). . . . The CSA allows these particular drugs to be available only by a written prescription from a registered physician. In the ordinary course the same drugs are prescribed in smaller doses for pain alleviation.

A November 9, 2001, Interpretive Rule issued by the Attorney General . . . determines that using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the CSA. The Interpretive Rule's validity under the CSA is the issue before us.

. . . Enacted in 1970 with the main objectives of combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances, the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act's five schedules. . . . The Act places substances in one of five schedules based on their potential for abuse or dependence, their accepted medical use, and their accepted safety for use under medical supervision. Schedule I contains the most severe restrictions on access and use, and Schedule V the least. . . . Congress classified a host of substances when it enacted the CSA, but the statute permits the Attorney General to add, remove, or reschedule substances. He may do so, however, only after making particular findings, and on scientific and medical matters he is required to accept the findings of the Secretary of Health and Human Services (Secretary). These proceedings must be on the record after an opportunity for comment. . . .

The present dispute involves controlled substances listed in Schedule II, substances generally available only

pursuant to a written, nonrefillable prescription by a physician. . . . A 1971 regulation promulgated by the Attorney General requires that every prescription for a controlled substance "be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." . . .

To prevent diversion of controlled substances with medical uses, the CSA regulates the activity of physicians. To issue lawful prescriptions of Schedule II drugs, physicians must "obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him." . . . The Attorney General may deny, suspend, or revoke this registration if, as relevant here, the physician's registration would be "inconsistent with the public interest." . . .

The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its preemption provision: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together." . . .

Oregon voters enacted ODWDA in 1994. For Oregon residents to be eligible to request a prescription under ODWDA, they must receive a diagnosis from their attending physician that they have an incurable and irreversible disease that, within reasonable medical judgment, will cause death within six months. . . . Attending physicians must also determine whether a patient has made a voluntary request, ensure a patient's choice is informed, and refer patients to counseling if they might be suffering from a psychological disorder or depression causing impaired judgment. . . . A second "consulting" physician must examine the patient and the medical record and confirm the attending physician's conclusions. . . . Oregon physicians may dispense or issue a prescription for the requested drug, but may not administer it. . . .

The reviewing physicians must keep detailed medical records of the process leading to the final prescription, . . . records that Oregon's Department of Human Services reviews. . . . Physicians who dispense medication pursuant to ODWDA must also be registered with both the State's Board of Medical Examiners and the federal Drug Enforcement Administration (DEA). . . . In 2004, 37 patients ended their lives by ingesting a lethal dose of medication prescribed under ODWDA. . . .

On November 9, 2001, without consulting Oregon or apparently anyone outside his Department, the Attorney General issued an Interpretive Rule announcing his intent to restrict the use of controlled substances for physician-assisted suicide. . . .

There is little dispute that the Interpretive Rule would substantially disrupt the ODWDA regime. Respondents contend, and petitioners do not dispute, that every prescription filled under ODWDA has specified drugs classified under Schedule II. A physician cannot prescribe the substances without DEA registration, and revocation or suspension of the registration would be a severe restriction on medical practice. Dispensing controlled substances without a valid prescription, furthermore, is a federal crime. . . .

In response the State of Oregon, joined by a physician, a pharmacist, and some terminally ill patients, all from Oregon, challenged the Interpretive Rule in federal court. The United States District Court for the District of Oregon entered a permanent injunction against the Interpretive Rule's enforcement.

A divided panel of the Court of Appeals for the Ninth Circuit granted the petitions for review and held the Interpretive Rule invalid. . . . It reasoned that, by making a medical procedure authorized under Oregon law a federal offense, the Interpretive Rule altered the "usual constitutional balance between the States and the Federal Government" without the requisite clear statement that the CSA authorized such action. . . . The Court of Appeals held in the alternative that the Interpretive Rule could not be squared with the plain language of the CSA, which targets only conventional drug abuse and excludes the Attorney General from decisions on medical policy. . . .

The starting point for this inquiry is, of course, the language of the delegation provision itself. In many cases authority is clear because the statute gives an agency broad power to enforce all provisions of the statute. . . . The CSA does not grant the Attorney General this broad authority to promulgate rules.

The CSA gives the Attorney General limited powers, to be exercised in specific ways. His rulemaking authority under the CSA is described in two provisions: (1) "The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to listed chemicals" . . . and (2) "The Attorney General may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter." . . . As is evident from these sections, Congress did not delegate to the Attorney General authority to carry out or effect all provisions of the CSA. Rather, he can promulgate rules relating only to "registration" and "control," and "for the efficient execution of his functions" under the statute.

Turning first to the Attorney General's authority to make regulations for the "control" of drugs, this delegation cannot sustain the Interpretive Rule's attempt to define standards of medical practice. Control is a term of art in the CSA. ". . . The term 'control' means to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise." . . .

To exercise his scheduling power, the Attorney General must follow a detailed set of procedures, including requesting a scientific and medical evaluation from the Secretary. The statute is also specific as to the manner in which the Attorney General must exercise this authority: "Rules of the Attorney General under this subsection [regarding scheduling] shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by [the Administrative Procedure Act]." . . . The Interpretive Rule now under consideration does not concern the scheduling of substances and was not issued after the required procedures for rules regarding scheduling, so it cannot fall under the Attorney General's "control" authority.

Even if "control" . . . were understood to signify something other than its statutory definition, it would not support the Interpretive Rule. The statutory references to "control" outside the scheduling context make clear that the Attorney General can establish controls "against diversion," . . . but do not give him authority to define diversion based on his view of legitimate medical practice. As explained below, the CSA's express limitations on the Attorney General's authority, and other indications from the statutory scheme, belie any notion that the Attorney General has been granted this implicit authority. Indeed, if "control" were given the expansive meaning required to sustain the Interpretive Rule, it would transform the carefully described limits on the Attorney General's authority over registration and scheduling into mere suggestions.

We turn, next, to the registration provisions of the CSA. Before 1984, the Attorney General was required to register any physician who was authorized by his State. The Attorney General could only deregister a physician who falsified his application, was convicted of a felony relating to controlled substances, or had his state license or registration revoked. . . . The CSA was amended in 1984 to allow the Attorney General to deny registration to an applicant "if he determines that the issuance of such registration would be inconsistent with the public interest." . . . Registration may also be revoked or suspended by the Attorney General on the same grounds. . . . In determining consistency with the public interest, the Attorney General must, as discussed above, consider five factors, including: the State's recommendation; compliance with state, federal, and local laws regarding controlled substances; and public health and safety. . . .

The Interpretive Rule cannot be justified under this part of the statute. It does not undertake the five-factor analysis and concerns much more than registration. Nor does the Interpretive Rule on its face purport to be an application of the registration provision. . . . It is, instead, an interpretation of the substantive federal law requirements . . . for a valid prescription. It begins by announcing that assisting suicide is not a "legitimate medical purpose" . . . and that dispensing controlled substances to assist a suicide violates the CSA. . . . Violation is a criminal offense, and often a felony. . . . The Interpretive Rule thus purports to declare that using controlled substances for physician-assisted suicide is a crime, an authority that goes well beyond the Attorney General's statutory power to register or deregister. . . .

The authority desired by the Government is inconsistent with the design of the statute in other fundamental respects. The Attorney General does not have the sole delegated authority under the CSA. He must instead share it with, and in some respects defer to, the Secretary, whose functions are likewise delineated and confined by the statute. The CSA allocates decision making powers among statutory actors so that medical judgments, if they are to be decided at the federal level and for the limited objects of the statute, are placed in the hands of the Secretary. In the scheduling context, for example, the Secretary's recommendations on scientific and medical matters bind the Attorney General. The Attorney General cannot control a substance if the Secretary disagrees. . . .

In a similar vein the 1970 Act's regulation of medical practice with respect to drug rehabilitation gives the Attorney General a limited role; for it is the Secretary who, after consultation with the Attorney General and national medical groups, "determine[s] the appropriate methods of professional practice in the medical treatment of . . . narcotic addiction." . . .

Post enactment congressional commentary on the CSA's regulation of medical practice is also at odds with the Attorney General's claimed authority to determine appropriate medical standards. In 1978, in preparation for ratification of the Convention on Psychotropic Substances, . . . Congress decided it would implement the United States' compliance through "the framework of the procedures and criteria for classification of substances provided in the" CSA. . . . It did so to ensure that "nothing in the Convention will interfere with ethical medical practice in this country as determined by [the Secretary] on the basis of a consensus of the views of the American medical and scientific community." . . .

The structure of the CSA, then, conveys unwillingness to cede medical judgments to an Executive official who lacks medical expertise. In interpreting statutes that divide authority, the Court has recognized: "Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes." . . . This presumption works against a conclusion that the Attorney General has authority to make quintessentially medical judgments.

The Government contends the Attorney General's decision here is a legal, not a medical, one. This generality, however, does not suffice. The Attorney General's Interpretive Rule, and the Office of Legal Counsel memo it incorporates, places extensive reliance on medical judgments and the views of the medical community in concluding that assisted suicide is not a "legitimate medical purpose." . . . This confirms that the authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design.

The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes." . . .

The importance of the issue of physician-assisted suicide, which has been the subject of an "earnest and profound debate" across the country, . . . makes the oblique form of the claimed delegation all the more suspect. Under the Government's theory, moreover, the medical judgments the Attorney General could make are not limited to physician-assisted suicide. Were this argument accepted, he could decide whether any particular drug may be used for any particular purpose, or indeed whether a physician who administers any controversial treatment could be deregistered. This would occur, under the Government's view, despite the statute's express limitation of the Attorney General's authority to registration and control, with attendant restrictions on each of those functions, and despite the statutory purposes to combat drug abuse and prevent illicit drug trafficking. . . .

As we have noted before, the CSA "repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs." . . . In doing so, Congress sought to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." . . . It comes as little surprise, then, that we have not considered the extent to which the CSA regulates medical practice beyond prohibiting a doctor from acting as a drug "pusher" instead of a physician. . . .

In deciding whether the CSA can be read as prohibiting physician-assisted suicide, we look to the statute's text and design. The statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism, which allow the States "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." . . .

The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers. The Attorney General can register a physician to dispense controlled substances "if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices." . . . When considering whether to revoke a physician's registration, the Attorney General looks not just to violations of federal drug laws; but he "shall" also consider "[t]he recommendation of the appropriate state licensing board or professional disciplinary authority" and the registrant's compliance with state and local drug laws. . . . The very definition of a "practitioner" eligible to prescribe includes physicians "licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices" to dispense controlled substances. . . . Further cautioning against the conclusion that the CSA effectively displaces the States' general regulation of medical practice is the Act's pre-emption provision, which indicates that, absent a positive conflict, none of the Act's provisions should be "construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State." . . .

The Government, in the end, maintains that the [Controlled Substances Act] delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal–state balance and the congressional role in maintaining it. . . .

Justice Scalia, with whom ***Chief Justice Roberts*** and ***Justice Thomas*** join, dissenting.

The Court concludes that the Attorney General lacked authority to declare assisted suicide illicit under the Controlled Substances Act (CSA), because the CSA is concerned only with "illicit drug dealing and trafficking." . . . This question-begging conclusion is obscured by a flurry of arguments that distort the statute and disregard settled principles of our interpretive jurisprudence. . . .

The Court's decision today is perhaps driven by a feeling that the subject of assisted suicide is none of the Federal Government's business. It is easy to sympathize with that position. The prohibition or deterrence of assisted suicide is certainly not among the enumerated powers conferred on the United States by the Constitution, and it is within the realm of public morality . . . traditionally addressed by the so-called police power of the States. But then, neither is prohibiting the recreational use of drugs or discouraging drug addiction among the enumerated powers. From an early time in our national history, the Federal Government has used its enumerated powers, such as its power to regulate interstate commerce, for the purpose of protecting public morality—for example, by banning the interstate shipment of lottery tickets, or the interstate transport of women for immoral purposes. . . . Unless we are to repudiate a long and well-established principle of our jurisprudence, using the federal commerce power to prevent assisted suicide is unquestionably permissible. The question before us is not whether Congress can do this, or even whether Congress should do this; but simply whether Congress has done this in the CSA. I think there is no doubt that it has. If the term "legitimate medical purpose" has any meaning, it surely excludes the prescription of drugs to produce death. . . .

Justice Thomas, dissenting.

When Angel Raich and Diane Monson challenged the application of the Controlled Substances Act . . . to their purely intrastate possession of marijuana for medical use as authorized under California law, a majority of this Court (a mere seven months ago) determined that the CSA effectively invalidated California's law because "the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner." . . . The majority employed unambiguous language, concluding that the "manner" in which controlled substances can be utilized "for medicinal purposes" is one of the "core activities regulated by the CSA." . . . And, it described the CSA as "creating a comprehensive framework for regulating the production, distribution, and possession of . . . 'controlled substances,'" including those substances that "'have a useful and legitimate medical purpose,'" in order to "foster the beneficial use of those medications" and "to prevent their misuse." [See *Gonzales v. Raich* (2005).] . . .

Today the majority beats a hasty retreat from these conclusions. Confronted with a regulation that broadly requires all prescriptions to be issued for a "legitimate medical purpose," . . . a regulation recognized in *Raich* as part of the Federal Government's "closed . . . system" for regulating the "manner" in "which controlled substances can be utilized for medicinal purposes," . . . the majority rejects the Attorney General's . . . determination that administering controlled substances to facilitate a patient's death is not a "legitimate medical purpose." . . . The majority does so based on its conclusion that the CSA is only concerned with the regulation of "medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood." . . . In other words, in stark contrast to *Raich*'s broad conclusions about the scope of the CSA as it pertains to the medicinal use of controlled substances, today this Court concludes that the CSA is merely concerned with fighting "drug abuse" and only insofar as that abuse leads to "addiction or abnormal effects on the nervous system." . . .

The majority's newfound understanding of the CSA as a statute of limited reach is all the more puzzling because it rests upon constitutional principles that the majority of the Court rejected in *Raich*. Notwithstanding the States' "traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens," . . . the *Raich* majority concluded that the CSA applied to the intrastate possession of marijuana for medicinal purposes authorized by California law because "Congress could have rationally" concluded that such an application was necessary to the regulation of the "larger interstate marijuana market." . . . Here, by contrast, the majority's restrictive interpretation of the CSA is based in no small part on "the structure and limitations of federalism, which allow the States "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." . . . According to the majority, these "background principles of our federal system . . . belie the notion that Congress would use . . . an obscure grant of authority to regulate areas traditionally supervised by the States' police power." . . .

Of course there is nothing "obscure" about the CSA's grant of authority to the Attorney General. . . . And, the Attorney General's conclusion that the CSA prohibits the States from authorizing physician assisted suicide is admittedly "at least reasonable," . . . and is therefore entitled to deference. . . . While the scope of the CSA and the

Attorney General's power thereunder are sweeping, and perhaps troubling, such expansive federal legislation and broad grants of authority to administrative agencies are merely the inevitable and inexorable consequence of this Court's Commerce Clause and separation-of-powers jurisprudence. . . .

I agree with limiting the applications of the CSA in a manner consistent with the principles of federalism and our constitutional structure. . . . But that is now water over the dam. The relevance of such considerations was at its zenith in *Raich,* when we considered whether the CSA could be applied to the intrastate possession of a controlled substance consistent with the limited federal powers enumerated by the Constitution. Such considerations have little, if any, relevance where, as here, we are merely presented with a question of statutory interpretation, and not the extent of constitutionally permissible federal power. This is particularly true where, as here, we are interpreting broad, straightforward language within a statutory framework that a majority of this Court has concluded is so comprehensive that it necessarily nullifies the States' "traditional . . . powers . . . to protect the health, safety, and welfare of their citizens." The Court's reliance upon the constitutional principles that it rejected in *Raich*—albeit under the guise of statutory interpretation—is perplexing to say the least. Accordingly, I respectfully dissent.

Case

Immigration and Naturalization Service v. Chadha

462 U.S. 919; 103 S.Ct. 2764; 77 L.Ed. 2d 317 (1983)
Vote: 7–2

In this case the Court considers the constitutionality of a one-House legislative veto provision contained in the Immigration and Nationality Act of 1952. Students should note the sharply contrasting approaches to constitutional interpretation manifested in the majority opinion and Justice White's dissent, that is "formalism" versus "functionalism."

Chief Justice Burger delivered the opinion of the Court.

. . . Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a non-immigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having "remained in the United States for a longer time than permitted." . . . [A] deportation hearing was held before an immigration judge on January 11, 1974. Chadha conceded that he was deportable for overstaying his visa and the hearing was adjourned to enable him to file an application for suspension of deportation. . . . Section 244(a)(1) provides:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States, or an alien lawfully admitted for permanent residence.

After Chadha submitted his application for suspension of deportation, the deportation hearing was resumed on February 7, 1974. On the basis of evidence adduced at the hearing, affidavits submitted with the application, and the results of a character investigation conducted by the INS, the immigration judge, on June 25, 1974, ordered that Chadha's deportation be suspended. The immigration judge found that Chadha met the requirements of 244(a)(1): he had resided continuously in the United States for over seven years, was of good moral character, and would suffer "extreme hardship" if deported.

Pursuant to 244(c)(1) of the Act, the immigration judge suspended Chadha's deportation and a report of the suspension was transmitted to Congress. Section 244(c)(1) provides:

> Upon application by any alien who is found by the Attorney General to meet the requirements of subsection

> (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

Once the Attorney General's recommendation for suspension of Chadha's deportation was conveyed to Congress, Congress had the power under § 244(c)(2) of the Act, to veto the Attorney General's determination that Chadha should not be deported. Section 244(c)(2) provides:

> In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

The June 25, 1974, order of the immigration judge suspending Chadha's deportation remained outstanding as a valid order for a year and a half. For reasons not disclosed by the record, Congress did not exercise the veto authority reserved to it under 244(c)(2), until the first session of the 94th Congress. This was the final session in which Congress, pursuant to 244(c)(2), could act to veto the Attorney General's determination that Chadha should not be deported. The session ended on December 19, 1975. Absent Congressional action, Chadha's deportation proceedings would have been cancelled after this date and his status adjusted to that of a permanent resident alien.

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing "the granting of permanent residence in the United States to [six] aliens," including Chadha. . . . The resolution was referred to the House Committee on the Judiciary. On December 16, 1975, the resolution was discharged from further consideration by the House Committee on the Judiciary and submitted to the House of Representatives for a vote. The resolution had not been printed and was not made available to other Members of the House prior to or at the time it was voted on. . . . So far as the record before us shows, the House consideration of the resolution was based on Representative Eilberg's statement from the floor that "[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution [Chadha and five others] did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended." . . .

The resolution was passed without debate or recorded vote. Since the House action was pursuant to 244(c)(2), the resolution was not treated as an Article I legislative act; it was not submitted to the Senate or presented to the President for his action.

After the House veto of the Attorney General's decision to allow Chadha to remain in the United States, the immigration judge reopened the deportation proceedings to implement the House order deporting Chadha. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional. The immigration judge held that he has no authority to rule on the constitutional validity of 244(c)(2). On November 8, 1976, Chadha was ordered deported pursuant to the House action.

Chadha appealed the deportation order to the Board of Immigration Appeals again contending that § 244(c)(2) is unconstitutional. The Board held that it had "no power to declare unconstitutional an act of Congress" and Chadha's appeal was dismissed. . . .

Pursuant to § 106(a) of the Act, Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit. The Immigration and Naturalization Service agreed with Chadha's position before the Court of Appeals and joined him in arguing that § 244(c)(2) is unconstitutional. In light of the importance of the question, the Court of Appeals invited both the Senate and the House of Representatives to file briefs *amici curiae*.

After full briefing and oral argument, the Court of Appeals held that the House was without constitutional authority to order Chadha's deportation; accordingly it directed the Attorney General "to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives." . . . The essence of its holding was that § 244(c)(2) violates the constitutional doctrine of separation of powers.

We granted certiorari . . . and we now affirm.

. . . We turn now to the question whether action of one House of Congress under § 244(c)(2) violates strictures of the Constitution. We begin, of course, with the presumption

that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained. . . .

By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies:

> Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940–49, nineteen statutes; between 1950–59, thirty-four statutes; and from 1960–69, forty-nine. From the years 1970 through 1975, at least one hundred sixty three such provisions were included in eighty-nine laws. . . .

Justice White undertakes to make a case for the proposition that the one-House veto is a useful "political invention," and we need not challenge that assertion. We can even concede this utilitarian argument although the long-range political wisdom of this "invention" is arguable. It has been vigorously debated and it is instructive to compare the views of the protagonists. But policy arguments supporting even useful "political inventions" are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions are critical to the resolution of this case, we set them out verbatim. . . .

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. . . . Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; . . .
>
> 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.

These provisions of Art. I are integral parts of the constitutional design for the separation of powers. We have recently noted that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." . . . Just as we relied on the textual provision of Art. II, Sec. 2, cl. 2, to vindicate the principle of separation of powers . . . , we find that the purposes underlying the Presentment Clauses, Art. I, Sec. 7, cls. 2, 3, and the bicameral requirement of Art. I, Sec. 1 and 7, cl. 2, guide our resolution of the important question presented in this case. The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers and we now turn to Art. I.

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers. Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, Sec. 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." As a consequence, Art. I, Sec. 7, cl. 3, was added.

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

The President's role in the law-making process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. The bicameral requirement of Art. I, Sec. 1, cl. 7 was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials. . . .

However familiar, it is useful to recall that apart from their fear that special interests could be favored at the expense of public needs, the Framers were also concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that could pass laws favoring a minority of the people. It need hardly be repeated here that the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states.

We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. . . . [This] represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

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

Although not "hermetically" sealed from one another, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere.

Beginning with this presumption, we must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, Sec. 7 apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect." . . .

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

The legislative character of the one-House veto in this case is confirmed by the character of the Congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined the alien should remain in the United States. Without the challenged provision in 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation. Similarly, a veto by one House of Congress under § 244(c)(2) cannot be justified as an attempt at amending the standards set out in 244(a)(1), or as a repeal of 244 as applied to Chadha. Amendment and repeal of statutes, no less than enactment, must conform with Art. I.

The nature of the decision implemented by the one-House veto in this case further manifests its legislative character. After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress's decision to deport Chadha—no less than Congress's original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that

Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. There are but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:

> (a) The House of Representatives alone was given the power to initiate impeachments. Art. I, Sec. 2, cl. 6;
>
> (b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, Sec. 3, cl. 5;
>
> (c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, Sec. 2, cl. 2;
>
> (d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, Sec. 2, cl. 2.

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

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Article I. The bicameral requirement, the Presentment Clauses, the President's veto, and Congress's power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.

The veto authorized by § 244(c)(2) doubtless has been in many respects a convenient shortcut; the "sharing" with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the States preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints, spelled out in the Constitution.

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

Justice Powell, concurring in the judgment.

The Court's decision, based on the Presentment Clauses, Art. I, Sec. 7, cls. 2 and 3, apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause. Congress has included the veto in literally hundreds of statutes, dating back to the

1930s. Congress clearly views this procedure as essential to controlling the delegation of power to administration agencies. One reasonably may disagree with Congress's assessment of the veto's utility, but the respect due its judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide this case. In my view, the case may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur only in the judgment. . . .

Justice White, dissenting.

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well-advised to decide the case, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy.

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

The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches—the concerns of Madison and Hamilton. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation's lawmaker. While the President has often objected to particular legislative vetoes, generally those left in the hands of congressional committees, the Executive has more often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.

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

If the legislative veto were as plainly unconstitutional as the Court strives to suggest, its broad ruling today would be more comprehensible. But, the constitutionality of the legislative veto is anything but clear-cut. The issue divides scholars, courts, attorneys general, and the two other branches of the National Government. If the veto devices so flagrantly disregarded the requirements of Article I as the Court today suggests, I find it incomprehensible that Congress, whose members are bound by oath to uphold the Constitution, would have placed these mechanisms in nearly 200 separate laws over a period of 50 years.

I do not suggest that all legislative vetoes are necessarily consistent with separation of powers principles. A legislative check on an inherently executive function, for example that of initiating prosecutions, poses an entirely different question. But the legislative veto device

here—and in many other settings—is far from an instance of legislative tyranny over the Executive. It is a necessary check on the unavoidably expanding power of the agencies, both executive and independent, as they engage in exercising authority delegated by Congress.

I regret that I am in disagreement with my colleagues on the fundamental questions that this case presents. But even more I regret the destructive scope of the Court's holding. It reflects a profoundly different conception of the Constitution than that held by the courts which sanctioned the modern administrative state. Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history. I fear it will now be more difficult "to insure that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people." . . .

Justice Rehnquist, dissenting. . . .

Case

WIENER V. UNITED STATES

357 U.S. 349; 78 S.Ct. 1275; 2 L.Ed. 2d 1377 (1958)
Vote: 9–0

This case examines the President's power to remove without adequate cause appointed officials in the independent agencies.

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a suit for back pay, based on [Wiener's] alleged illegal removal as a member of the War Claims Commission. The facts are not in dispute. By the War Claims Act of 1948, . . . Congress established that Commission with "jurisdiction to receive and adjudicate according to law" . . . claims for compensating internees, prisoners of war, and religious organizations . . . who suffered personal injury or property damage at the hands of the enemy in connection with World War II. The Commission was to be composed of three persons, at least two of whom were to be members of the bar, to be appointed by the President, by and with the advice and consent of the Senate. The Commission was to wind up its affairs not later than three years after the expiration of the time for filing claims, originally limited to two years but extended by successive legislation. . . . This limit on the Commission's life was the mode by which the tenure of the Commissioners was defined, and Congress made no provision for removal of a Commissioner.

Having been duly nominated by President Truman, [Wiener] was confirmed on June 2, 1950, and took office on June 8. . . . On his refusal to heed a request for his resignation, he was, on December 10, 1953, removed by President Eisenhower in the following terms: "I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection." The following day, the President made recess appointments to the Commission, including petitioner's post. After Congress assembled, the President, on February 15, 1954, sent the names of the new appointees to the Senate. The Senate had not confirmed these nominations when the Commission was abolished, July 1, 1954. . . . Thereupon, [Wiener] brought this proceeding in the Court of Claims for recovery of his salary as a War Claims Commissioner from December 10, 1953, the day of his removal by the President, to June 30, 1954, the last day of the Commission's existence. . . .

Controversy pertaining to the scope and limits of the President's power of removal fills a thick chapter of our political and judicial history. The long stretches of its history, beginning with the very first Congress, with early echoes in the Reports of this Court, were laboriously traversed in *Myers v. United States* . . . and need not be retraced. President Roosevelt's reliance upon the pronouncements of the Court in that case in removing a member of the Federal Trade Commission on the ground that "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection" reflected contemporaneous professional opinion regarding the significance of the *Myers* decision. Speaking through a Chief Justice who himself had been President, the Court did not restrict itself to the immediate issue before it, the President's inherent power to remove a postmaster, obviously an executive official. As of set purpose and not by way of parenthetic casualness, the Court announced that the President had inherent constitutional power of removal also of officials who have "duties of a quasi-judicial character . . . whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control." . . . This view of presidential power was deemed to flow from his "constitutional duty of seeing that the laws be faithfully executed." . . .

The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power

to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure. . . . Within less than ten years a unanimous Court, in *Humphrey's Executor v. United States* . . . narrowly confined the scope of the *Myers* decision to include only "all purely executive officers," . . . The Court explicitly "disapproved" the expressions in *Myers* supporting the President's inherent constitutional power to remove members of quasi-judicial bodies. . . . Congress had given members of the Federal Trade Commission a seven-year term and also provided for the removal of a Commissioner by the President for inefficiency, neglect of duty or malfeasance in office. . . .

Humphrey's case . . . drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers and . . . those whose tasks require absolute freedom from Executive interference. "For it is quite evident," again to quote *Humphrey's Executor,* "that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." . . .

Thus, the most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission. What were the duties that Congress confided to this Commission? And can the inference fairly be drawn from the failure of Congress to provide for removal that these Commissioners were to remain in office at the will of the President? For such is the assertion of power on which [Wiener's] removal must rest. The ground of President Eisenhower's removal . . . was precisely the same as President Roosevelt's removal of Humphrey. Both Presidents desired to have Commissioners to be their men. The terms of removal in the two cases are identical and express the assumption that the agencies of which the two Commissioners were members were subject in the discharge of their duties to the control of the Executive. An analysis of the Federal Trade Commission Act left this Court in no doubt that such was not the conception of Congress in creating the Federal Trade Commission. The terms of the War Claims Act of 1948 leave no doubt that such was not the conception of Congress regarding the War Claims Commission.

The history of this legislation emphatically underlines this fact. The short of it is that the origin of the Act was a bill . . . passed by the House that placed the administration of a very limited class of claims in the hands of the Federal Security Administrator. . . . The Federal Security Administrator was indubitably an arm of the President. When the House bill reached the Senate, it struck out all but the enacting clause, rewrote the bill, and established a Commission with "jurisdiction to receive and adjudicate according to law." . . . The Commission was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination "not subject to review by any other official of the United States or by any court, by mandamus or otherwise." . . . Awards were to be paid out of a War Claims fund in the hands of the Secretary of the Treasury, whereby such claims were given even more assured collectability than adheres to judgments rendered in the Court of Claims. . . . With minor amendment . . . this Senate bill became a law.

. . . For Congress itself to have made appropriations for the claims with which it dealt under the War Claims Act was not practical in view of the large number of claimants and the diversity in the specific circumstances giving rise to the claims. The House bill in effect put the distribution of the narrow class of claims that it acknowledged into Executive hands, by vesting the procedure in the Federal Security Administrator. The final form of the legislation, as we have seen, left the widened range of claims to be determined by adjudication. Congress could, of course, have given jurisdiction over these claims to the District Courts or to the Court of Claims. The fact that it chose to establish a Commission to "adjudicate according to law" the classes of claims defined in the statute did not alter the intrinsic judicial character of the task with which the Commission was charged. The claims were to be "adjudicated according to law," that is, on the merits of each claim, supported by evidence and governing legal considerations, by a body that was "entirely free from the control or coercive influence, direct or indirect," . . . of either the Executive or the Congress. If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, a fortiori must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

For such is this case. We have not a removal for cause involving the rectitude of a member of an adjudicatory body, nor even a suspensory removal until the Senate could act upon it by confirming the appointment of a new Commissioner or otherwise dealing with the matter. Judging the matter in all the nakedness in which it is presented, . . . we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it. The philosophy of *Humphrey's Executor,* in its explicit language as well as its implications, precludes such a claim. . . .

Case

VERMONT YANKEE NUCLEAR POWER CORPORATION v. NATURAL RESOURCES DEFENSE COUNCIL

435 U.S. 519; 98 S.Ct. 1197 55 L.Ed. 2d 460 (1978)
Vote: 7–0

In a proceeding growing out of the licensing of two nuclear power plants, the Atomic Energy Commission (AEC) (predecessor to the Nuclear Regulatory Commission), promulgated a "spent fuel cycle rule." Although AEC was authorized to follow informal rule making procedures, it received oral comments at a hearing. But the AEC did not allow discovery proceedings or cross-examination of the witnesses who appeared at the hearing. On review, the U.S. Court of Appeals for the D.C. Circuit overturned the rule, holding that the procedures followed by the AEC were insufficient because they did not provide "due process of law" under the Fifth Amendment. The U.S. Supreme Court granted review.

Mr. Justice Rehnquist delivered the Opinion of the Court.

In 1946, Congress enacted the Administrative Procedure Act, which . . . was not only "a new and comprehensive regulation of procedures in many agencies," . . . but was also a legislative enactment which settled "long continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." . . . Section 553 of the Act, dealing with rulemaking, requires that ". . . notice of proposed rulemaking shall be published in the Federal Register" . . . describes the contents of that notice, and goes on to require in subsection (c) that after the notice the agency "shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." After consideration of the relevant matter presented the agency shall incorporate in the rules adopted a general statement of their basis and purpose." 5 U.S.C.A. § 553. . . .

Interpreting this provision of the Act . . . we [have] held that generally speaking this section of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare. . . .

It is in the light of this background of statutory and decisional law that we granted certiorari to review two judgments of the Court of Appeals for the District of Columbia Circuit because of our concern that they had seriously misread or misapplied this statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions of Congress. . . .

. . . [B]efore determining whether the Court of Appeals reached a permissible result, we must determine exactly what result it did reach, and in this case that is no mean feat. Vermont Yankee argues that the court invalidated the rule because of the inadequacy of the procedures employed in the proceedings. Respondent NRDC, on the other hand, labeling petitioner's view of the decision a "straw man," argues to this Court that the court merely held that the record was inadequate to enable the reviewing court to determine whether the agency had fulfilled its statutory obligation. . . .

After a thorough examination of the opinion itself, we conclude that while the matter is not entirely free from doubt, the majority of the Court of Appeals struck down the rule because of the perceived inadequacies of the procedures employed in the rulemaking proceedings. The court first determined the intervenors' primary argument to be "that the decision to preclude 'discovery or cross-examination' denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process." . . . The court also refrained from actually ordering the agency to follow any specific procedures, but there is little doubt in our minds that the ineluctable mandate of the court's decision is that the procedures afforded during the hearings were inadequate. This conclusion is particularly buttressed by the fact that after the court examined the record, . . . and declared it insufficient, the court proceeded to discuss at some length the necessity for further procedural devices or a more "sensitive" application of those devices employed during the proceedings. . . .

In prior opinions we have intimated that even in a rulemaking proceeding when an agency is making a "quasi-judicial" determination by which a very small number of persons are "exceptionally affected" . . . , in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process. . . . It might

also be true, although we do not think the issue is presented in this case and accordingly do not decide it, that a totally unjustified departure from well settled agency procedures of long standing might require judicial correction.

But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances, "the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." . . .

. . . NRDC argues that Sec. 553 of the Administrative Procedure Act merely establishes lower procedural bounds and that a court may routinely require more than the minimum when an agency's proposed rule addresses complex or technical factual issues or "issues of great public import." . . . We have, however, previously shown that our decisions reject this view.

We also think the legislative history, even the part which it cites, does not bear out its contention. . . . Congress intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed.

There are compelling reasons for construing Sec. 553 in this manner. In the first place, if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the "best" or "correct" result, judicial view would be totally unpredictable. And the agencies, operating under this vague injunction to employ the "best" procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, through which Congress enacted "a formula upon which opposing social and political forces have come to rest," . . . but all the inherent advantages of informal rulemaking would be totally lost.

Secondly, it is obvious that the court in this case reviewed the agency's choice of procedures on the basis of the record actually produced at the hearing, and not on the basis of the information available to the agency when it made the decision to structure the proceedings in a certain way. This sort of Monday morning quarterbacking not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings.

Finally, and perhaps more importantly, this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule. The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate and contribute to the proceedings. But informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. . . . Thus, the adequacy of the "record" in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes. If the agency is compelled to support the rule which it ultimately adopts with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conduct a full adjudicatory hearing prior to promulgating every rule. In sum, this sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress. . . .

Mr. Justice Blackmun and ***Mr. Justice Powell*** took no part in . . . [this decision].

Case

GOLDBERG V. KELLY

397 U.S. 254; 90 S.Ct. 1011; 25 L.Ed. 2d 287 (1970)
Vote: 5–3

A group of welfare recipients from New York City brought suit challenging an action by a state agency terminating their benefits without a prior evidentiary hearing. They claimed that the agency's action violated the Due Process Clause of the Fourteenth Amendment.

Mr. Justice Brennan delivered the opinion of the Court.

The constitutional issue to be decided . . . is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits. . . .

The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" . . . Relevant constitutional restraints apply as much to the withdrawal of public assistance

benefits as to disqualification for unemployment compensation, . . . or to denial of a tax exemption, . . . or to discharge from public employment. . . . The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," . . . depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, . . . "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." . . .

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree . . . that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—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. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. 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, and secure the Blessings of Liberty to ourselves and our Posterity." 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.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

We agree . . . however, that these governmental interests are not overriding in the welfare context. 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. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. 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. . . .

The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

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 secondhand 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 secondhand 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. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . . .

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department. . . .

Finally, the decision maker'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 decision maker 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. . . . We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.

Mr. Chief Justice Burger, dissenting. . . .

Mr. Justice Stewart, dissenting. . . .

Mr. Justice Black, dissenting.

In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far toward becoming a welfare state, that is, a nation that for one reason or another taxes its most affluent people to help support, feed, clothe, and shelter its less fortunate citizens. The result is that today more than nine million men, women, and children in the United States receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter. Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on government and it certainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today. . . .

The procedure required today as a matter of constitutional law finds no precedent in our legal system. Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship that requires one party to make periodic payments to the other. Often the situation arises where the party "owing" the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision in no way obligates the welfare recipient to pay back any benefits wrongfully received during the pre-termination evidentiary hearings or post any bond, and in all "fairness" it could not do so. These recipients are by definition too poor to post a bond or to repay the benefits that, as the majority assumes, must be spent as received to insure survival.

The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. While today's decision requires only an administrative, evidentiary hearing, the inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review. In the next case the welfare recipients are bound to argue that cutting off benefits before judicial review of the agency's decision is also a denial of due process. Since, by hypothesis, termination of aid at that point may still "deprive an eligible recipient of the very means by which to live while he waits," . . . I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. After all, at each step, as the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual. Similarly today's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these people are too poor to hire their own advocates. . . . Thus the end result of today's decision may

well be that the government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including, of course, the opportunity to present his case to this Court. Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full "due process" proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.

. . . The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.

Case

MATHEWS V. ELDRIDGE

424 U.S. 319; 96 S.Ct. 893; 47 L.Ed. 2d 18 (1976)
Vote: 6–2

Here the Court considers the scope of constitutional due process protections in the context of termination of Social Security disability benefits.

Mr. Justice Powell delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance program created by the 1956 amendments to . . . the Social Security Act. . . . Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it has made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability. The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability. . . . The secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. . . .

. . . [The] District Court held that prior to termination of benefits Eldridge had to be afforded an evidentiary hearing of the type required for welfare beneficiaries under . . . the Social Security Act. . . . [T]he Court of Appeals for the Fourth Circuit affirmed. . . . We reverse. . . .

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, . . . that the interest of an individual in continued receipt of these benefits is a statutorily

created "property" interest protected by the Fifth Amendment. . . . Rather, the Secretary contends that the existing administration procedures . . . provide all the process that is constitutionally due before a recipient can be deprived of that interest.

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. . . . The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." . . . The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." . . . Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg v. Kelly,* . . . has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. . . .

These decisions underscore the truism that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances." . . . "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." . . . Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. . . . More precisely, our prior decisions indicate 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. . . .

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was an error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this course of income pending final administrative decision on his claim. . . .

Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence. . . . Eligibility for disability benefits, in contrast, is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force." . . .

As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decision making process. . . . The potential deprivation here is generally likely to be less than in *Goldberg,* although the degree of difference can be overstated. . . . [T]o remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." . . .

As we recognized last Term, . . . "the possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on the private interests." The Secretary concedes that the delay between a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cut off of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, . . . and 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. . . . In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. . . . In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic techniques" . . . that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." . . . In short, a medical assessment of the worker's physical or mental condition is required. This 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 decision maker, is substantially less in this context than in *Goldberg*. . . .

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefore, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his field as well as the correctness of the agency's tentative conclusions. These procedures . . . enable the recipient to "mold" his argument to respond to the precise issues which the decision maker regards as crucial. . . .

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset of the added outlay of public funds. . . . [E]xperience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative recourses, is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society, in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process had identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. . . .

But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." . . . The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacity and circumstances of those who are to be heard," . . . to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be

given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. . . . This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. . . .

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

The judgment of the Court of Appeals is reversed.

Mr. Justice Brennan, with whom ***Mr. Justice Marshall*** concurs, dissenting.

. . . I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be afforded an evidentiary hearing of the type required for welfare beneficiaries. . . . I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife and children to sleep in one bed. . . . Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

Mr. Justice Stevens took no part in the consideration or decision of this case.

Case

Dow Chemical Company v. United States

476 U.S. 227; 106 S.Ct. 1819; 90 L.Ed. 2d 226 (1986)
Vote: 5–4

In this case, the Supreme Court reviews a court of appeals decision upholding the Environmental Protection Agency's aerial observation of a chemical plant complex. The key question is whether the EPA action constituted a search within the meaning of the Fourth Amendment.

Chief Justice Burger delivered the opinion of the Court.

. . . Petitioner Dow Chemical Company operates a 2,000-acre facility manufacturing chemicals at Midland, Michigan. The facility consists of numerous covered buildings, with manufacturing equipment and piping conduits located between the various buildings exposed to visual observation from the air. At all times, Dow has maintained elaborate security around the perimeter of the complex barring ground-level public views of these areas. It also investigates any low-level flights by aircraft over the facility. Dow has not undertaken, however, to conceal all manufacturing equipment within the complex from aerial views. Dow maintains that the cost of covering its exposed equipment would be prohibitive.

In early 1978, enforcement officials of EPA, with Dow's consent, made an on-site inspection of two power plants in this complex. A subsequent EPA request for a second inspection, however, was denied, and EPA did not thereafter seek an administrative search warrant. Instead, EPA employed a commercial aerial photographer, using a standard floor-mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet. At all times the aircraft was lawfully within navigable airspace. . . .

EPA did not inform Dow of this aerial photography, but when Dow became aware of it, Dow brought suit in the District Court alleging that EPA's action violated the Fourth Amendment and was beyond EPA's statutory investigative authority. The District Court granted Dow's motion for summary judgment on the grounds that EPA had no authority to take aerial photographs and that doing so was a search violating the Fourth Amendment. EPA was permanently enjoined from taking aerial photographs of Dow's premises and from disseminating, releasing, or copying the photographs already taken. . . .

The District Court accepted the parties' concession that EPA's "quest for evidence" was a "search," . . . and limited its analysis to whether the search was unreasonable under *Katz v. United States* . . . (1967). Proceeding on the assumption that a search in Fourth Amendment terms had

been conducted, the court found that Dow manifested an expectation of privacy in its exposed plant areas because it intentionally surrounded them with buildings and other enclosures. . . .

The District Court held that this expectation of privacy was reasonable, as reflected in part by trade secret protections restricting Dow's commercial competitors from aerial photography of these exposed areas. . . . The court emphasized that use of "the finest precision aerial camera available" permitted EPA to capture on film "a great deal more than the human eye could ever see." . . .

The Court of Appeals reversed. . . . It recognized that Dow indeed had a subjective expectation of privacy in certain areas from ground-level intrusions, but the court was not persuaded that Dow had a subjective expectation of being free from aerial surveillance since Dow had taken no precautions against such observation, in contrast to its elaborate ground-level precautions. . . . The court rejected the argument that it was not feasible to shield any of the critical parts of the exposed plant areas from aerial surveys. The Court of Appeals, however, did not explicitly reject the District Court's factual finding as to Dow's subjective expectations. . . .

Viewing Dow's facility to be more like the "open field" in *Oliver v. United States* . . . (1984), than a home or an office, [the court of appeals] held that the common-law curtilage doctrine did not apply to a large industrial complex of closed buildings connected by pipes, conduits, and other exposed manufacturing equipment. The Court of Appeals looked to "the peculiarly strong concepts of intimacy, personal autonomy and privacy associated with the home" as the basis for the curtilage protection. The court did not view the use of sophisticated photographic equipment by EPA as controlling.

The Court of Appeals then held that EPA clearly acted within its statutory powers even absent express authorization for aerial surveillance, concluding that the delegation of general investigative authority to EPA, similar to that of other law enforcement agencies, was sufficient to support the use of aerial photography. . . .

The photographs at issue in this case are essentially like those commonly used in mapmaking. Any person with an airplane and an aerial camera could readily duplicate them. In common with much else, the technology of photography has changed in this century. These developments have enhanced industrial processes, and indeed all areas of life; they have also enhanced law enforcement techniques. Whether they may be employed by competitors to penetrate trade secrets is not a question presented in this case. Governments do not generally seek to appropriate trade secrets of the private sector, and the right to be free of appropriation of trade secrets is protected by law.

Dow nevertheless relies heavily on its claim that trade secret laws protect it from any aerial photography of this industrial complex by its competitors, and that this protection is relevant to our analysis of such photography under the Fourth Amendment. That such photography might be barred by state law with regard to competitors, however, is irrelevant to the questions presented here. State tort law governing unfair competition does not define the limits of the Fourth Amendment. . . . The Government is seeking these photographs in order to regulate, not to compete with, Dow. If the Government were to use the photographs to compete with Dow, Dow might have a Fifth Amendment "taking" claim. Indeed, Dow alleged such a claim in its complaint, but the District Court dismissed it without prejudice. But even trade secret laws would not bar all forms of photography of this industrial complex; rather, only photography with an intent to use any trade secrets revealed by the photographs may be proscribed. Hence, there is no prohibition of photographs taken by a casual passenger on an airliner, or those taken by a company producing maps for its mapmaking purposes.

Dow claims first that EPA has no authority to use aerial photography to implement its statutory authority for "site inspection" under § 114(a) of the Clean Air Act . . . ; second, Dow claims EPA's use of aerial photography was a "search" of an area that, notwithstanding the large size of the plant, was within an "industrial curtilage" rather than an "open field," and that it had a reasonable expectation of privacy from such photography protected by the Fourth Amendment. . . .

Congress has vested in EPA certain investigatory and enforcement authority, without spelling out precisely how this authority was to be exercised in all the myriad circumstances that might arise in monitoring matters relating to clean air and water standards. When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission. Aerial observation authority, for example, is not usually expressly extended to police for traffic control, but it could hardly be thought necessary for a legislative body to tell police that aerial observation could be employed for traffic control of a metropolitan area, or to expressly authorize police to send messages to ground highway patrols that a particular over-the-road truck was traveling in excess of 55 miles per hour. Common sense and ordinary human experience teach that traffic violators are apprehended by observation.

Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority

granted. Environmental standards such as clean air and clean water cannot be enforced only in libraries and laboratories, helpful as those institutions may be.

Under § 114(a)(2), the Clean Air Act provides that "upon presentation of . . . credentials," EPA has a "right of entry to, upon, or through any premises." . . . Dow argues this limited grant of authority to enter does not authorize any aerial observation. In particular, Dow argues that unannounced aerial observation deprives Dow of its right to be informed that an inspection will be made or has occurred, and its right to claim confidentiality of the information contained in the places to be photographed. . . . It is not claimed that EPA has disclosed any of the photographs outside the agency.

Section 114(a), however, appears to expand, not restrict, EPA's general powers to investigate. Nor is there any suggestion in the statute that the powers conferred by this section are intended to be exclusive. There is no claim that EPA is prohibited from taking photographs from a ground-level location accessible to the general public. EPA, as a regulatory and enforcement agency, needs no explicit statutory provision to employ methods of observation commonly available to the public at large: we hold that the use of aerial observation and photography is within EPA's statutory authority. . . .

We turn now to Dow's contention that taking aerial photographs constituted a search without a warrant, thereby violating Dow's rights. Under this contention, however, Dow concedes that a simple flyover with naked-eye observation, or the taking of a photograph from a nearby hillside overlooking such a facility, would give rise to no Fourth Amendment problem. . . .

Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe. . . . Moreover, it could hardly be expected that Dow would erect a huge cover over a 2,000-acre tract. In contending that its entire enclosed plant complex is an "industrial curtilage," Dow argues that its exposed manufacturing facilities are analogous to the curtilage surrounding a home because it has taken every possible step to bar access from ground level.

The Court of Appeals held that whatever the limits of an "industrial curtilage" barring ground-level intrusions into Dow's private areas, the open areas exposed here were more analogous to "open fields" than to a curtilage for purposes of aerial observation. In *Oliver,* the Court described the curtilage of a dwelling as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.

Admittedly, Dow's enclosed plant complex, like the area in *Oliver,* does not fall precisely within the "open fields" doctrine. The area at issue here can perhaps be seen as falling somewhere between "open fields" and curtilage, but lacking some of the critical characteristics of both. Dow's inner manufacturing areas are elaborately secured to ensure they are not open or exposed to the public from the ground. Any actual physical entry by EPA into any enclosed area would raise significantly different questions, because "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." The narrow issue raised by Dow's claim of search and seizure, however, concerns aerial observation of a 2,000-acre outdoor manufacturing facility without physical entry.

We pointed out in *Donovan v. Dewey* . . . (1981), that the Government has "greater latitude to conduct warrantless inspections of commercial property" because "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home." We 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 inspections." And with regard to regulatory inspections, we have held that "[w]hat is observable by the public is observable without a warrant, by the Government inspector as well." . . .

Here, EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking. The Government asserts it has not yet enlarged the photographs to any significant degree, but Dow points out that simple magnification permits identification of objects such as wires as small as 1/2-inch diameter.

It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain 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 here, does not give rise to constitutional problems.

An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical

formulae or other trade secrets would raise very different and far more serious questions; other protections such as trade secret laws are available to protect commercial activities from private surveillance by competitors.

We conclude that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the curtilage of a dwelling, [because they are] open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment. . . .

Justice Powell, with whom ***Justice Brennan***, ***Justice Marshall,*** and ***Justice Blackmun*** join, . . . dissenting in part.

The Fourth Amendment protects private citizens from arbitrary surveillance by their Government. For nearly 20 years, this Court has adhered to a standard that ensured that Fourth Amendment rights would retain their vitality as technology expanded the Government's capacity to commit unsuspected intrusions into private areas and activities. Today, in the context of administrative aerial photography of commercial premises, the Court retreats from that standard. It holds that the photography was not a Fourth Amendment "search" because it was not accompanied by a physical trespass and because the equipment used was not the most highly sophisticated form of technology available to the Government. Under this holding, the existence of an asserted privacy interest apparently will be decided solely by reference to the manner of surveillance used to intrude on that interest. Such an inquiry will not protect Fourth Amendment rights, but rather will permit their gradual decay as technology advances. . . .

. . . EPA's aerial photography penetrated into a private commercial enclave, an area in which society has recognized that privacy interests legitimately may be claimed. The photographs captured highly confidential information that Dow had taken reasonable and objective steps to preserve as private. Since the Clean Air Act does not establish a defined and regular program of warrantless inspections, see *Marshall v. Barlow's, Inc*. . . . (1978), EPA should have sought a warrant from a neutral judicial officer. The Court's holding that the warrantless photography does not constitute an unreasonable search within the meaning of the Fourth Amendment is based on the absence of any physical trespass—a theory disapproved in a line of cases beginning with the decision in *Katz v. United States*. . . . These cases have provided a sensitive and reasonable means of preserving interests in privacy cherished by our society. The Court's decision today cannot be reconciled with our precedents or with the purpose of the Fourth Amendment.

Case

Treasury Employees v. Von Raab

489 U.S. 656; 109 S.Ct. 1384; 103 L.Ed. 2d 685 (1989)
Vote: 5–4

In this case the Supreme Court considers the constitutionality of a drug testing program for federal customs agents. The policy was challenged by an employees' union as a violation of the Fourth Amendment.

Justice Kennedy delivered the opinion of the Court.

. . . The United States Customs Service, a bureau of the Department of the Treasury, is the federal agency responsible for processing persons, carriers, cargo, and mail into the United States, collecting revenue from imports, and enforcing customs and related laws. . . . An important responsibility of the Service is the interdiction and seizure of contraband, including illegal drugs. In 1987 alone, Customs agents seized drugs with a retail value of nearly $9 billion. . . .

In December 1985, respondent, the Commissioner of Customs, established a Drug Screening Task Force to explore the possibility of implementing a drug-screening program within the Service. . . . After extensive research and consultation with experts in the field, the task force concluded that "drug screening through urinalysis is technologically reliable, valid and accurate." Citing this conclusion, the Commissioner announced his intention to require drug tests of employees who applied for, or occupied, certain positions within the Service. . . .

In May 1986, the Commissioner announced implementation of the drug-testing program. Drug tests were made a condition of placement or employment for positions that meet one or more of three criteria. The first is direct involvement in drug interdiction or enforcement of related laws, an activity the Commissioner deemed fraught with obvious dangers to the mission of the agency and the lives of Customs agents. . . . The second criterion is a requirement that the incumbent carry firearms, as the Commissioner concluded that "[p]ublic safety demands

that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free." The third criterion is a requirement for the incumbent to handle "classified" material, which the Commissioner determined might fall into the hands of smugglers if accessible to employees who, by reason of their own illegal drug use, are susceptible to bribery or blackmail. . . .

After an employee qualifies for a position covered by the Customs testing program, the Service advises him by letter that his final selection is contingent upon successful completion of drug screening. An independent contractor contacts the employee to fix the time and place for collecting the sample. On reporting for the test, the employee must produce photographic identification and remove any outer garments, such as a coat or a jacket, and personal belongings. The employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses. To ensure against adulteration of the specimen, or substitution of a sample from another person, a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination. Dye is added to the toilet water to prevent the employee from using the water to adulterate the sample.

Upon receiving the specimen, the monitor inspects it to ensure its proper temperature and color, places a tamperproof custody seal over the container, and affixes an identification label indicating the date and the individual's specimen number. The employee signs a chain-of-custody form, which is initialed by the monitor, and the urine sample is placed in a plastic bag, sealed, and submitted to a laboratory.

The laboratory tests the sample for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine. Two tests are used. An initial screening test uses the enzyme-multiplied-immunoassay technique (EMIT). Any specimen that is identified as positive on this initial test must then be confirmed using gas chromatography/mass spectrometry (GC/MS). Confirmed positive results are reported to a "Medical Review Officer." . . . After verifying the positive result, the Medical Review Officer transmits it to the agency.

Customs employees who test positive for drugs and who can offer no satisfactory explanation are subject to dismissal from the Service. Test results may not, however, be turned over to any other agency, including criminal prosecutors, without the employee's written consent. . . .

. . . The Customs Service has been entrusted with pressing responsibilities, and its mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions. Furthermore, a warrant would provide little or nothing in the way of additional protection of personal privacy. A warrant serves primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope and to interpose a neutral magistrate between the citizen and the law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." . . . But in the present context, "the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically . . . , and doubtless are well known to covered employees." . . . Under the Customs program, every employee who seeks a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must follow in administering the test. A covered employee is simply not subject "to the discretion of the official in the field." . . . The process becomes automatic when the employee elects to apply for, and thereafter pursue, a covered position. Because the Service does not make a discretionary determination to search based on a judgment that certain conditions are present, there are simply "no special facts for a neutral magistrate to evaluate." . . .

Even where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause. . . . Our cases teach, however, that the probable-cause standard "'is peculiarly related to criminal investigations.'" . . . In particular, the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, . . . especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person. . . . We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms. . . .

It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment. Indeed, the Government's interest here is at least as important as its interest in searching travelers entering the country. We have long held that travelers seeking to enter the country may be stopped and required to submit to a routine search without probable cause, or even founded suspicion, "because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." . . .

The public interest likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm, even if the incumbent is not engaged directly in the interdiction of drugs.

Customs employees who may use deadly force plainly "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Ante, at 628. We agree with the Government that 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. Indeed, ensuring against the creation of this dangerous risk will itself further Fourth Amendment values, as the use of deadly force may violate the Fourth Amendment in certain circumstances. . . .

Against these valid public interests we must weigh the interference with individual liberty that results from requiring these classes of employees to undergo a urine test. The interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances. . . . We have recognized, however, that the "operational realities of the workplace" may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts. . . . While these operational realities will rarely affect an employee's expectations of privacy with respect to searches of his person, or of personal effects that the employee may bring to the workplace, . . . it is plain that certain forms of public employment may diminish privacy expectations even with respect to such personal searches. Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Similarly, those who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions. . . .

We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. . . . While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.

. . . [P]etitioners . . . contend that the Service's drug-testing program is unreasonable in two particulars. First, petitioners argue that the program is unjustified because it is not based on a belief that testing will reveal any drug use by covered employees. In pressing this argument, petitioners point out that the Service's testing scheme was not implemented in response to any perceived drug problem among Customs employees, and that the program actually has not led to the discovery of a significant number of drug users . . . Counsel for petitioners informed us at oral argument that no more than 5 employees out of 3,600 have tested positive for drugs. . . . Second, petitioners contend that the Service's scheme is not a "sufficiently productive mechanism to justify [its] intrusion upon Fourth Amendment interests," . . . because illegal drug users can avoid detection with ease by temporary abstinence or by surreptitious adulteration of their urine specimens. . . . These contentions are unpersuasive.

Petitioners' first contention evinces an unduly narrow view of the context in which the Service's testing program was implemented. Petitioners do not dispute, nor can there be doubt, that drug abuse is one of the most serious problems confronting our society today. There is little reason to believe that American workplaces are immune from this pervasive social problem. . . .

The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, . . . and of motorists who are stopped at the checkpoints. . . .

We think petitioner's second argument—that the Service's testing program is ineffective because employees may attempt to deceive the test by a brief abstention before the test date, or by adulterating their urine specimens—overstates the case. As the Court of Appeals noted, 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, the avoidance techniques suggested by petitioners are fraught with uncertainty and risks for those employees who venture to attempt them. 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. Petitioners' own expert indicated below that the time it takes for particular drugs to become undetectable in urine can vary widely depending on the individual, and may extend for as long as 22 days. . . . Thus, contrary to petitioners' suggestion, no employee reasonably can expect to deceive the test by the simple expedient of abstaining after the test date is assigned. Nor can he expect attempts at adulteration to succeed, in view of

the precautions taken by the sample collector to ensure the integrity of the sample. In all the circumstances, we are persuaded that the program bears a close and substantial relation to the Service's goal of deterring drug users from seeking promotion to sensitive positions.

In sum, we believe the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm. We hold that the testing of these employees is reasonable under the Fourth Amendment. . . .

Justice Marshall, with whom ***Justice Brennan*** joins, dissenting. . . .

Justice Scalia, with whom ***Justice Stevens*** joins, dissenting.

The issue in this case is not whether Customs Service employees can constitutionally be denied promotion, or even dismissed, for a single instance of unlawful drug use, at home or at work. They assuredly can. The issue here is what steps can constitutionally be taken to detect such drug use. . . .

. . . In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use. . . .

What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of even a single instance in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribetaking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use. Although the Court points out that several employees have in the past been removed from the Service for accepting bribes and other integrity violations, and that at least nine officers have died in the line of duty since 1974, . . . there is no indication whatever that these incidents were related to drug use by Service employees. Perhaps concrete evidence of the severity of a problem is unnecessary when it is so well known that courts can almost take judicial notice of it; but that is surely not the case here. The Commissioner of Customs himself has stated that he "believe[s] that Customs is largely drug-free," that "[t]he extent of illegal drug use by Customs employees was not the reason for establishing this program," and that he "hope[s] and expect[s] to receive reports of very few positive findings through drug screening." . . . The test results have fulfilled those hopes and expectations. According to the Service's counsel, out of 3,600 employees tested, no more than 5 tested positive for drugs. . . .

The Court's response to this lack of evidence is that "[t]here is little reason to believe that American workplaces are immune from [the] pervasive social problem" of drug abuse. . . . Perhaps such a generalization would suffice if the workplace at issue could produce such catastrophic social harm that no risk whatever is tolerable—the secured areas of a nuclear power plant, for example. . . . But if such a generalization suffices to justify demeaning bodily searches, without particularized suspicion, to guard against the bribing or blackmailing of a law enforcement agent, or the careless use of a firearm, then the Fourth Amendment has become frail protection indeed. . . .

Today's decision would be wrong, but at least of more limited effect, if its approval of drug testing were confined to that category of employees assigned specifically to drug interdiction duties. Relatively few public employees fit that description. But in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity. Logically, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others—automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards. A similarly broad scope attaches to the Court's approval of drug testing for those with access to "sensitive information." Since this category is not limited to Service employees with drug interdiction duties, nor to "sensitive information" specifically relating to drug traffic, today's holding apparently approves drug testing for all federal employees with security clearances—or, indeed, for all federal employees with valuable confidential information to impart. Since drug use is not a particular problem in the Customs Service, employees throughout the Government are no less likely to violate the public trust by taking bribes to feed their drug habit, or by yielding to blackmail. Moreover, there is no reason why this super-protection against harms arising from drug use must be limited to public employees; a law requiring similar testing of private citizens who use dangerous instruments such as guns or cars, or who have access to classified information, would also be constitutional. . . .

Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

5 The Dynamics of the Federal System

Chapter Outline

"'Our Federalism' . . . is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."

—Justice Hugo L. Black, Writing for the Court in *Younger v. Harris* (1971)

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INTRODUCTION

In a **federal system**, sovereignty is divided between a central government and a set of regional governments. A **unitary system**, by contrast, vests all authority in the central government. In the American context, federalism refers to the division of power between the national government on the one hand and the state and local governments on the other.

Federalism is one of the two basic structural characteristics of the American constitutional system, the other being separation of powers among branches of the national government. During the more than two centuries since the republic was founded, the relationship between the national government and the states has changed dramatically.

Today, there is no question of the dominance of the national government in most areas of policy making. Yet states remain viable actors in the political system and in recent years may have become even more important. Thus, as a constitutional principle, federalism retains considerable vitality.

As an applied principle of government, federalism requires an ongoing effort by legislators, chief executives, and judges to balance many competing interests and values—among them individual liberty and public order, local diversity and the national interest, limited government, and social justice. This chapter examines the constitutional basis and evolving meaning of federalism, giving special attention to the contribution of the U.S. Supreme Court in defining the relationships and marking the boundaries between national and state functions.

DEVELOPMENT OF THE FEDERAL SYSTEM

Prior to the ratification of the Constitution of 1787, the United States was a confederation of sovereign states. Each state was vested with the necessary powers of government, limited only by the terms of state constitutions and the traditional common law rights and immunities of individuals. States had broad taxing and spending powers, of course, but they also issued their own currency and regulated the terms of their commercial relationships with other states and foreign countries. Moreover, the states possessed police power: the authority to make laws to protect the public safety, health, and welfare, and even to foster the morality of their citizens.

There was never any real prospect that the Constitution of 1787 would provide for a unitary system. The states existed as autonomous political entities from the time of the American Revolution and were not about to surrender to the national government rights and powers to which they had become accustomed. Moreover, there was widespread fear of concentrating too much power in the national government. The smaller states, in particular, were concerned about how their interests would be protected under the new Constitution. The solution was twofold. First, all states would enjoy equal representation in the U.S. Senate. Second, the national government would be one of definite and limited powers. In addition, the **Tenth Amendment**, ratified in 1791, specifically recognized the reserved powers of the states:

> 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.

In *United States v. Sprague* (1931), the Supreme Court recognized that the Tenth Amendment "was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the [federal government] were reserved to the States or to the people." More recently, in *Fry v. United States* (1975), the Court noted, "The Amendment expressly declares the constitutional

policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."

National Supremacy versus States' Rights

Although the **Supremacy Clause** of Article VI recognized the primacy of national authority in areas of national activity, those areas were specifically enumerated, for the most part, with the implication (made explicit in the Tenth Amendment) that the states retained autonomy in other areas. The original Constitution, however, was ambiguous on the question of where ultimate sovereign power resided. Federalist Party leaders, including Alexander Hamilton, John Marshall, and John Adams, argued eloquently that the issue must be resolved in favor of the national government.

The Democratic-Republicans, most notably James Madison and Thomas Jefferson, argued on behalf of **states' rights.** In proposing the Kentucky Resolution of 1798, Jefferson went so far as to argue that the "sovereign and independent states" had the right to nullify acts of Congress that they deemed to be unconstitutional. The accompanying Virginia Resolution, written by Madison, did not claim this degree of state autonomy. Jefferson's Resolution was the origin of the doctrines of **nullification** and **interposition,** later employed by the New England states during the War of 1812 and by South Carolina in opposition to federal tariff legislation in 1832. These doctrines were most fully developed in the writings of the South Carolina statesman and political theorist John C. Calhoun. Theories of nullification and interposition later provided a rationale for the **secession** of eleven southern states in 1860 and 1861. States' rights doctrines even figured prominently in the desegregation battles of the 1950s and 1960s.

Chisholm v. Georgia

The U.S. Supreme Court rendered its first major constitutional decision in 1793. The case, *Chisholm v. Georgia,* dealt broadly with the issue of state sovereignty. An essential aspect of sovereignty in the Anglo-American tradition has been **sovereign immunity,** the doctrine that the government may be sued only with its consent. As previously noted, Article III of the Constitution granted to federal courts jurisdiction over "controversies between a state and citizens of another state." In response to criticism from the Anti-Federalists, proponents of the Constitution argued that this provision did not authorize a private individual to sue a state without its consent.

Nevertheless, shortly after the Constitution was adopted, several such suits were filed in federal court. One of these cases was *Chisholm v. Georgia,* an original action brought in the Supreme Court by two South Carolina citizens who, as executors of the estate of a British decedent, sought to recover property confiscated by the state of Georgia during the Revolution. Georgia refused to appear in the case but filed a strong protest denying the Court's jurisdiction. In addition, a resolution was introduced in the Georgia legislature asserting that federal judicial authority to entertain such suits "would effectually destroy the retained sovereignty of the states." By a 4-to-1 majority, the Supreme Court rejected Georgia's argument, strongly endorsing the authority of the federal judiciary in relation to the states. This decision drew an intense reaction from states' rights advocates. The result was adoption of the **Eleventh Amendment** in 1798, in effect barring a citizen from suing a state government in a federal court without the state's consent. Specifically, the 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 ratification of the Eleventh Amendment was a major victory for states' rights forces, the amendment has not proved to be an insurmountable barrier to federal court review of most state policies. As noted in Chapter 2, the Fourteenth Amendment authorizes Congress to enforce certain basic civil rights guarantees against the states. Congress has used this power to limit the states' sovereign immunity with respect to certain civil rights lawsuits. However, beginning in the mid-1990s, a determined five-member majority of the Rehnquist Court placed substantial limits on the power of Congress to abrogate state sovereign immunity. (This topic is discussed more fully later in the chapter, in the section titled "Resurgence of the Tenth and Eleventh Amendments.")

The Marshall Court Establishes National Supremacy

Although *Chisholm v. Georgia* was overruled by the Eleventh Amendment, the Supreme Court continued to embrace a nationalist point of view. This was largely due to President John Adams's appointment of John Marshall, an ardent Federalist, to be chief justice in 1801. Chief Justice Marshall provided one of the most forceful statements of **national supremacy** in *M'Culloch v. Maryland* (1819), in which he and his colleagues broadly interpreted the Necessary and Proper Clause as conferring on Congress the implied power to establish a national bank (see Chapter 2). The Court not only expanded congressional powers but also struck a blow against states' rights by invalidating a Maryland law imposing a tax on the Baltimore branch of the bank.

Marshall developed his theory of national power in large part as a constitutional rationale for limiting the broad authority reserved to the states. His Court invalidated various state commercial and financial restrictions opposed by business interests, citing infringements on federal authority. But federal power was largely dormant during the Marshall era. Marshall did not anticipate a vigorous national regulatory policy, and in fact no such policy emerged until well into the twentieth century. Thus, Marshall's nationalism went hand in hand with the growth of private enterprise. By placing restrictions on state power in the name of abstract principles of national supremacy, the Marshall Court helped clear the way for early commercial and industrial expansion.

As this economic development proceeded, basic changes took place within the political environment. Jacksonian democracy, with its emphasis on broader political participation (at least by white males), swept away most of the property qualifications for voting that had existed when the Constitution was written. With this drive toward greater political equality, economic privilege also came under attack, primarily in state legislatures. Laws were passed providing for debtor relief and more extensive regulation of business. The Court moderated its earlier negative position as it reviewed more and more legislation of this kind. This developing trend was apparent even before Marshall's death in 1835. For example, over his solitary dissent, the Court upheld an Ohio law making bankruptcy procedures available to persons who assumed debts after its passage (*Ogden v. Saunders* [1827]). A similar law, applicable to all debtors regardless of whether their obligations were incurred before or after its passage, had been declared unconstitutional by the Marshall Court a few years earlier (*Sturges v. Crowninshield* [1819]). In 1829, Marshall joined his colleagues in upholding the authority of a state to drain disease-infested marshlands as a public health measure (*Willson v. Black-Bird Creek Marsh Company* [1829]). The dam constructed for this purpose interfered with commercial navigation. Nevertheless, the Court recognized that, as a basic aspect of the state's police power, the public health objective was controlling. This decision was a limited, but significant, victory for proponents of state regulation.

The Taney Court: Renewed Emphasis on States' Rights

During the time Marshall's successor, Roger B. Taney, served as chief justice (1836–1864), the **police powers of the states** continued to expand. In addition to protecting public health and safety, the police power was also used as a justification for safeguarding the morals and general welfare of the community (see, for example, *New York v. Miln* [1837]). Moreover, the Taney Court came to recognize state power to regulate certain aspects of interstate commerce, a power that the Federalists earlier had argued was the exclusive domain of the national government (see *Cooley v. Board of Port Wardens* [1852], discussed later in this chapter).

Despite the Supreme Court's attempts to harmonize federal and state power, a conflict was brewing that would forever change the character of American federalism. The source of the conflict was the "peculiar institution" of slavery, an institution so divisive that it had threatened to derail the Constitutional Convention of 1787. During the early and middle nineteenth century, the integrity of the Union was preserved by a series of fragile congressional compromises defining the extent of slavery in the states and federal territories.

By far the most significant decision of the Taney Court was *Scott v. Sandford* (1857), in which the Court severely limited the power of the federal government to regulate slavery in the territories (see Chapter 1). Sharp regional divisions, aggravated by the Court's defense of slavery, ultimately split the nation into two armed camps. Southern states, under the banner of states' rights, asserted the right to secede from the Union and ultimately backed this assertion with the use of force. The Union, under the leadership of President Abraham Lincoln, resolved to prevent secession by any means necessary. The resulting Civil War was by far the greatest bloodbath in American history. After the loss of more than 620,000 lives and the destruction of billions of dollars worth of property, it was settled once and for all that a state could not secede from the Union.

Aftermath of the Civil War

With its decision in *Texas v. White* (1869), handed down four years after General Robert E. Lee's surrender at Appomattox, the Supreme Court added its constitutional endorsement to the new order by solemnly proclaiming that a state could not withdraw from the Union without violating the basic law. Perhaps the Court contributed a measure of legal authority to the military verdict of the Civil War, but in doing so (after the fact), it merely underscored the limits of judicial power to deal with questions that profoundly divide the American people.

The ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, 1868, and 1870, respectively, had a tremendous impact on federalism. These amendments were designed primarily to protect the civil rights of the former slaves. As a means to that end, the **Civil War Amendments** imposed broad prohibitions on the state governments. Most notably, the Fourteenth Amendment enjoined the states from denying persons within their respective jurisdictions due process or equal protection of the law. Section 5 of the Fourteenth Amendment authorized Congress to pass legislation in support of these injunctions. The Thirteenth Amendment, abolishing slavery, and the Fifteenth Amendment, prohibiting racial discrimination in voting, contain similar language authorizing congressional enforcement legislation.

In the decade that followed the Civil War, Congress used its newly granted powers under the Civil War Amendments to enact a series of important civil rights measures. The first of these measures, the Civil Rights Act of 1866 provided that citizens of all races have the same rights to make and enforce contracts, to sue and give evidence in

the courts, and to own, purchase, sell, rent, and inherit real and personal property. This statute was aimed directly at the Black Codes, laws enacted by southern states that effectively denied black citizens basic economic freedoms and property rights as well as access to the courts. The Civil Rights Act of 1870 was also aimed squarely at discriminatory state action. It criminalized any act under "color of state law" that subjected persons to deprivations of constitutional rights. Similarly, the Civil Rights Act of 1871 made individuals acting under color of state law personally liable for acts violating the constitutional rights of others. These provisions remain important components of federal civil rights law today. However, from the end of Reconstruction through the end of World War II civil rights would take a back seat to other constitutional and legislative priorities, most notably the massive social and economic changes produced by the Industrial Revolution.

The Heyday of Dual Federalism: 1890–1937

The rapid accumulation and concentration of corporate wealth, stimulated by the upheaval and dislocation of war, drew an active regulatory response from state legislatures during the 1860s and 1870s. Only with the rise of organized labor in the 1880s and the appearance of the Populist Party in the 1890s did a marked change in the Supreme Court's permissive view toward state regulatory power take place. Identifying with an economic establishment that saw the specter of socialism in these movements, the Court began to use the Due Process Clause of the Fourteenth Amendment and the Commerce Clause as justifications for restricting the police power of the states. This tendency was but one aspect of a far larger trend of constitutional interpretation through which the Court set limits on regulatory power at all levels of government.

Although it placed restrictions on state police power, the Court also imposed similar curbs on the emerging national police power by invoking the Tenth Amendment and the Due Process Clause of the Fifth Amendment, the latter provision applying directly to the national government. This development contributed to the growing influence of **dual federalism** after 1890. A good example of this perspective can be seen in *Hammer v. Dagenhart* (1918) (discussed and reprinted in Chapter 2), in which the Supreme Court invoked the Tenth Amendment in striking down a federal law restricting the use of child labor in factories. Writing for the Court, Justice William R. Day characterized the statute as "an invasion by the federal power" into an area reserved to the states by the Tenth Amendment.

Proponents of the dual federalism perspective not only sought a balance between state and national power, but they also contemplated a kind of constitutional "twilight zone" into which neither the states nor the national government could intrude. Thus dual federalism comported nicely with the classical liberal view that the best government is that which governs least. From 1890 to 1937, the Supreme Court was often receptive to this view and, as a consequence, struck down a great number of laws, both federal and state, that interfered with the operations of the free market.

The Constitutional Revolution of 1937

Dual federalism remained a major factor in American constitutional development until the beginning of the constitutional revolution of 1937 (see Chapters 1 and 2). But it was by no means the only factor at work during the half century preceding its eventual eclipse. Accelerated industrial growth and urbanization increased the impetus toward centralized governmental authority. As we noted in Chapter 2, the Court sanctioned piecemeal extension of national power under the Commerce Clause,

particularly to protect conventional morality, public health, and safety. Thus, even during the period before the New Deal, the growing number of problems demanding a national response threatened to upset the balance implicit in dual federalism.

Following its 1937 confrontation with President Franklin D. Roosevelt, the Court began to sanction the exercise of national regulatory power and social welfare programs of broad scope. The Fourteenth Amendment was no longer interpreted as a restriction on state regulatory power, and the Tenth Amendment virtually disappeared as a limitation on national authority. Dual federalism eventually gave way to **cooperative federalism**, a system of shared powers that has become an essential feature of American government and politics since the late 1930s. Supreme Court decisions upholding the Social Security Act of 1935 (*Helvering v. Davis* [1937] and *Steward Machine Company v. Davis* [1937]) and the Fair Labor Standards Act of 1938 (*United States v. Darby* [1941]) represented this trend.

Cooperative federalism was a prominent feature of the Social Security Act. The dissenting justices in *Steward Machine Company* contended that the tax credits granted to employers who contributed to state unemployment funds had the effect of forcing the states to participate in the Social Security program and that such coercion violated the Tenth Amendment. The argument did not prevail, and with the passage of time, it became apparent that cooperative arrangements between nation and state would proliferate. The traditional model of two distinct spheres of government, characteristic of dual federalism, gave way to what has been aptly described as "marble cake" federalism, due to the blending of national and state functions and responsibilities.

TO SUMMARIZE:

- With the adoption of the Constitution of 1787, the United States was converted from a confederation to a federal republic.
- Under Chief Justice John Marshall, the Supreme Court firmly established the principle of national supremacy embodied in Article VI of the Constitution.
- The Taney Court, more favorably inclined toward states' rights, accommodated the growing demand for governmental regulation by expanding the doctrine of the state police power.
- Precipitating the crisis of the Civil War was the constitutional question of whether states could secede from the Union. Ultimately the issue was resolved on the battlefield in favor of national unity and against secession.
- Although the state police power continued to develop during the immediate post–Civil War era, the emphasis shifted in the 1890s toward dual federalism, a perspective that provided a basis for the Court to limit both state and national regulatory power.
- One result of the constitutional revolution of 1937 was that dual federalism was replaced by cooperative federalism, which emphasizes the expansion of regulatory authority at all levels of government. In some instances the federal government uses its superior position to coerce the states into enacting policies the federal government cannot mandate directly.

NATION-CENTERED FEDERALISM

In the post-1937 period, the national government became increasingly dominant over the states. In the 1960s and 1970s Congress utilized enacted legislation greatly expanding the role of the national government in areas such as education, transportation,

criminal justice, and environmental protection. The growth of the administrative state at the national level (see Chapter 4) brought federal regulators into areas of traditional state concern. By and large the Supreme Court endorsed these developments. In numerous decisions spanning several decades, the Court supported broad exercises of federal power vis-à-vis the states. Among the most dramatic of these decisions were those holding that federal law preempts—that is, supersedes—state law if considerations of national policy warrant it, as long as those considerations are consistent either with enumerated powers or broader national interests.

The Preemption Doctrine

The classic statement of the **federal preemption doctrine** is found in *Pennsylvania v. Nelson* (1956), in which the Court struck down a state law criminalizing sedition against the national government. As the Court made clear in *Nelson,* a state law may be struck down, even where there is no explicit conflict with federal law, if the Court finds that Congress has legitimately occupied the field. Thus, in *Burbank v. Lockheed Air Terminal* (1973), the Supreme Court held that a local aircraft noise-abatement ordinance was preempted by the federal Noise Control Act of 1972, even though the latter contained no specific preemptive language and there was no evidence that the ordinance placed a heavy burden on interstate commerce. Writing for the Court, Justice William O. Douglas emphasized the potential safety hazard that could result if a "significant number of municipalities" adopted similar ordinances. Similarly, in *Nantahala Power and Light Company v. Thornburg* (1986), the Court invoked the preemption doctrine to prohibit states from deviating from federal standards in setting intrastate rates for the sale of electrical power. Likewise, in *California v. Federal Energy Regulatory Commission* (1990), the Supreme Court held that state regulations imposing minimum flow rates on rivers used to generate hydroelectric power were preempted by the Federal Power Act.

Recent decisions indicate that the preemption doctrine continues to stand as a major limitation on state regulatory authority. During the 2000 term, for example, the Supreme Court handed down no fewer than three decisions reinforcing the preemption doctrine (see *Buckman Company v. Plaintiff's Legal Committee* [2001]; *Egelhoff v. Egelhoff* [2001]; and *Lorillard Tobacco Company v. Reilly* [2001]). In the most prominent of the these cases, the Rehnquist Court was unwilling to accommodate the states in the area of cigarette advertising; in the *Lorillard* case, the Court held that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted Massachusetts regulations governing the sale and advertisement of tobacco products.

From Cooperative to Coercive Federalism

Today federal and state agencies work together in a variety of programmatic areas, including law enforcement, social welfare, transportation, education, environmental protection, and, most recently, homeland security. However, due to its fiscal superiority and constitutional supremacy, the federal government plays the dominant role in this "cooperative" relationship. Indeed, the term **coercive federalism** is sometimes used to refer to the tendency for the national government to use its considerable fiscal resources to pressure the states into adopting policies the federal government prefers but is unable to impose directly. An excellent example of coercive federalism is seen in *South Dakota v. Dole* (1987) (discussed and reprinted in Chapter 2), in which the Court allowed Congress to use federal highway grants to the states as a means of persuading the states to raise their legal drinking age to 21.

Using National Power to Further Civil Rights and Liberties

Another area in which the national government has established clear dominance over the states is civil rights and civil liberties. The most notable development in this realm has been the expansion of the role of the federal judiciary in reviewing actions and policies of state governments. Because most of the civil rights and liberties cases that have come to the Court in the modern era have involved challenges to the power of state and local governments, the Court has found it necessary to expand federal constitutional protection of citizens vis-à-vis state and authorities. This was accomplished through broad judicial interpretation of the Fourteenth Amendment.

Reinterpreting the Equal Protection Clause Although the Civil Rights Act of 1866 effectively dismantled the Black Codes, in the late nineteenth century the southern states enacted "Jim Crow laws" establishing a thoroughgoing regime of racial segregation and discrimination. Whether mandating segregated schools and other public facilities, prohibiting racial intermarriage, or preventing blacks from registering to vote, these laws had the effect of relegating African Americans to a position of second-class citizenship. In *Plessy v. Ferguson* (1896), the Supreme Court essentially gave its blessing to these arrangements by adopting a narrow interpretation of the Fourteenth Amendment's requirement that states provide equal protection of the laws to persons within their jurisdictions. Beginning with the landmark decision in *Brown v. Board of Education* (1954), the Supreme Court launched a series of rulings abolishing segregation and requiring states to take seriously their constitutional obligation to provide equal protection. Congress played an important role as well by enacting sweeping civil rights measures like the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Throughout the 1950s and 1960s, opponents of these measures waved the banner of states' rights. But the Court and Congress took the position that the constitutional commitment to equality was superior to claims based on assertions of state sovereignty.

Incorporation of the Bill of Rights Originally, the protections of the Bill of Rights applied only to infringements of liberty by the federal government (see *Barron v. Baltimore* [1833]). However, the Fourteenth Amendment created a constitutional basis for the application of the Bill of Rights to state action. In *Chicago, Burlington & Quincy Railroad v. Chicag*o (1897), the Supreme Court had held that the Just Compensation Clause of the Fifth Amendment is incorporated within the Fourteenth Amendment and therefore enforceable against the states. In the 1920s and early 1930s, the Court expanded the **doctrine of incorporation** to include the First Amendment freedoms of speech and press (see *Gitlow v. New York* [1925]; *Fiske v. Kansas* [1927]; and *Near v. Minnesota* [1931]). (For an extensive discussion of the doctrine of incorporation, see Chapter 1, Volume II.) In the post-1937 period, the Court continued to apply Bill of Rights limitations to state action under the Fourteenth Amendment. For example, in *Everson v. Board of Education* (1947), the Court said that states must abide by the separation of church and state mandated by the Establishment Clause of the First Amendment. This set the stage for a long series of controversial decisions (most notably, the School Prayer Decisions of the early 1960s) in which the federal courts imposed a national standard of secularism on unwilling state and local governments. Similarly, the Warren Court's decisions in cases like *Mapp v. Ohio* (1961), *Robinson v. California* (1962), *Gideon v. Wainwright* (1963), and *Miranda v. Arizona* (1966) brought the federal courts into the administration of justice at the state and local levels. Decisions of the Supreme Court (for example, *Johnson v. Avery,* (1969)) allowed state prisoners to bring federal lawsuits challenging the conditions of their confinement. By the 1970s, federal judges had become deeply involved in the administration of some state prison

systems. The Court's "privacy" decisions (for example, *Griswold v. Connecticut,* (1965); *Roe v. Wade,* (1973)) allowed federal courts to review state laws affecting abortion and other reproductive issues. And the Court's due process decisions of the 1970s (for example, *Golberg v. Kelly,* 1970; *Goss v. Lopez,* (1975)) allowed federal judges to review decisions of welfare offices, school boards, and various other state and local agencies.

Ultimately, through congressional legislation and judicial decisions, the revolutions in civil rights and liberties that began after the Second World War led to further dominance of the national government over the states. Today, there is little question that all three branches of the federal government possess ample power to protect civil rights and liberties from state and local authorities.

TO SUMMARIZE:

- Relying on the Supremacy Clause of Article VI, the Supreme Court has held that national law preempts state law if considerations of national policy warrant it, as long as those considerations are consistent either with enumerated powers or broader national interests.
- Congress can preempt state law through explicit statutory language or by implication. In reviewing preemption claims, the Court engages in statutory interpretation, seeking to determine, either through the specific language of the federal statute or the intent of Congress, whether state policy has been preempted.
- In some instances the federal government uses its superior position to coerce the states into enacting policies the federal government cannot mandate directly. Thus, "cooperative federalism" sometimes gives way to "coercive federalism."
- In the modern era, the Court's effort to enhance protection of civil rights and liberties led to a greatly expanded role for the federal courts in reviewing state policies and actions. Through congressional legislation and judicial decisions, the civil rights revolution that began in the 1950s led to further dominance of the national government over the states.

THE RESURGENCE OF STATES' RIGHTS

During the 1970s, the constitutional pendulum began to swing back in the direction of the states. To some extent, this resulted from presidential and congressional policy decisions. As early as 1969, President Richard Nixon called for a "new federalism" in which states would have more leeway in their use of federal funds. Similarly, Ronald Reagan's election in 1980 was accompanied by considerable rhetoric about scaling back the federal government and returning power and responsibility to the states. Likewise, when the Republican Party gained control of Congress in the mid-1990s, party leaders called for "devolution" of power from Washington to the states. While the Reagan Revolution and the Republican takeover of Congress did produce some significant changes in the federal-state relationship, from a constitutional law standpoint, the most significant impact of the Republican ascendancy in Washington was the appointment of conservative Supreme Court justices committed to reviving state sovereignty. In particular, Richard Nixon's appointment of William H. Rehnquist (1972), Ronald Reagan's appointment of Sandra Day O'Connor (1981), and George H. W. Bush's appointment of Clarence Thomas (1991) had a major impact on the constitutional law of federalism. While Justices Anthony Kennedy and Antonin Scalia (both Reagan appointees) were generally sympathetic to the states, the aforementioned three justices emerged as veritable champions of states' rights.

In *Gregory v. Ashcroft* (1991), the Court upheld a Missouri law mandating retirement for state judges at age 70. Justice O'Connor used the majority opinion in that case to make clear her philosophy of federalism: "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Students will recall from Chapter 2 that one of the most significant constitutional law developments of the Rehnquist Court was a pair of decisions marking the outer limits of congressional authority under the Commerce Clause (*United States v. Lopez,* (1995); *United States v. Morrison,* (2000)). Writing for the Court in *Lopez* (1995), Chief Justice Rehnquist quoted Justice O'Connor's opinion in *Gregory v. Ashcroft*. Concurring in *Morrison,* Justice Thomas criticized the Court's modern Commerce Clause jurisprudence, saying,

> The Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

In both of these controversial decisions, Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas were in the majority. When, in *Gonzales v. Raich* (2005), the Court upheld a federal prohibition on private cultivation of marijuana for medicinal use, there were three dissenters. Writing for the three, Justice O'Connor observed:

> This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.

The Tenth Amendment Roller Coaster

As previously noted, the Tenth Amendment virtually disappeared as a limitation on the powers of the national government in the wake of the constitutional revolution of 1937. Yet in 1976, the Supreme Court resurrected the Tenth Amendment in a controversial 5-to-4 decision. In *National League of Cities v. Usery,* the Court struck down the 1974 amendments to the Fair Labor Standards Act that extended the federal minimum wage to state and local government employees. Writing for the Court, Justice Rehnquist opined that the Tenth Amendment prohibits Congress from infringing on "traditional aspects of state sovereignty." In dissent, Justice William Brennan accused the majority of an irresponsible departure from modern principles of constitutional law. Brennan's critique was vindicated in 1985, when a sharply divided Court overruled *National League of Cities* (*Garcia v. San Antonio Metropolitan Transit Authority* [1985]). With the *Garcia* decision, many assumed that the revitalization of the Tenth Amendment had ended.

Throughout the 1980s, the Court continued to narrowly interpret the Tenth Amendment's restrictions on national power. In *South Carolina v. Baker* (1988), in upholding a federal tax on interest from unregistered state and local bonds, the Court concluded that protections afforded by the Tenth Amendment are "structural, not

substantive." Writing for the majority, Justice Brennan explained that the states "must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulated state activity." Brennan found that "nothing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation." It is true that the Court in *Garcia* recognized the importance of the national political process in protecting the autonomy of the states. Still, the *Garcia* majority examined the question of whether the political process offered sufficient protection to state interests threatened by the minimum wage legislation at issue in that case. In *South Carolina v. Baker,* on the other hand, the Court made no such inquiry. South Carolina did not allege that it was barred from participation in the political process or that "it was singled out in a way that left it politically isolated and powerless." As the majority viewed the case, this purely procedural question was the only relevant Tenth Amendment concern. As thus interpreted, the Tenth Amendment offered no protection to the states other than their right to take part in national politics. The Supreme Court evidently assumed, rightly or wrongly, that such participation alone is a sufficient means of protecting state interests.

In 1992 the Supreme Court gave new life to the Tenth Amendment when it struck down the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985. Under this act, states that had not created nuclear waste disposal sites were required to "take title and possession" of any such waste generated inside the state if requested by those who owned or generated it. The Court, dividing 6-to-3 in *New York v. United States,* concluded that "no matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the states to regulate."

Five years later, the Court went one step further in reviving the Tenth Amendment when it struck down a key provision of the Brady gun control law. In *Printz v. United States* (1997), the Court invalidated a federal requirement that local law enforcement officers perform background checks on prospective handgun purchasers. According to Justice Antonin Scalia's opinion for the sharply divided Court, this federal requirement violated "the very principle of separate state sovereignty." Dissenting, Justice John Paul Stevens observed that "[i]f Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power." *Printz* and *New York v. United States* signaled the Rehnquist Court's strong determination to shift the federal balance back toward the states. This determination soon manifested itself in the rediscovery of the Eleventh Amendment as a significant limitation on Congressional power in relation to the states.

The Eleventh Amendment Redux

A direct response to the Supreme Court's decision in *Chisholm v. Georgia* (discussed earlier), the Eleventh Amendment bars citizens of one state from suing governments of other states in federal court. Although the Eleventh Amendment does not expressly forbid suits by citizens against their own states, the Supreme Court, maintaining that state sovereign immunity transcends the Eleventh Amendment, extended this constitutional restriction to bar such actions (*Hans v. Louisiana* [1890]).

In the modern era, the Court recognized the power of Congress under Section 5 of the Fourteenth Amendment to authorize private lawsuits against states in federal courts. Thus Congress was permitted to abrogate the states' sovereign immunity in order to vindicate individual rights protected by the Fourteenth Amendment (see *Fitzpatrick v. Bitzer*

[1976]). In 1989 the Court went a step further by recognizing that Congress had similar authority under the Commerce Clause of Article I, Section 8. In *Pennsylvania v. Union Gas Company* (1989), a five-member majority concluded that Congress has the authority under the Commerce Clause to abrogate the sovereign immunity of the states.

The retirements of liberal Justices William Brennan and Thurgood Marshall in the early 1990s led to a reconsideration of congressional authority to abrogate state sovereign immunity. In the mid-1990s, a more conservative Court, dividing 5-to-4, overturned *Pennsylvania v. Union Gas Company.* Thus, in *Seminole Tribe of Florida v. Florida* (1996), the Court struck down a provision of the Indian Gaming Regulatory Act that allowed Indian tribes to bring federal lawsuits against states to require them to engage in good faith negotiations to establish "Tribal-State Gaming Compacts." Speaking for the Court, Chief Justice Rehnquist asserted that: "Even when the Constitution vests in Congress complete lawmaking authority over a particular area [in this instance, the power to regulate commerce with the Indian tribes], the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states." The *Seminole Tribe* decision barred Congress from authorizing suits brought against states in federal court. But what about suits brought against states in their own courts?

In *Alden v. Maine* (1999), the Court extended the logic of *Seminole Tribe* to prohibit Congress from authorizing such actions. Again dividing 5-to-4, the Court, speaking this time through Justice Anthony Kennedy, held that congressional authority under the Commerce Clause "does not include the power to subject nonconsenting States to private suits for damages in state courts." On the same day that it decided *Alden v. Maine,* the Court handed down two rulings placing similar restrictions on the authority of Congress to abrogate state sovereign immunity with respect to infringement of trademarks and patents (see *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank* [1999]; *College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board* [1999]). Thus by the turn of the new century, the Supreme Court had effectively prohibited Congress from abolishing state sovereign immunity as a means of implementing its enumerated powers under Article I.

As noted in Chapter 2, the Court held in *City of Boerne v. Flores* (1997) that the power of Congress to enforce the Fourteenth Amendment must be consistent with judicial interpretation of the substantive protections of that amendment. In *Kimel v. Board of Regents* (2000), the Court reiterated this position in the context of an attempt by Congress to abrogate state sovereign immunity. The Court did not disturb its holding in *Fitzpatrick v. Bitzer* that Congress may abrogate state sovereign immunity as a means of protecting Fourteenth Amendment rights. However, the Court in *Kimel* held that in attempting to protect state employees from age discrimination, Congress had prohibited state action that did not violate the Equal Protection Clause of the Fourteenth Amendment.

In *Board of Trustees v. Garrett* (2001), the Court continued down the path blazed by *Seminole Tribe*. Splitting 5–4, the Court held the Eleventh Amendment bars suits in federal court to recover money damages for state violations of Title I of the Americans with Disabilities Act, which protects persons with disabilities from employment discrimination. Chief Justice Rehnquist wrote for the sharply divided court that "in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation." Rehnquist and his colleagues in the majority concluded that these conditions had not been met.

In *Nevada Department of Human Resources v. Hibbs* (2003) and *Tennessee v. Lane* (2004), the Court retreated somewhat from the position staked out in *Kimel* and *Garrett*.

In *Hibbs,* the Court held that Congress could abrogate state sovereign immunity by permitting a private individual to sue his state employer for monetary damages resulting from a violation of the Family and Medical Leave Act of 1993. In a 6-to-3 decision, the Court recognized that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic . . . legislation" under Section 5 of the Fourteenth Amendment.

Similarly, in *Tennessee v. Lane,* the Court said that Congress could abrogate state sovereign immunity in order to allow lawsuits under Title II of the Americans with Disabilities Act. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." George Lane, who was confined to a wheelchair, sued the state of Tennessee after being forced to crawl up a flight of stairs in order to appear in a courtroom located on the second floor of an old courthouse without an elevator. In an opinion by Justice Stevens, the Court held that "Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' Section 5 authority to enforce the guarantees of the Fourteenth Amendment."

TO SUMMARIZE:

- In the wake of the constitutional revolution of 1937, the Tenth Amendment virtually disappeared as a meaningful limitation on the power of the national government. In recent years a more conservative Supreme Court has revitalized the Tenth Amendment, holding that it prohibits Congress from mandating that the states enact particular policies.
- In the modern era, the Supreme Court has recognized the power of Congress under Section 5 of the Fourteenth Amendment to authorize private lawsuits against states in federal courts. The Court has maintained that position, but has emphasized that it is the role of the courts, not Congress, to determine the substantive protections of the Fourteenth Amendment.
- In the 1970s and 1980s, the Court also recognized Congress's power to abrogate state sovereign immunity as a means of implementing its enumerated powers under Article I. Beginning in the mid-1990s, however, a more conservative Court repudiated this position, thus restricting congressional power in this area and redefining somewhat the federal-state relationship.
- The Court's recent effort to resuscitate the Tenth and Eleventh Amendments is one of its most important contributions to American constitutional development and reflects the broader political trend toward devolving power from the national government to the states.

THE COMMERCE CLAUSE AND STATE REGULATORY AUTHORITY

In the preceding sections of this chapter, we have surveyed the historical development and contemporary characteristics of American federalism. We turn now to a more detailed examination of the interplay between state and national power in a major area of policy making: the regulation of commerce. As described in Chapter 2, the power of Congress to regulate commerce among the states is vast, but far from exclusive. The constitutional language granting this power is general and open-ended. One of the

Supreme Court's most important responsibilities has been to decide how this general language relates to the exercise of state power in an endless variety of regulatory settings. No definitive rulings fixing the limits of state authority or drawing a precise line of demarcation between national and state power have emerged. The process of constitutional interpretation is heavily influenced by changes in the perceived needs and interests of society. Nowhere is this influence better illustrated than in the regulation of commerce. Cases in this area also vividly illustrate the Court's important function in policing the boundaries of our federal system.

The Commerce Clause as drafted in 1787 represented an attempt to address problems faced by a growing national economy saddled with commercial rivalries among largely independent states. But this affirmative grant of authority to Congress was not accompanied by an explicit negation of state power. Although it forbids the states to tax imports and exports (unless specifically authorized by Congress), the Constitution is silent on the nature and extent of state power to regulate commerce. We know that some of the Framers of the Constitution assumed that the commerce power was indivisible—that is, an exclusive grant of power to the national government. But experience, coupled with the logical and political implications of federalism, soon made it clear that this inflexible position was unworkable. Nevertheless, the Commerce Clause placed substantial implied limits on state power. Over the years, those limits have been defined and redefined, not only by the Supreme Court but also by Congress.

Gibbons v. Ogden

The first major decision of the Supreme Court involving state versus federal regulation of commerce was *Gibbons v. Ogden* (1824). The *Gibbons* case resulted from an attempt by the state of New York to create and protect a monopoly issued to a private steamboat company. A competing company, operating under a federal license, was enjoined by a New York court from operating on waters within the borders of New York state (for an extensive discussion of *Gibbons,* see Chapter 2). The Supreme Court held that (1) the licensure of steamboats by the federal government was a valid exercise of the national power to regulate interstate commerce and (2) the attempt by New York to enforce a steamboat monopoly within its waters was a violation of the Supremacy Clause.

In terms of federalism, the thrust of *Gibbons v. Ogden* was that states could not impede the efforts of Congress to regulate commerce among the states. But the Court stopped short of holding that states had no power whatsoever to regulate interstate commerce. Suppose Congress has not acted on a matter covered by state commercial legislation. Or suppose state law merely complements existing national policy. Under such circumstances, are the states free to act, even if their actions have an impact on interstate commerce? The *Gibbons* decision left these questions unanswered.

The *Cooley* Case

It was not until 1852 that the Supreme Court made a serious effort to resolve the issue of **state power to regulate interstate commerce.** Before that time, the Court had upheld various state laws directly or indirectly affecting interstate commerce, ruling that they were appropriate exercises of the police power. But the concept of interstate commerce was too all-embracing and the demand for state regulatory activity too strong for the Court to avoid the issue indefinitely. Ultimately, it reached the Taney Court in *Cooley v. Board of Port Wardens* (1852). Justice Benjamin R. Curtis wrote the opinion of the Court, recognizing that the Commerce Clause did not automatically

bar all state regulation in this field. At issue was the constitutionality of a Pennsylvania law requiring ships entering or leaving the port of Philadelphia to hire local harbor pilots. This was admittedly a regulation of both interstate and foreign commerce. Nevertheless, it was upheld because it dealt with a "subject" of commerce "imperatively demanding that diversity, which alone can meet the local necessities of navigation." Curtis reasoned that the term *commerce* covered a multitude of subjects, some requiring national uniformity in their regulation, others calling for the diversity of local control. Because the Constitution did not explicitly prohibit the states from regulating, and because Congress in 1789 had purported to authorize state regulation of pilots, he concluded that the law in question was valid. This distinction between local and national aspects of interstate commerce, although far from clear-cut, was a significant contribution to constitutional interpretation. While its application in *Cooley* was expressly limited to the facts of that case, the principle applied soon achieved the status of constitutional doctrine.

The Supreme Court's attempt to strike a balance between the values of local diversity and national uniformity has been apparent in hundreds of decisions rendered since *Cooley.* The justices have developed more sophisticated terminology than the local-national dichotomy used by Justice Curtis. But his perception of the complex problem of promoting commerce in a federal system remains important to this day.

State Regulation of Interstate Commerce: Divergent Perspectives

Except for the Court's general inclination to take a more critical view of economic regulation between the late 1880s and late 1930s, no consistent historical pattern has emerged in this field since the *Cooley* case. From time to time, the Court has attempted to classify state regulations with respect to their "direct" or "indirect" effect on interstate commerce or the degree to which they "burden" or "discriminate against" it. The **direct–indirect test** has not been in vogue since the late 1930s, but even when it was used, the Court seemed more concerned about the basic distinction between commercial regulations per se and police power legislation aimed at protecting the health, safety, and general welfare of the community. The Court has become less concerned than was Justice Curtis with the subject of commerce being regulated and more concerned with the means by which the regulation is implemented.

This approach has produced results in different cases that are difficult to reconcile. For instance, in *South Carolina Highway Department v. Barnwell Brothers* (1938), the Supreme Court sustained a South Carolina statute prescribing maximum weights and widths of trucks using the highways of the state. This measure imposed a substantial burden on interstate commerce, but the Court, through Justice Harlan F. Stone, reasoned that the countervailing safety considerations were more important. Stone pointed to the extensive control states had traditionally exerted over their public roads. He also pointed out that the highway regulation fell with equal weight on intrastate and interstate truckers—that it did not, in other words, single out businesses engaged in interstate commerce and impose added burdens on them to the advantage of intrastate economic interests. Still, the decision depended heavily on a view of state autonomy in building, maintaining, and controlling highways that was debatable even in 1938 and is open to far more serious challenge now that a nationally subsidized interstate highway system is well established.

In sharp contrast to its decision in *Barnwell,* the Court in *Southern Pacific Railroad Company v. Arizona* (1945) invalidated a law limiting the lengths of passenger and freight trains traveling through the state to fourteen and seventy cars, respectively. The regulation imposed a substantial burden on interstate commerce, but Arizona defended it as an appropriate safety measure and pointed to the absence of conflicting

federal legislation on the subject. The Supreme Court, in a sharply divided decision, declared the law unconstitutional. Justice Stone, who had been elevated to chief justice in 1941, again wrote the majority opinion. He concluded that "as a safety measure" the law afforded "slight and dubious advantage, if any, over unregulated train lengths." Accordingly, the "serious burden" imposed on interstate commerce was not justified. On the other hand, before this decision was rendered, the Court had upheld a number of railroad safety measures adopted by the states, including Arkansas's "full crew" laws. These regulations fixed the minimum number of employees required to serve on trains traveling designated distances within the state. The statutes were again sustained more than twenty years after the *Southern Pacific* decision, even though they were no longer relevant to the issue of safety. As enacted in 1903 and 1907, they included the requirement for fireman to be present on each train. By 1966, coal-burning steam engines had been replaced by diesel power, and the continued requirement of a fireman was justified, if at all, only as a means of providing local employment.

Nevertheless, the Court, in an opinion by Justice Hugo Black, who had dissented in the *Southern Pacific* case, was willing to defer to state policy. Even if the laws were no longer justifiable as safety measures, Black maintained that it was up to the legislature, not the Court, to change them (*Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Company* [1966]).

Cases Involving the Trucking Industry Although the Supreme Court has continued to express deference toward state efforts to promote highway safety, it has from time to time invalidated statutes in this area when the "burden" on interstate commerce appears to outweigh the safety benefits of the regulation. Thus, in *Bibb v. Navajo Freight Lines* (1959), the Court struck down as a burden on interstate commerce an Illinois law requiring the use of contoured mudguards on trucks traversing the state's highways. A more recent example is *Kassel v. Consolidated Freightways Corporation* (1981), in which the Court struck down, as a violation of the Commerce Clause, an Iowa statute prohibiting the use of 65-foot-long double-trailer trucks on its highways. The justices, however, could not agree on a rationale for their decision. A plurality of four (Powell, White, Blackmun, and Stevens) expressed the view that the Iowa statute imposed an unreasonable burden on interstate commerce, given the absence of "any significant countervailing safety interest." In a concurring opinion, Justice Brennan, joined by Justice Marshall, maintained that the Iowa legislation was protectionist in nature. He found that the primary intent underlying the statute was not to promote safety but "to discourage interstate truck traffic on Iowa's highways." Justice Rehnquist, in a dissenting opinion supported by Chief Justice Burger and Justice Stewart, took issue with Brennan's view, arguing that the statute was without doubt "a valid highway safety regulation and thus entitled to the strongest presumption of validity against Commerce Clause challenges." He maintained that Iowa's regulation of truck lengths was rational and that the safety benefits were more than slight. The "true problem" with this decision, as Rehnquist viewed it, was that the plurality and concurring opinions gave the states "no guidance whatsoever . . . as to whether their laws are valid or how to defend them."

The Nation as an Economic Unit

Any state regulation of interstate commerce aimed squarely at promoting local business interests by curtailing competition from out-of-state firms is unlikely to survive a constitutional challenge that reaches the Supreme Court. Those who drafted the Commerce Clause recognized the importance of promoting a national economy, and successive generations of Supreme Court justices have not lost sight of that objective.

Although the Commerce Clause does not place explicit limits on state power, it contains a clear negative implication—states may not discriminate against interstate commerce unless they can show that their actions serve legitimate local purposes that could not be served by alternative nondiscriminatory means. This negative component is often labeled the "dormant Commerce Clause." The 1949 decision in *H. P. Hood and Sons v. Du Mond* provides a good illustration of the dormant Commerce Clause. In *Hood,* the Supreme Court invalidated a New York administrative decision that denied Hood and Sons, a Massachusetts corporation, permission to increase from three to four the number of milk processing plants it operated in New York. Writing for the majority, Justice Robert Jackson viewed this limitation on Hood's source of supply as a form of economic isolationism that the state was not free to impose. It made no difference in principle that New York placed a ceiling, rather than an absolute ban, on Hood's activities within the state. "Our system, fostered by the Commerce Clause," Jackson asserted, "is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation." Here, as in the *Southern Pacific* case, the absence of national legislation on the matter at issue was not the controlling factor. The state had acted simply to protect local interests, and that action, the Court found, was inconsistent with the Commerce Clause.

The Supreme Court has been equally skeptical of state regulations that pressure out-of-state businesses into moving the center of their operations to the regulating state. Even when such coercive measures are defended as legitimate health laws, the Court is not easily persuaded. In *Dean Milk Company v. Madison* (1951), for instance, the Court struck down a purported local health ordinance prohibiting the sale of milk if it came from a farm more than 25 miles from Madison, Wisconsin, or was bottled more than 5 miles from the central square of the city. Clearly this measure discriminated against interstate commerce, something the Court was unwilling to condone, even for health purposes, if "reasonable, nondiscriminatory alternatives, adequate to conserve legitimate local interests" were available. In this instance, the Court believed such alternatives could be found.

In 1976, the Court invalidated a Mississippi regulation under which the board of health prohibited the sale of milk from another state unless Mississippi milk could be marketed there. The mandatory nature of this reciprocity was held to be an undue burden on interstate commerce and was not justified either as a health measure or as a provision promoting free trade among the states (*Great Atlantic and Pacific Tea Company v. Cottrell* [1976]).

The Problem of Interstate Waste Disposal In recent decades, state and local governments have struggled with the increasingly serious problem of disposing of household and industrial waste materials. In the landmark case of *Philadelphia v. New Jersey* (1978), the Supreme Court invalidated a state law prohibiting the importation of most solid and liquid waste materials from other states. Brushing aside the alleged environmental dangers posed by overuse of New Jersey's limited landfill space, the Court, through Justice Potter Stewart, concluded that however justifiable the objectives of the law might be, the method employed to achieve them could not discriminate against articles of interstate commerce (in this instance, garbage) "unless there is some reason, apart from their origin, to treat them differently." The Court saw this attempt to bar out-of-state access to New Jersey's privately owned landfill sites, while leaving them open to in-state users, as simply another example of **parochial legislation** tending to promote state **economic protectionism** at the expense of national interests. The problem of preserving adequate landfill space was by no means unique to New Jersey. And yet, in the Court's view, the state was attempting through this legislation

"to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." In *Chemical Waste Management, Inc. v. Hunt* (1992), the Supreme Court relied on *Philadelphia v. New Jersey* in striking down Alabama's $72 per ton fee on the disposal of out-of-state hazardous waste. However, the Court left open the possibility that such a fee could be valid if based on the increased cost of disposing of waste from other states. But in *Oregon Waste Systems v. Department of Environmental Quality* (1994), the Court invalidated a surcharge placed on the importation of out-of-state waste by the state of Oregon. Splitting 7 to 2, the Court had little difficulty reaching the conclusion that the surcharge discriminated against interstate commerce. Dissenting, Chief Justice Rehnquist chided the Court for limiting "the dwindling options available to States as they contend with the environmental, health, safety, and political challenges posed by the problem of solid waste disposal in modern society."

Regulation of Alcoholic Beverages

In 1984, the Court, by a 5-to-3 margin (Justice Brennan did not participate) invalidated a provision of the Hawaii liquor tax exempting certain locally produced alcoholic beverages (*Bacchus Imports, Ltd. v. Dias*). Writing for the majority, Justice White reasoned that although "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry, . . . [the] Commerce Clause stands as a limitation on the means by which a state can constitutionally seek to achieve that goal." He found it "irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers." The exemption at issue violated the Commerce Clause "because it had both the purpose and effect of discriminating in favor of local products." The Court rejected a challenge to the tax exemption based on Section 2 of the **Twenty-first Amendment**, recognizing the power of the states to regulate the importation and sale of "intoxicating liquors" within their borders. (The Twenty-first Amendment repealed the Eighteenth Amendment, which had prohibited the "manufacture, sale, or transportation of intoxicating liquors" within the United States.)

In dissent, Justice Stevens, joined by Justices Rehnquist and O'Connor, maintained that the Commerce Clause argument was "squarely foreclosed by the Twenty-first Amendment." Stevens asserted that since adoption of this amendment in 1933, the Court had "consistently reaffirmed" the view that the states may regulate commerce in intoxicating liquors "unconfined by ordinary limitations imposed . . . by the Commerce Clause and other constitutional provisions." The Supreme Court followed a line of reasoning similar to that of *Bacchus* in striking down state laws designed to keep local liquor and beer prices in line with prices charged in neighboring states. In *Healy v. Beer Institute* (1989), for example, the Court invalidated Connecticut's "beer price affirmation" statute as a violation of the Commerce Clause. This act required brewers and importers of beer to post monthly prices for each brand of beer they intended to sell in Connecticut and to affirm that these prices were no higher than prices in bordering states at the time of posting.

Writing for the Court, Justice Harry Blackmun found that this law had the effect of controlling commercial activity entirely outside Connecticut. He maintained that "the practical effect of this affirmation law, in conjunction with the many other beer pricing and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." As in previous cases, the Court rejected the argument that because this regulation involved alcoholic beverages, it was justified

under the Twenty-first Amendment. (For further discussion of this issue, see *Brown-Forman Distillers Corporation v. New York State Liquor Authority* [1986].)

Likewise, in the 2005 decision of *Granholm v. Heald* the Court, dividing 5-to-4, held that Michigan and New York laws that permitted in-state wineries to sell wine directly to in-state consumers while barring out-of-state wineries from doing so—or made such sales economically impractical—violated the Commerce Clause. Writing for the majority, Justice Kennedy maintained that the states had provided "little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries." In response to the argument that the Twenty-first Amendment provided an additional basis for state regulation, Kennedy concluded that while states" have broad power to regulate liquor under [this Amendment]" states are not empowered to "ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers." Justice Thomas spoke for the four dissenters in asserting that the Michigan and New York laws should be upheld. In his view "[t]he Twenty-First Amendment . . . displaced the negative Commerce Clause as applied to regulation of liquor imports into a state."

State Attempts to Conserve Their Natural Resources

The Supreme Court is unlikely even to permit a state to conserve its privately controlled natural resources if the conservation effort affords preferential treatment to local consumers. In a 1923 decision, for example, the Court invalidated a West Virginia law requiring local natural gas producers to give priority to the orders of in-state, as opposed to out-of-state, customers (*Pennsylvania v. West Virginia*). Of course, a state can assume ownership and direct control of its natural resources without violating the Commerce Clause. But if a state seeks to regulate privately owned businesses, even those engaged in the sale of scarce natural resources, the federal courts are almost certain to condemn the policy if it results in local favoritism.

For a long time, the Supreme Court recognized an exception to this general restriction by permitting the states to exercise broad control over interstate shipment of wild animals and fish for commercial sale. But in *Hughes v. Oklahoma* (1979), this exception was abolished. Here, the Court struck down a statute providing that minnows other than those produced in licensed hatcheries could not be sold outside Oklahoma. The law was presumably designed to protect the state's "natural" minnow population, but the Court rejected this rationale. Writing for the majority, Justice Brennan concluded that "challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources." The *Hughes* decision requires courts to scrutinize state laws restricting the import and export of animals and fish.

It does not, however, create an insurmountable obstacle to such legislation. For example, in *Maine v. Taylor* (1986), the Supreme Court upheld a state law prohibiting the importation of live bait fish. The Court accepted Maine's argument that the restriction was necessary to protect the state's valuable fisheries from parasites and nonnative species of fish.

The "Market Participant" Exception

Despite its critical view of state economic protectionism, the Supreme Court has upheld state regulations designed to promote noneconomic objectives, even when such regulations inhibit economic competition—as long as the state is a "market participant." For example, in a sharply divided ruling, the Court upheld a Maryland law authorizing the state to pay a bounty to junk processors for the hulks of abandoned

automobiles (*Hughes v. Alexandria Scrap Corporation* [1976]). To receive the bounty, a dealer had to furnish documentation of title. However, the documentation requirements were more demanding for out-of-state processors. A Virginia processor challenged the law as a violation of both the Commerce and the Equal Protection Clauses of the Fourteenth Amendment. Justice Lewis Powell, writing for the majority, conceded that the law had the practical effect of channeling economic benefits to in-state processors. Nevertheless, he concluded that "[n]othing in the purposes animating the Commerce Clause forbids a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." In a dissenting opinion, Justice Brennan, joined by Justices White and Marshall, denied that this law differed from the kind of economic protectionism struck down in previous cases. He maintained that the Maryland bounty was an obvious discrimination against interstate commerce.

The **market participant exception** recognized in *Alexandria Scrap* was reaffirmed in the 1980 case of *Reeves, Inc. v. Stake*. Here, the Court, by a 5-to-4 margin, upheld a South Dakota policy under which all in-state customers were supplied first with cement produced by a state-operated plant. Adhering closely to the reasoning in *Alexandria Scrap,* Justice Blackmun, writing for the majority, stated that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." He found "no indication of a constitutional plan to limit the ability of the states themselves to operate freely in the free market." Three years later, in *White v. Massachusetts Council of Construction Employers, Inc.* (1983), the Court held that the Commerce Clause did not bar implementation of an executive order requiring that at least 50 percent of the workers on all city-funded construction projects be residents of Boston. In his majority opinion, Justice Rehnquist reasoned that "[i]f the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its participation." The Court, however, refused to apply the market participant exception to an Alaska law requiring that any timber taken from state-owned land be at least partially processed before being removed from the state (*South-Central Timber Development, Inc. v. Wunnicke* [1984]).

Continuing Controversy over the Dormant Commerce Clause

The contemporary Supreme Court remains sharply divided over interpretation of the Commerce Clause as a limitation on state regulatory power. This point is well illustrated by the 1997 decision in *Camps Newfound/Owatonna v. Town of Harrison.* Here a five-member majority, speaking through Justice Stevens, held unconstitutional a state law granting preferential tax treatment to charities that extended benefits to in-state, as distinguished from out-of-state, residents. In an attempt to justify this stringent application of the dormant Commerce Clause, Justice Stevens observed that "[t]he history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union." In a vigorous dissenting opinion, Justice Scalia, joined by Chief Justice Rehnquist and Justices Thomas and Ginsburg, maintained that the Court had gone too far:

> We have often said that the purpose of our negative commerce clause jurisprudence is to create a national market. . . . In our zeal to advance this policy, however, we must take care not to overstep our mandate, for the Commerce Clause was not intended "to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country."

It is clear from this decision and others reviewed in this section that the Court has been unable to articulate a bright-line standard defining the scope of state regulatory power in relation to national commerce. Of course, the complexity of this subject makes it virtually impossible to achieve such clarity.

TO SUMMARIZE:

- The Commerce Clause is both a source of national power and a limitation of state power.
- Although states are permitted to regulate local aspects of interstate commerce, they may not engage in economic protectionism.
- In balancing competing interests in this area, the Supreme Court encourages the continued growth of a strong national economy while acknowledging state responsibility to protect the health, safety, and general welfare of the citizenry.
- The inherent tension between legitimate state and national interests within a federal system is well illustrated by the continuing controversy over state regulatory power in the field of commerce.

STATE TAXING POWER

By contrast with the regulation of commerce, state power to tax was well established when the Constitution was drafted in 1787. The grant of taxing authority to Congress in Article I, Section 8, Clause 1, did not withdraw or transfer this power from the states.

Taxation simply became one of those **concurrent powers** exercised broadly by both spheres of government. Of course, the authority to tax at the local level is derived from the states. Cities, counties, and other units of local government are created and may be abolished by the states, and the scope of their taxing power is largely determined either by state constitutional provisions or by statutes—always subject, however, to federal constitutional requirements.

Routine aspects of state and local taxation do not often raise serious federal constitutional problems. The states have retained broad discretion under the federal Constitution to tap a variety of revenue sources that have widened as governmental services and costs have increased. It is only when states or their local subdivisions use taxation to block or undermine a federal constitutional principle or objective that state taxing power is likely to be limited by the Supreme Court. One such principle is the promotion of a national economy, embodied in such provisions as the Commerce Clause and the restriction on state taxation of imports and exports (see Article I, Section 10). A state tax that unfairly burdens interstate commerce to the advantage of local economic interests is vulnerable to constitutional attack. The foregoing discussion of state power to regulate commerce touched on this aspect of state taxation. Two additional problems are posed by the federal relationship, both of which have their origins in constitutional principles and reflect the gradual expansion of governmental power. These problem areas are **intergovernmental tax immunity** and the scope of state taxing power under the Imports-Exports Clause.

Intergovernmental Tax Immunity

In *M'Culloch v. Maryland* (1819), Chief Justice Marshall asserted that Congress has not only an implied power to establish a national bank but also that a state cannot use its taxing authority to undermine that power. Marshall refused to sanction a state tax

having the potential to destroy an entity constitutionally created by the national government. As he put it, characteristically "the power to tax involves the power to destroy." But in Marshall's view, this reasoning did not apply in reverse—that is, it provided no justification for imposing restrictions on national taxing power when that power interfered with lawful state objectives. But whether Marshall acknowledged it or not, the logic of his argument cut both ways.

As the doctrine of dual federalism emerged in the aftermath of the Civil War, the argument in favor of state immunity from national taxation gained support. In 1871, the Supreme Court embraced this doctrine in *Collector v. Day,* holding that the salary of a Massachusetts judge was immune from the federal income tax levied during the Civil War. The judge's salary was treated as an "instrumentality" of state government protected by the Tenth Amendment, just as the Bank of the United States had been viewed as an instrumentality of the national government protected by the Supremacy Clause. This reasoning was later applied to exempt from state as well as federal income taxes the salaries of many employees at all levels of government. Precisely why these salaries should be afforded special protection was never made clear, but the broader principle of intergovernmental tax immunity, which *Collector v. Day* established, followed logically from the assumptions underlying classical federalism.

For a number of years, the doctrine of intergovernmental tax immunity flourished in American constitutional law. The Court expanded the doctrine in the famous income tax case of 1895 by holding, among other things, that Congress could not tax income generated by state and local government securities (see *Pollock v. Farmers' Loan and Trust Company*). Although the *Pollock* decision was in large part overruled by the Sixteenth Amendment, adopted in 1913, this restriction on federal taxation remained in effect for many years. The exemption was finally challenged in 1982, when Congress imposed a tax on the interest from unregistered, long-term bonds issued by state and local governments. The state of South Carolina brought an original action in the Supreme Court attacking the constitutionality of this measure (*South Carolina v. Baker* [1988]). In upholding the tax, the Court concluded that neither the Tenth Amendment nor the doctrine of intergovernmental tax immunity prevented Congress from taxing this important source of state and local revenue. *South Carolina v. Baker* thus finally overruled the last remaining vestige of the *Pollock* decision.

Intergovernmental tax immunity had its heyday during the 1920s. In 1922, for example, the Court went so far as to strike down a state tax on income accruing to a company from oil lands it had leased from Indian tribes. Because these lands were classified as federal property, the Court concluded that the oil company, as lessee, was an instrumentality of the United States, carrying out the government's "duties to the Indians" (*Gillespie v. Oklahoma* [1922]). In a 1928 case, the states were barred from taxing royalties derived from national patents on the ground that such a tax would discourage national efforts to promote science and invention (*Long v. Rockwood*). With growing demands for additional tax sources in response to the Great Depression, these highly restrictive decisions were overruled (*Fox Film Corporation v. Doyal* [1932]). In 1939, the Supreme Court overruled *Collector v. Day* and its progeny, thus removing the tax exemptions previously applied to the salaries of state and federal employees (*Graves v. New York ex rel. O'Keefe*). Justice Harlan Stone, who, along with Justices Oliver Wendell Holmes and Louis Brandeis, had been on the dissenting side during the heyday of reciprocal tax immunity, assumed a leading role in articulating the new approach. He rejected the rigid logic of dual federalism and recognized the practical demands imposed by two legally distinct governments, both obviously requiring more revenue to perform their expanding duties.

Neither the states nor the national government can tax essential governmental functions performed by the other. This is as true today as it was in the 1920s. The

problem is determining just what constitutes an essential function of government. Presumably, Congress could not impose a tax on the publication of statutes enacted by a state legislature; nor could a state levy a tax on the Supreme Court case reporter, *United States Reports*. But once we move away from such extreme and improbable situations, the answers are not found as easily. For example, although a state may not tax federal property directly, it can place a privilege tax on an individual or corporation using federal property and may base the tax on the value of such property (*United States v. City of Detroit* [1958]). States may also tax federal contractors, even if the burden of the tax is absorbed in the contract price and thus in effect is passed on to the government (*Alabama v. King & Boozer* [1941]). On the other hand, the Supremacy Clause broadly protects functions of the national government from regulation through the imposition of state taxes or exercise of the state police power (*United States v. Georgia Public Service Commission* [1963]). Basically, the Supreme Court has attempted to maximize the discretion of the taxing authority without impairing the performance of essential activities of government.

Formal doctrine is less useful to the Court in making specific determinations in this field than practical assessments of political or economic reality. The gradual decline of reciprocal tax immunity since the 1930s illustrates the veracity of Justice Oliver Wendell Holmes's famous observation that the "life of the law has not been logic; it has been experience." A modern example of the erosion of reciprocal tax immunity is provided by the 1978 decision in *Massachusetts v. United States*. Here, the Court upheld the imposition of a federal aircraft registration tax on a state-owned helicopter used exclusively for police work. It is difficult to think of a more basic governmental function than that of law enforcement, but the Court readily found the tax valid as a "user fee." Writing for the majority, Justice Brennan concluded:

> A nondiscriminatory taxing measure that operates to defray the cost of a federal program by recovering a fair approximation of each beneficiary's share of the cost is surely no more offensive to the constitutional scheme than is either a tax on the income earned by state employees or a tax on a State's sale of bottled water [see *New York v. United States* (1946)]. . . . There is no danger that such measures will not be based on benefits conferred or that they will function as regulatory devices unduly burdening essential state activities.

With respect to both federal and state taxation, the emphasis today is on enlarging, not restricting, available sources of revenue. This point is illustrated by the decision in *United States v. County of Fresno* (1977), in which the Court upheld a local property tax on U.S. Forestry Service employees whose houses were rented from the government. The tax was imposed only on those renting from owners (in this instance, the federal government) who were themselves exempt from taxation. Justice White, for the majority, found the tax to be nondiscriminatory, concluding that since it fell on individuals and not government, it was no impediment to the work of the Forestry Service. On the other hand, in *Davis v. Michigan Department of Treasury* (1989), the Court struck down a state law exempting state but not federal retirement benefits from state income taxes. The Court concluded that no significant differences existed between the two classes of retirees that would justify exempting one but not the other from state taxation.

The Imports-Exports Clause

Article I, Section 10, Clause 2, of the Constitution provides: "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 its inspection Laws." Like the

Commerce Clause, the **Imports-Exports Clause** was intended to promote broad national economic interests and minimize the negative influence of parochial state policies. In addition, the Imports-Exports Clause was designed to bar discrimination against both the shipment of goods into the United States from foreign countries and the shipment of American goods destined for foreign markets. Another aim of this clause was to remove the unfair advantage that seaboard states with ports of entry would otherwise have over interior states. Given the legal characteristics of the federal system, however, the Imports-Exports Clause was also theoretically applicable to goods imported from or exported to other states. Despite occasional tendencies to accord it this broad interpretation, this clause has usually been confined to the movement of goods between foreign countries and the United States.

The first question the Supreme Court considered in limiting the scope of state taxing power turned on the definition of the word *import* in this clause. At what point, for state taxation purposes, does a commodity imported from a foreign country lose its distinct character as an import and thereby become subject to a state's general taxing power? Chief Justice Marshall considered this question in the 1827 case of *Brown v. Maryland.* Maryland required that importers and sellers of goods in designated forms pay a license fee of $50. The state imposed a financial penalty for failure to comply with this requirement. Four sellers of foreign merchandise challenged the Maryland law as violative of the Imports-Exports Clause and the Commerce Clause. The Marshall Court declared the law unconstitutional on both grounds. The chief justice interpreted the Imports-Exports Clause as a broad restriction on state power. The fee at issue in this case was aimed exclusively at imports and, on the basis of his analysis, was clearly a violation of the Constitution. But Marshall went one step further and considered a question not directly at issue in this case: When does a commodity moving into a state from a foreign jurisdiction lose its distinct character as an import? He answered as follows:

> When the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property within the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

Because the law at issue did not apply to sellers of domestic goods, it was plainly discriminatory and could have been invalidated without reference to this "original package" test. But the state attorney general, Roger B. Taney (Marshall's successor as chief justice on the Supreme Court), argued that a simple invalidation of the license fee through strict construction of the language of the Imports-Exports Clause could permanently insulate imported goods from state and local taxation. Marshall's development of the **original package doctrine**, with its emphasis on a cutoff point beyond which the states would be free to tax, appears to have come in response to Taney's argument.

The Rise and Fall of the Original Package Doctrine

In *Low v. Austin* (1872), the original package dictum was accorded formal constitutional status, providing the basis for invalidating a nondiscriminatory property tax on imported goods that, although no longer in the "stream of commerce," remained in their original packages. The **original package doctrine** had the appeal of apparent simplicity, and over time it acquired the aura accorded to many of the pronouncements of Chief Justice Marshall. But as many scholars pointed out, the doctrine was both

mechanical and inconsistent with the purpose of the Imports-Exports Clause, which was simply to prevent discriminatory state taxation on goods moving from or to foreign markets.

Generally speaking, the development of American law relies heavily on precedent. Although less pronounced in constitutional law than in most other legal subfields, *stare decisis* is a powerful factor in the decision making process. Perhaps this explains the durability of the original package doctrine. However, with advances in technology and great increases in the volume of foreign trade, the doctrine became untenable. By the 1940s, legal scholars were calling for its abandonment. They urged the substitution of a simple test focusing on the question of whether a given state tax is discriminatory.

Finally, in the 1976 case of *Michelin Tire Corporation v. Wages,* the Supreme Court adopted this position. It overruled *Lowe v. Austin* and upheld a nondiscriminatory Georgia tax on tires and tubes imported from France and Canada. Writing for the majority, Justice Brennan took note of the extensive criticism of the original package doctrine and of its departure from the intent of the Framers. He then concluded:

> Our independent study persuades us that a nondiscriminatory *ad valorem* property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* [*v. Maryland*] had in mind as being an "impost" or duty and the *Lowe v. Austin*'s reliance upon the *Brown* dictum to reach the contrary conclusion was misplaced.

In this way, the Court managed to nullify the original package doctrine without challenging John Marshall's initial statement of the formula, thus according deference to judicial tradition while at the same time overruling a troublesome constitutional precedent.

Other Taxation Issues

The Supreme Court has encountered other constitutional problems in determining the scope of state taxing power. These include issues of multiple taxation, the proper basis of assessment, the degree of burden that will be permitted on interstate commerce, and the procedural requirements of due process of law. This chapter, however, is concerned only with the more salient aspects of American federalism and cannot elaborate on these additional questions of state taxation. Like its national counterpart, state taxation serves regulatory as well as revenue-raising purposes. For example, certain state-imposed license fees may be upheld even though they apply to interstate as well as intrastate business activities. The question in such cases is whether the state is acting within the proper scope of its police power. The Supreme Court has not invalidated a state tax merely because of its regulatory effect. The Court has been far more concerned with whether a given tax discriminates against interstate or foreign commerce or whether it inhibits an essential function of the national government. The constitutional scope of the state taxing power is strongly influenced, even in an age of cooperative federalism, by the central objective of balancing state and national interests.

TO SUMMARIZE:

- When states use taxation to block or undermine a federal constitutional principle or objective, such state taxing power is likely to be limited by the Supreme Court.
- A state tax that unfairly burdens interstate commerce to the advantage of local economic interests is vulnerable to constitutional attack.

- Until the late 1930s, the doctrine of intergovernmental tax immunity served as a basis for limiting both state and federal taxing authority. As a practical matter, the doctrine no longer limits federal taxing power and only rarely restricts state taxing authority.
- The Imports-Exports Clause limits state power to tax imports and exports and was intended to promote broad national economic interests and minimize the negative influence of parochial state policies. Chief Justice John Marshall developed the original package doctrine in an effort to place tangible limits on state taxing power over imports. The vast growth of commercial activity in combination with the revolution in transportation rendered this doctrine obsolete, and the Supreme Court formally repudiated it in 1976.

INTERSTATE RELATIONS

In addition to interaction between the national government and the states, American federalism encompasses relations among the states. This interstate dimension is addressed primarily by Article IV of the Constitution, with its Full Faith and Credit, Privileges and Immunities, and Rendition provisions. The Framers also provided, in Article I, Section 10, Clause 3, that the states could not, without congressional consent, "enter into any Agreement or Compact" with other states or with foreign powers.

The Full Faith and Credit Clause

The Constitution requires that each state give "[f]ull Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State" (Article IV, Section 1, Clause 1). In addition to asserting this general principle, the **Full Faith and Credit Clause** grants Congress the power to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." To that end, Congress passed legislation in 1790 and 1804 providing for the authentication and effect of public records. As a result of this early legislation and occasional minor changes over the years, the principle of full faith and credit has become an integral part of our legal system.

The most difficult and important questions in this area have involved the extent to which valid final judgments by state courts are enforceable in other states. One brief illustration of the complexity characterizing this area is provided by the Supreme Court's decision in *Estin v. Estin* (1948). Here, the Court recognized a "divisible" divorce decree. Under this approach, a state must accord validity to a divorce granted by another state but is not bound by another state's decision on such related matters as alimony, child custody, and division of property.

The Controversy over Same-Sex Marriage The Full Faith and Credit Clause has long been interpreted to require states to recognize marriage licenses issued by other states. In the late 1990s, an issue emerged over whether states would have to recognize same-sex marriages licensed by other states. Although only Massachusetts has recognized same-sex marriage, several other states have come close to doing so. Vermont permits same-sex couples to enter into "civil unions" that have all the legal rights and duties associated with marriage. This appears to avoid the issue of recognition by other states, as civil unions are not technically marriages. In 1996, the Hawaii Supreme Court invalidated that state's ban on same-sex marriage, but this decision was effectively overturned in 1999 when voters in that state overwhelmingly approved a constitutional amendment reserving to the legislature the power to limit marriages to

opposite-sex couples. Many other states have enacted laws reaffirming the traditional conception of marriage. Still, gay rights activists are pushing for courts and legislatures around the country to legalize same-sex marriage. In Massachusetts, the legislature has legalized same-sex marriage, and in Vermont the legislature has recognized "civil unions" between same-sex partners. Other states are likely to follow suit. The question then becomes: Are states obligated to recognize same-sex unions licensed by other states? In 1996 Congress passed and in 1997 President Bill Clinton signed the Defense of Marriage Act (DOMA). The act provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

The Defense of Marriage Act did not end the controversy, however. Critics charge that Congress has no power to relieve states of their obligations under the Full Faith and Credit Clause. Thus far, litigation attacking DOMA has not been successful. In *Smelt v. County of Orange* (2005), the Ninth Circuit Court of Appeals dismissed a challenge to DOMA brought by a same-sex couple in California. Judge Ferdinand F. Fernandez, writing for the court, observed that it is "difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if there is an alternative." The *Smelt* case was dismissed because the plaintiffs could not prove that they had been legally married elsewhere. Many observers believe that it is only a matter of time before several cases will be presented to the federal courts in which the plaintiffs will have standing to challenge DOMA and that, when that happens, it is likely that one or more federal courts will rule that DOMA is unconstitutional. This is why President Bush in 2004 proposed a federal constitutional amendment—to insulate DOMA from constitutional attack. However, there was insufficient support in Congress, indeed throughout the country, for the proposal to gain traction.

The Privileges and Immunities Clause

The principle of full faith and credit is insufficient to promote harmonious interstate relations. Recognition of another state's "Acts, Records, and judicial Proceedings" would be of little consequence if the states were free to favor their own citizens over those of other states. To preclude this possibility, the Framers provided in Section 2, Clause 1, of Article IV that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This **Privileges and Immunities Clause** should not be confused with a similar provision in the Fourteenth Amendment declaring "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Whereas the Fourteenth Amendment protects privileges and immunities of national citizenship only, Article IV is directed to state citizenship (see *The Slaughter-House Cases* [1873]). In spite of its open-ended language, this provision was until recently accorded a narrow judicial interpretation.

The first major decision interpreting Article IV's Privileges and Immunities Clause established this narrow construction but identified a number of fundamental rights embraced by the provision (*Corfield v. Coryell* [1823]). In this circuit court ruling, Supreme Court Justice Bushrod Washington argued that the clause protects only those privileges and immunities "which are, in their nature, fundamental; which belong of right to the citizens of all free governments." For Washington, these fundamentals included "the right of a citizen of one state to pass through or reside in any other state . . . ; to claim the benefit of the writ of habeas corpus; to institute and

maintain actions of any kind in the courts of the state; to take, hold, and dispose of property; and an exemption from higher taxes or impositions than are paid by other citizens of the state." Justice Washington's list of **fundamental rights** is limited by comparison with the scope of constitutional protections today. Nevertheless, the logic underlying his position could be extended to include many rights guaranteed by other constitutional provisions. Indeed, the Privileges and Immunities Clause is closely related to such concepts as equal protection and due process, as well as to the negative implications of the Commerce Clause.

The Supreme Court has not elaborated on the "fundamental rights" formulation of *Corfield v. Coryell*. Rather, it directed its attention to the question of whether states are granting equality of rights to citizens of other states relative to their own citizens. However, the Privileges and Immunities Clause has never been interpreted to preclude all differential treatment of out-of-state citizens. On occasion, the Court has allowed even discrimination involving fundamental rights if it could be shown that such discrimination could not be "reasonably . . . characterized as hostile to the rights of citizens of other states" (*Blake v. McClung* [1898]). As a result, differential state standards governing the practice of certain professions are not barred by the Privileges and Immunities Clause. Out-of-state physicians, lawyers, and other professionals may be required to prove their competency on the basis of higher standards than those applied to their in-state counterparts. Tuition rates at public colleges and universities are typically lower for in-state students. Out-of-state residents are charged more for hunting and fishing licenses than are in-state residents. Such discrepancies are generally accepted as justifiable because they advance legitimate state interests.

On this basis, the Supreme Court upheld Iowa's one-year residency requirement as a prerequisite to obtaining a divorce (*Sosna v. Iowa* [1975]). Similar durational residency requirements had been struck down as applied to welfare benefits, voting, and publicly financed health care (see, for example, *Shapiro v. Thompson* [1969] and *Dunn v. Blumstein* [1972]). The state-imposed restrictions in those cases were justified only by budgetary and record-keeping concerns. These interests were regarded as less important than the constitutional claims of individuals burdened by the residency requirements. By contrast, Iowa could justify its residency requirement for divorce on grounds other than budgetary constraints and administrative convenience. "A decree of divorce," said Justice Rehnquist for the majority, "is not a matter in which the only interested parties are the state as a sort of 'grantor' and a plaintiff . . . in the role of 'grantee.'" He continued by observing:

> Both spouses are obviously interested in the proceedings, since it will affect their marital status and very likely their property rights. Where a married couple has minor children, a decree of divorce would usually include provisions for their custody and support. With consequences of such moment riding on a divorce decree issued by its courts, Iowa may insist that one seeking to initiate such a proceeding have the modicum of attachment to the state required here.

Thus, a state must show that its differential treatment of in-state and out-of-state residents serves some reasonable purpose. Alaska's failure to justify such differential treatment led the Court in 1978 to strike down a statute requiring employers to give preferential treatment to in-state residents (*Hicklin v. Orbeck*). Specifically, the law required "the employment of qualified Alaska residents" in preference to out-of-state residents, in connection with "all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes . . . to which the state is a party." Alaska began to enforce this act seriously in 1975, when construction on the Trans-Alaska Pipeline was reaching its peak. As a result, Hicklin and other nonresidents who had previously worked on this project "were prevented from obtaining pipeline-related work." The

Court unanimously invalidated Alaska's preferential requirement as a violation of the Privileges and Immunities Clause of Article IV. Writing for the Court, Justice Brennan concluded that this law was "an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop her oil and gas resources to bias their employment practices in favor of the state's residents." We have already noted the close relationship between the Privileges and Immunities Clause and the Commerce Clause. But this relationship does not mean that the two clauses are entirely equivalent in impact. Thus, a state policy that survives scrutiny under the Commerce Clause may be invalidated under Article IV, Section 2.

This point is well illustrated by the 1984 decision of *United Building and Construction Trades v. Camden*. At issue was the question of whether the Privileges and Immunities Clause was violated by a Camden, New Jersey, city ordinance requiring that a minimum of 40 percent of persons employed under city construction contracts be Camden residents. The New Jersey Supreme Court held that because the ordinance was written in terms of municipal rather than state residency, it was not subject to the Privileges and Immunities Clause. Without ruling on the constitutionality of the ordinance, the Supreme Court reversed. In his majority opinion, Justice Rehnquist concluded that the local character of the ordinance did not "somehow place it outside the scope of the Clause." The ordinance in question had state approval, but even if it had been "adopted solely by Camden, the hiring preference would still have to comport" with this constitutional provision.

Distinguishing the *Camden* decision from *White v. Massachusetts Council of Construction Employers* (1983), discussed earlier, Rehnquist asserted that the Commerce and the Privileges and Immunities Clauses "have different aims and set different standards for state conduct." The "market participant" rationale applied in *White* was not controlling in the *Camden* case. In supporting this conclusion, Rehnquist reasoned as follows:

> The Commerce Clause is an implied restraint upon state regulatory powers. Such powers must give way before the superior authority of Congress to legislate on (or leave unregulated) matters involving interstate commerce. When the state acts solely as a market participant, no conflict between state regulation and federal regulatory authority can arise. . . . The Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony. . . . It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce.

The Rendition Clause

The Full Faith and Credit Clause does not extend to criminal offenses; that is, no state need enforce the criminal laws of another state or respect those laws as a defense in a prosecution. This position has its roots in the Anglo-American concept of due process, which requires trial in the district where the crime was committed. Complete reliance on this tradition could have permitted any of the states to become havens of refuge for fugitives from other states. The Framers therefore included a **Rendition Clause** in Section 2 of Article IV: "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."

Pursuant to this clause, Congress in 1793 passed legislation delineating the manner of rendition and obligating governors to comply with the extradition requirements. Those provisions, both statutory and constitutional, were presumed to cover

any and all violations of a state's criminal law and required a governor to deliver a fugitive to the "requesting" state, even if the fugitive's acts would not have been criminal in the governor's state. This requirement was upheld in the 1861 case of *Kentucky v. Dennison*. Ohio Governor William Dennison had refused to comply with Kentucky's demand that he surrender a black defendant charged in Kentucky with aiding the escape of slaves. The Supreme Court unanimously held that although Dennison had a duty to comply with Kentucky's demand, this duty was unenforceable. This anomalous aspect of the *Dennison* case was eventually overruled by a 1987 Supreme Court decision holding that a federal judge can require a governor to perform "the ministerial duty" of delivering a fugitive upon a proper demand from another state (*Puerto Rico v. Branstad*).

Interstate Compacts

The Full Faith and Credit, Privileges and Immunities, and Rendition Clauses were obviously designed to minimize friction among the states. By contrast, the Compacts Clause, although stated in negative terms, was more positive in that it paved the way for the states, with congressional consent, to enter into agreements among themselves. The relevant language of Article I, Section 10, Clause 3, provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power." Over the years, many such agreements have been entered into with generally beneficial results. New York and New Jersey, for example, have cooperated in administering the New York Port Authority. Other states have developed **interstate agreements** for the regulation of oil and gas, the management of water resources, and the like. Despite the constitutional requirement of congressional approval, the Court has sustained several interstate agreements not explicitly sanctioned by Congress.

This was the result in the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*. In 1967, a multistate tax compact went into effect among seven states. By 1978, some twenty-three states had participated at various times, some remaining affiliated, others withdrawing. The purpose of this compact was to reduce the inefficiency inherent in the separate single-state administration of taxes levied on multistate businesses. The compact established a commission to carry out a number of related functions. U.S. Steel and other large corporations, believing that the commission's activities worked to their disadvantage, challenged the constitutionality of the compact, alleging that it unreasonably burdened interstate commerce. However, the Supreme Court sustained the compact in spite of the absence of explicit congressional consent. In *Multistate Tax Commission,* the Supreme Court relied principally on the precedent of *Virginia v. Tennessee* (1893). There, the Court had sustained a compact between Virginia and Tennessee that resolved a border dispute, finding that Congress had tacitly approved the arrangement. In this early decision, Justice Stephen J. Field, speaking for the Court, added that not all compacts required even tacit approval. Approval was unnecessary if the compact did not tend to "increase the political power of the states which may encroach upon or interfere with the just supremacy of the United States." The Court applied this rationale in *Multistate Tax Commission*. Justice Powell, writing for the majority, reasoned that because the taxing authority remained in the hands of each state and because all regulations promulgated by the commission were ineffectual until state statutes authorized them, the compact did not expand state power at the expense of federal authority. Indeed, the compact gave no single state any greater power than it possessed independently. Accordingly, the compact was no greater burden on interstate commerce than were state taxes on multistate businesses previously sustained as constitutional.

Interstate compacts that are granted congressional approval function as the legal equivalent of federal treaties and statutes—that is, they are the supreme law of the land. Once approved, the terms of the compact are binding on all parties, preventing a state from unilaterally withdrawing and from using its internal domestic policy to avoid compliance with the terms of the compact. This policy is well illustrated by the case of *West Virginia ex rel. Dyer v. Sims* (1951). There, the Supreme Court overruled the West Virginia Supreme Court's holding that West Virginia's commitments under an interstate compact were invalid because they conflicted with the state constitution.

TO SUMMARIZE:

- The Full Faith and Credit Clause of Article IV, Section 1, of the Constitution requires each state to recognize and enforce the public acts, records, and judicial proceedings of other states. The most difficult questions in this area involve the extent to which final judgments of state courts are enforceable in other states.
- The Privileges and Immunities Clause of Article IV, Section 2, of the Constitution embodies the principle that states cannot show favoritism to their own citizens at the expense of persons from other states. A state must show that any differential treatment serves a reasonable and legitimate purpose.
- Article IV, Section 2, also provides for extradition of accused criminals who flee across state lines. The process begins upon the request of the governor of the state from which the fugitive has fled. A federal judge can require a governor to perform the duty of delivering a fugitive upon a proper demand from another state.
- The qualified prohibition against interstate compacts contained in Article I, Section 10, Clause 3, of the Constitution has not prevented the states from entering into numerous agreements designed to promote their mutual interests. The Supreme Court has upheld interstate compacts even in the absence of explicit congressional approval.

CONCLUSION

Taking into account both the constitutional basis and the political dimensions of American federalism, it is possible to identify five basic characteristics of this system of government.

1. *The continuing division of legal authority between two levels of government: national and state.* Each level has an independent mechanism of government through which it enacts, interprets, and administers law. Considerable overlapping occurs, of course, but the structure of two legally distinct spheres of government—each with its own constitution, legislature, chief executive, judiciary, and administrative bureaucracy—remains intact.
2. *Direct simultaneous authority over persons within their jurisdictions.* The national government and the states exercise authority over persons within their jurisdictions. Dual citizenship is a fundamental part of the federal system, and rights, privileges, and immunities derive from both types of citizenship.
3. *National supremacy.* Both the Supremacy Clause of Article VI and the Fourteenth Amendment mandate the subordination of state to national authority in instances where the national government is constitutionally empowered to act.
4. *Cooperative federalism.* The modern era has been characterized by a high level of interaction between federal and state authorities. Today, the national

government and the states work cooperatively in the areas of law enforcement, domestic security, education, highway construction, public health, social welfare, and environmental protection, among others. While the term "cooperative federalism" is often used to describe these relationships, the role of the national government is clearly dominant.

5. *The Supreme Court as "umpire of the federal system."* Throughout its history, the Supreme Court has played a leading role in allocating constitutional power between the national government and the states and in refereeing interstate relations. Federalism encompasses a set of complex and dynamic relationships between the states and the national government and among the states themselves. These relationships are defined and redefined through the process of judicial interpretation. In performing its role as **umpire of the federal system**, the Supreme Court has attempted over the years to give expression to the contending values of national unity and local diversity.

Although the role of the national government became dominant during the second half of the twentieth century, the states continue to be viable and important governmental entities. They have by no means become mere administrative units of the national government. Indeed, as a result of the "Reagan Revolution" of the 1980s and the Republican Congress's "devolution" of power to the states in the 1990s, states have had to shoulder greater policy making and fiscal responsibilities.

Since the mid-1990s, the Supreme Court, in a series of closely divided and highly controversial decisions, has buttressed the constitutional standing of the states within the federal system. Whether the recent reallocation of power toward the states represents a long-term trend remains to be seen. American federalism, after all, is highly dynamic.

KEY TERMS

federal system
unitary system
Tenth Amendment
Supremacy Clause
states' rights
nullification
interposition
secession
sovereign immunity
Eleventh Amendment
national supremacy
police powers of the states
Civil War Amendments
dual federalism
cooperative federalism
federal preemption doctrine
coercive federalism
doctrine of incorporation
state power to regulate interstate commerce
direct–indirect test
parochial legislation
economic protectionism
Twenty-first Amendment
market participant exception
concurrent powers
intergovernmental tax immunity
Imports-Exports Clause
original package doctrine
Full Faith and Credit Clause
Privileges and Immunities Clause
fundamental rights
Rendition Clause
interstate agreements
umpire of the federal system

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Case

CHISHOLM V. GEORGIA

2 Dall. (2. U.S.) 419; 1 L.Ed. 440 (1793)
Vote: 4–1

In 1777, the state of Georgia authorized two state commissioners to purchase supplies from Robert Farquhar, a merchant based in Charleston, South Carolina. Although the supplies were delivered, Farquhar never received payment. After Farquhar's death, the executor of his estate, Alexander Chisholm, brought a federal lawsuit against the state of Georgia to force payment of the claim. Relying on the ancient doctrine of sovereign immunity, Georgia responded that it could not be sued without its own consent, even by a citizen of another state proceeding in a federal tribunal. The Chisholm case was decided by the Supreme Court on February 18, 1793. Dividing 4-to-1, the Court rejected the state's contention of immunity. In keeping with the common practice of the day, all five justices rendered opinions seriatim. Chief Justice John Jay and Associate Justices James Wilson, John Cushing, and John Blair wrote opinions concurring in the judgment. Justice James Iredell produced a dissenting opinion. (Although Congress in 1792 had increased the size of the Court to six justices, Justice William Paterson did not begin service on the Court until March 1793.) Only Justice Wilson's concurrence and Justice Iredell's dissent are excerpted here.

Wilson, Justice:

This is a case of uncommon magnitude. One of the parties to it is a state; certainly respectable, claiming to be sovereign. The question to be determined is whether this state, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the supreme court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this—"do the people of the United States form a nation?" . . .

To the Constitution of the United States the term "sovereign" is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those who ordained and established that constitution. They might have announced themselves "sovereign people of the United States." But serenely conscious of the fact, they avoided the ostentatious declaration. . . .

In one sense, the term "sovereign" has for its correlative, [the term] "subject." In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that constitution there are citizens, but no subjects. "Citizens of the United States." "Citizens of another state." "Citizens of different states." "A state or citizen thereof." The term "subject" occurs indeed, once in the instrument; but to make the contrast strongly, the epithet "foreign" is prefixed. In this sense, I presume the state of Georgia has no claim upon her own citizens: In this sense, I am certain, she can have no claim upon the citizens of another state. . . .

As a judge of this court, I know, and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the union, as part of the "People of the United States," did not surrender the supreme or sovereign power to that state; but, as to the purposes of the union, retained it to themselves. As to the purposes of the union, therefore, Georgia is not a sovereign state. . . .

. . . "The people of the United States" are the first personages introduced [in the Constitution]. Who were those people? They were the citizens of thirteen states, each of which had a separate constitution and government, and all of which were connected together by Articles of

Confederation. To the purposes of public strength and felicity that confederacy was totally inadequate. A requisition on the several states terminated its legislative authority; executive or judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to insure domestic tranquility, to provide for common defense, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present constitution. By that constitution, legislative power is vested, executive power is vested, judicial power is vested.

The question now opens fairly to our view, could the people of those states, among whom were those of Georgia, bind those states, and Georgia, among the others, by the legislative, executive, and judicial power so vested? If the principles on which I have founded myself are just and true, this question must, unavoidably, receive an affirmative answer. If those States were the work of those people, those people, and that I may apply the case closely, the people of Georgia, in particular, could alter, as they pleased, their former work; to any given degree, they could diminish as well as enlarge it. Any or all of the former State powers they could extinguish or transfer. The inference which necessarily results is, that the constitution ordained and established by those people; and still closely to apply the case, in particular, by the people of Georgia, could vest jurisdiction or judicial power over those states, and over the state of Georgia in particular.

The next question . . . is—Has the constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. In order, ultimately, to discover, whether the people of the United States intended to bind those states by the judicial power vested by the national constitution, a previous inquiry will naturally be: Did those people intend to bind those states by the legislative power vested by that constitution? The Articles of Confederation, it is well known, did not operate upon individual citizens, but operated only upon states. This defect was remedied by the national constitution, which as all allow, has an operation on individual citizens. But if an opinion, which some seem to entertain, be just; the defect remedied, on one side, was balanced by a defect introduced on the other: for they seem to think, that the present constitution operates only on individual citizens, and not on states. This opinion, however, appears to be altogether unfounded. When certain laws of the states are declared to be "subject to the revision and control of the congress"; it cannot, surely be contended, that the legislature power of the national government was meant to have no operation on the several states. The fact, incontrovertibly established in one instance, proves the principle in all other instances, to which the facts will be found to apply. We may then infer, that the people of the United States intended to bind the several states, by the legislative power of the national government. . . .

Whoever considers, in a combined and comprehensive view, the general texture of the constitution, will be satisfied that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for such purposes, a national government complete in all its parts, with powers legislative, executive and judiciary; and in all those powers extending over the whole nation. Is it congruous that, with regard to such purposes, any man or body of men, any person, natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When so many trains of deduction, coming from different quarters, converge and unite at last in the same point, we may safely conclude, as the legitimate result of this constitution, that the State of Georgia is amenable to the jurisdiction of this court. . . .

Iredell, Justice [dissenting]:

Every state in the union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course the part not surrendered must remain as it did before. The powers of the general government, either of a legislative or executive nature, or which particularly concerns treaties with foreign powers, do for the most part (if not wholly) affect individuals, and not states. They require no aid from any state authority. This is the great leading distinction between the old articles of confederation, and the present constitution. The judicial power is of a peculiar kind. It is indeed commensurate with the ordinary legislative and executive powers of the general government, and the power which concerns treaties. But it also goes further. . . .

So far as states under the constitution can be made legally liable to [the federal courts] . . . , so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires. The authority extends only to the

decision of controversies in which a state is a party, and providing laws necessary for that purpose. That surely can refer only to such controversies in which a state can be a party; it can be determined, according to the principles [of law] I have supported, in no other manner than by a reference either to preexistent laws, or laws passed under the constitution and in conformity to it.

Whatever be the true construction of the constitution in this particular; whether it is to be construed as intending merely a transfer of jurisdiction from one tribunal to another, or as authorizing the legislature to provide laws for the decision of all possible controversies in which a state may be involved with an individual, without regard to any prior exception; yet it is certain that the legislature [in passing the Judiciary Act of 1789] has in fact proceeded upon the former supposition and not upon the latter. . . . [I]n instances like this before the court, this court hath a concurrent jurisdiction only; the present being one of those cases where by the judicial act this court hath original but not exclusive jurisdiction. This court, therefore, under that act, can exercise no authority in such instances but such authority as from the subject matter of it may be exercised in some other court.—There are no courts with which a concurrence can be suggested but the circuit courts, or courts of the different states. With the former it cannot be, for admitting that the Constitution is not to have a restrictive operation, so as to confine all cases in which a state is a party exclusively to the supreme court (an opinion to which I am strongly inclined), yet there are no words in the definition of the powers of the circuit court which give a color to an opinion, that where a suit is brought against a state by a citizen of another state, the circuit court could exercise any jurisdiction at all. If they could, however, such a jurisdiction, by the very terms of their authority, could only be concurrent with the courts of the several States. It follows, therefore, unquestionably, I think, that looking at the act of Congress, which I consider is on this occasion the limit of our authority . . . , we can exercise no authority in the present instance consistently with the clear intention of the act, but such a proper state court would have been at least competent to exercise at the same time the act was passed . . .

Case

UNITED STATES V. DARBY

312 U.S. 100; 61 S.Ct. 451; 85 L.Ed. 609 (1941)
Vote: 9–0

The Fair Labor Standards Act of 1938 established minimum wages and maximum working hours for employees of industries whose products were shipped in interstate commerce. Fred Darby, owner of the Darby Lumber Company in Statesboro, Georgia, was indicted for violating the statute. Darby demurred to the indictment on the ground that in passing the law Congress had exceeded its powers under the Commerce Clause and had infringed on the powers reserved to the states by the Tenth Amendment.

Mr. Justice Stone delivered the opinion of the Court.

The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. . . .

The Fair Labor Standards Act [FLSA] set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy . . . is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. . . .

. . . [T]he statute . . . prohibits certain specified acts and punishes willful violation of it by a fine of not more than $10,000 and punishes each conviction after the first by imprisonment of not more than six months or by the specified fine or both. . . . [The act makes it unlawful to ship in interstate commerce goods produced by employees working for less than a minimum wage of twenty-five cents per hour or for more than forty-four hours a week.]

The indictment charges that [Darby] is engaged, in the state of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that he does in fact so ship a large part of the lumber so produced. There are numerous counts charging [him] with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, [Darby] has employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. . . .

The case comes here on assignments by the Government that the district court erred in so far as it held that Congress was without constitutional power to penalize the acts set forth in the indictment, and [Darby] seeks to sustain the decision below on the grounds that the prohibition by Congress of those Acts is unauthorized by the commerce clause. . . .

The prohibition of shipment of the proscribed goods in interstate commerce. [The FLSA] prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. . . . [T]he only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." . . . It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. . . . It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, . . . and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. . . .

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the prescribed articles from interstate commerce in aid of state regulation, . . . but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." . . . That power can neither be enlarged nor diminished by the exercise or nonexercise of state power. . . . Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. . . .

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other constitutional provisions. It is no objection to the assertion of power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. . . .

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . . Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons v. Ogden,* these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart.* . . . In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes

setting forth the fundamental issues involved that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. Dagenhart has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . . The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. . . .

The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Validity of the wage and hour requirements. . . . [W]e must at the outset determine whether the particular acts charged in the courts, . . . as they were construed below, constitute "production for commerce" within the meaning of the statute. As the Government seeks to apply the statute in the indictment, and as the court below construed the phrase "produced for interstate commerce," it embraces at least the case where an employer engaged, as is [Darby], in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce. . . .

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. . . .

While this Court has many times found state regulations of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce.

. . . In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. . . . But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. . . .

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. . . . A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. . . .

. . . [T]he evils aimed at by the [FLSA] are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or

destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair," as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce. . . .

The means adopted . . . for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. . . . Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. . . . The legislation aimed at a whole embraces all its parts. . . .

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . . .

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. . . . Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act. . . .

The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required. . . .

Case

National League of Cities v. Usery

426 U.S. 833; 96 S.Ct. 2465; 49 L.Ed. 2d 245 (1976)
Vote: 5–4

Here the Court considers whether Congress may, consistent with the Tenth Amendment, extend the federal minimum wage to employees of state and local governments.

Mr. Justice Rehnquist delivered the opinion of the Court.

Nearly 40 years ago Congress enacted the Fair Labor Standards Act, and required employers covered by the Act to pay their employees a minimum hourly wage and to pay them at one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week.

. . . This Court unanimously upheld the Act as a valid exercise of congressional authority under the commerce power in *United States v. Darby*. . . .

The original Fair Labor Standards Act passed in 1938 specifically excluded the States and their political subdivisions from its coverage. In 1974, however, Congress enacted the most recent of a series of broadening amendments to the Act. By these amendments Congress has extended the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions. Appellants in these cases include individual cities and States, the National League of Cities, and the National Governors' Conference; they brought an action . . . which challenged the validity of the 1974 amendments. They asserted in effect when Congress sought to apply the Fair Labor Standards Act provisions virtually across the board to employees of state and municipal governments it "infringed a constitutional prohibition" running in favor of the States as States. The gist of their complaint was not that the conditions of employment of such public employees were beyond the scope of the commerce power had those employees been employed in the private sector, but that the established constitutional doctrine of intergovernmental immunity consistently recognized in a long series of our cases affirmatively prevented the exercise of this authority in the manner which Congress chose in the 1974 amendments. . . .

[The League] in no way challenge[s] . . . the breadth of authority granted Congress under the commerce power. Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution. Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because [they are] found to offend against the right to trial by jury contained in the Sixth Amendment . . . or the Due Process Clause of the Fifth Amendment. . . . [The League's] essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers.

This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. . . . [T]he Court [has] recognized that an express declaration of this limitation is found in the Tenth Amendment. . . .

. . . It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. . . .

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are "functions essential to separate and independent existence," . . . so that Congress may not abrogate the States' otherwise plenary authority to make them. . . .

Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. The Act, speaking directly to the States qua States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress. It may well be that as a matter of economic policy it would be desirable that States, just as private employers, comply with these minimum wage requirements. But it cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment. The State might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements, and pay them less than the federally prescribed minimum wage. It may wish to offer part-time or summer employment to teenagers at a figure less than the minimum wage, and if unable to do so may decline to offer such employment at all. But the Act would forbid such choices by the States. The only "discretion" left to them under the Act is either to attempt to increase their revenue to meet the additional financial burden imposed upon them by paying congressionally prescribed wages to their existing complement of employees, or to reduce that complement to a number which can be paid the federal minimum wage without increasing revenue.

This dilemma presented by the minimum wage restrictions may seem not immediately different from that faced by private employers, who have long been covered by the Act and who must find ways to increase their gross income if they are to pay higher wages while maintaining current earnings. The difference, however, is that a State is not merely a factor in the "shifting economic arrangements" of the private sector of the economy, . . . but is itself a coordinate element in the system established by the Framers for governing our Federal Union.

This congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs. Although at this point many of the actual effects under the proposed amendments remain a matter of some dispute among the parties, enough can be satisfactorily anticipated for an outline discussion of their general import. The requirement imposing premium rates upon any employment in excess of what Congress has decided is appropriate for a governmental employee's workweek, for example, appears likely to have the effect of coercing the States to structure work periods in some employment areas, such as police and fire protection, in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation. . . .

Our examination of the effect of the 1974 amendments, as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage

and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies. . . . If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence." . . . Thus, even if appellants may have overestimated the effect which the Act will have upon their current levels and patterns of governmental activity, the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system." . . . This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, Sec. 8, cl. 3. . . .

Mr. Justice Blackmun, concurring. . . .

Mr. Justice Brennan, with whom ***Mr. Justice White*** and ***Mr. Justice Marshall*** join, dissenting.

. . . My Brethren do not successfully obscure today's patent usurpation of the role reserved for the political process by their purported discovery in the Constitution of a restraint derived from sovereignty of the States on Congress's exercise of the commerce power. . . . [T]here is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on the commerce power. . . .

We are left with a catastrophic judicial body blow at Congress's power under the Commerce Clause. Even if Congress may nevertheless accomplish its objectives—for example, by conditioning grants of federal funds upon compliance with federal minimum wage and overtime standards . . . —there is an ominous portent of disruption of our constitutional structure implicit in today's mischievous decision. I dissent.

Mr. Justice Stevens, dissenting.

The Court holds that the Federal Government may not interfere with a sovereign State's inherent right to pay a substandard wage to the janitor at the state capitol. The principle on which the holding rests is difficult to perceive.

The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the governor's limousine over 55 miles an hour. Even though these and many other activities of the capitol janitor are activities of the State qua State, I have no doubt that they are subject to federal regulation. . . .

My disagreement with the wisdom of this legislation may not, of course, affect my judgment with respect to its validity. On this issue there is no dissent from the proposition that the Federal Government's power over the labor market is adequate to embrace these employees. Since I am unable to identify a limitation on that federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid. Accordingly, with respect and a great deal of sympathy for the views expressed by the Court, I dissent from its constitutional holding.

Case

GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY

469 U.S. 528; 105 S.Ct. 1005; 83 L.Ed. 2d 1016 (1985)
Vote: 5–4

In National League of Cities v. Usery the Court held that Congress may not enforce the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the states "in areas of traditional governmental functions." Here the Court reconsiders this decision.

Justice Blackmun delivered the opinion of the Court.

. . . Although *National League of Cities* supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled

with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

In the present cases, a Federal District Court concluded that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities,* is exempt from the obligations imposed by the FLSA. Faced with the identical question, three Federal Courts of Appeals and one state appellate court have reached the opposite conclusion.

Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.

The history of public transportation in San Antonio, Texas, is characteristic of the history of local mass transit in the United States generally. Passenger transportation for hire within San Antonio originally was provided on a private basis by a local transportation company. In 1913, the Texas Legislature authorized the State's municipalities to regulate vehicles providing carriage for hire. . . . Two years later, San Antonio enacted an ordinance setting forth franchising, insurance, and safety requirements for passenger vehicles operated for hire. The city continued to rely on such publicly regulated private mass transit until 1959, when it purchased the privately owned San Antonio Transit Company and replaced it with a public authority known as the San Antonio Transit System (SATS). SATS operated until 1978, when the city transferred its facilities and equipment to appellee San Antonio Metropolitan Transit Authority (SAMTA), a public mass-transit authority organized on a countywide basis. . . . SAMTA currently is the major provider of transportation in the San Antonio metropolitan area; between 1978 and 1980 alone, its vehicles traveled over 26 million route miles and carried over 63 million passengers.

As did other localities, San Antonio reached the point where it came to look to the Federal Government for financial assistance in maintaining its public mass transit. SATS managed to meet its operating expenses and bond obligations for the first decade of its existence without federal or local financial aid. By 1970, however, its financial position had deteriorated to the point where federal subsidies were vital for its continued operation. SATS's general manager that year testified before Congress that "if we do not receive substantial help from the Federal Government, San Antonio may . . . join the growing ranks of cities that have inferior [public] transportation or may end up with no [public] transportation at all." . . .

The principal federal program to which SATS and other mass-transit systems looked for relief was the Urban Mass Transportation Act of 1964 (UMTA), . . . which provides substantial federal assistance to urban mass-transit programs. . . . UMTA now authorizes the Department of Transportation to fund 75 percent of the capital outlays and up to 50 percent of the operating expenses of qualifying mass-transit programs. . . . SATS received its first UMTA subsidy, a $4.1 million capital grant, in December 1970. From then until February 1980, SATS and SAMTA received over $51 million in UMTA grants—more than $31 million in capital grants, over $20 million in operating assistance, and a minor amount in technical assistance. During SAMTA's first two fiscal years, it received $12.5 million in UMTA operating grants, $26.8 million from sales taxes, and only $10.1 million from fares. Federal subsidies and local sales taxes currently account for about 75 percent of SAMTA's operating expenses.

The present controversy concerns the extent to which SAMTA may be subjected to the minimum-wage and overtime requirements of the FLSA. When the FLSA was enacted in 1938, its wage and overtime provisions did not apply to local mass-transit employees or, indeed, to employees of state and local governments. . . . In 1961, Congress extended minimum-wage coverage to employees of any private mass-transit carrier whose annual gross revenue was not less than $1 million. . . . Five years later, Congress extended FLSA coverage to state and local-government employees for the first time by withdrawing the minimum-wage and overtime exemptions from public hospitals, schools, and mass transit carriers whose rates and services were subject to state regulation. . . . At the same time, Congress eliminated the overtime exemption for all mass-transit employees other than drivers, operators, and conductors. . . . The application of the FLSA to public schools and hospitals was ruled to be within Congress's power under the Commerce Clause. . . .

The FLSA obligations of public mass-transit systems like SATS were expanded in 1974 when Congress provided for the progressive repeal of the surviving overtime exemption for mass-transit employees. . . . Congress simultaneously brought the States and their subdivisions further within the ambit of the FLSA by extending FLSA coverage to virtually all state and local-government employees. . . .

Appellees have not argued that SAMTA is immune from regulation under the FLSA on the ground that it is a local transit system engaged in intrastate commercial activity. In a practical sense, SAMTA's operations might well be characterized as "local." Nonetheless, it long has been

settled that Congress's authority under the Commerce Clause extends to intrastate economic activities that affect interstate commerce. . . . Were SAMTA a privately owned and operated enterprise, it could not credibly argue that Congress exceeded the bounds of its Commerce Clause powers in prescribing minimum wages and overtime rates for SAMTA's employees. Any constitutional exemption from the requirements of the FLSA therefore must rest on SAMTA's status as a governmental entity rather than on the "local" nature of its operations.

The prerequisites for governmental immunity under *National League of Cities* were summarized by this Court in *Hodel* [*v. Virginia Surface Mining and Reclamation Association* (1981)]. . . . Under that summary, four conditions must be satisfied before a state activity may be deemed immune from a particular federal regulation under the Commerce Clause. First, it is said that the federal statute at issue must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission." . . .

The controversy in the present cases has focused on the third *Hodel* requirement—that the challenged federal statute trenches on "traditional governmental functions." The District Court voiced a common concern: "Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult." . . . Just how troublesome the task has been is revealed by the results reached in other federal cases. . . .

Thus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*. In that case the Court set forth examples of protected and unprotected functions, . . . but provided no explanation of how those examples were identified. . . .

The central theme of *National League of Cities* was that the States occupy a special position in our constitutional system and that the scope of Congress's authority under the Commerce Clause must reflect that position. Of course, the Commerce Clause by its specific language does not provide any special limitation on Congress's actions with respect to the States. . . . It is equally true, however, that the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for "[b]ehind the words of the constitutional provisions are postulates which limit and control." . . . *National League of Cities* reflected the general conviction that the Constitution precludes "the National Government [from] devour[ing] the essentials of state sovereignty." . . . In order to be faithful to the underlying federal premises of the Constitution, courts must look for the "postulates which limit and control." . . .

What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations. One approach to defining the limits on Congress's authority to regulate the States under the Commerce Clause is to identify certain underlying elements of political sovereignty that are deemed essential to the States' "separate and independent existence." . . . This approach obviously underlay, the Court's use of the "traditional governmental function" concept in *National League of Cities*. It also has led to the separate requirement that the challenged federal statute "address matters that are indisputably 'attribute[s] of state sovereignty.'" . . . In *National League of Cities* itself, for example, the Court concluded that decisions by a State concerning the wages and hours of its employees are an "undoubted attribute of state sovereignty." . . . The opinion did not explain what aspects of such decisions made them such an "undoubted attribute," and the Court since then has remarked on the uncertain scope of the concept. . . . The point of the inquiry, however, has remained to single out particular features of a State's internal governance that are deemed to be intrinsic parts of state sovereignty.

We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress's Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for "fundamental" elements of state sovereignty, a problem we have witnessed in the search for "traditional governmental functions." There is, however, a more fundamental reason: the sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, Sec. 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation. . . . By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law. . . . Finally, the developed application, through the Fourteenth Amendment, of the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess to legislate with respect to their citizens and to conduct their own affairs.

The States unquestionably do "retai[n] a significant measure of sovereign authority." . . . They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. . . .

. . . [T]o say that the Constitution assumes the continued role of the States is to say little about the nature of that role. Only recently, this Court recognized that the purpose of the constitutional immunity recognized in *National League of Cities* is not to preserve "a sacred province of state autonomy." . . . With rare exceptions, like the guarantee, in Article IV, 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace.

. . . The power of the Federal Government is a "power to be respected" as well, and the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies. In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.

When we look for the States' "residuary and inviolable sovereignty" . . . in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges. Apart from the limitation on federal authority inherent in the delegated nature of Congress's Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in presidential elections. . . . They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. . . . The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. . . .

The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evident in the views of the Framers. James Madison explained that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments. . . . " . . . In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power. . . .

This analysis makes clear that Congress's action in affording SAMTA employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress's power under the Commerce Clause. The judgment of the District Court therefore must be reversed.

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress's authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. . . .

Though the separate concurrence providing the fifth vote in *National League of Cities* was "not untroubled by certain possible implications" of the decision, . . . the Court in that case attempted to articulate affirmative limits on the Commerce Clause power in terms of core governmental functions and fundamental attributes of state sovereignty. But the model of democratic decision making the Court there identified underestimated, in our view, the solicitude of the national political process for the continued vitality of the States. Attempts by other courts since then to draw guidance from this model have proved it both impracticable and doctrinally barren. In sum, in *National League of Cities* the Court tried to repair what did not need repair.

We do not lightly overrule recent precedent. We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. . . . Due respect for the reach of congressional power within the federal system mandates that we do so now.

National League of Cities v. Usery . . . is overruled. The judgment of the District Court is reversed, and these cases are remanded to that court for further proceedings consistent with this opinion.

Justice Powell, with whom the ***Chief Justice, Justice Rehnquist,*** and ***Justice O'Connor*** join, dissenting. . . .

Justice Rehnquist, dissenting. . . .

Justice O'Connor, with whom ***Justice Powell*** and ***Justice Rehnquist*** join, dissenting.

. . . The last two decades have seen an unprecedented growth of federal regulatory activity, as the majority itself acknowledges. . . . In 1954, one could speak of a "burden of persuasion on those favoring national intervention" in asserting that "National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." . . . Today, as federal legislation and coercive grant programs have expanded to embrace innumerable activities that were once viewed as local, the burden of persuasion has surely shifted, and the extraordinary has become ordinary. . . . For example, recently the Federal Government has, with this Court's blessing, undertaken to tell the States the age at which they can retire their law enforcement officers, and the regulatory standards, procedures, and even the agenda which their utilities commissions must consider and follow. . . . The political process has not protected against these encroachments on state activities, even though they directly impinge on a State's ability to make and enforce its laws. With the abandonment of *National League of Cities,* all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.

The problems of federalism in an integrated national economy are capable of more responsible resolution than holding that the States as States retain no status apart from that which Congress chooses to let them retain. The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States. It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. That reasoning, embodied in the majority opinion, is inconsistent with the spirit of our Constitution. It remains relevant that a State is being regulated, as *National League of Cities* and every recent case have recognized. . . . As far as the Constitution is concerned, a State should not be equated with any private litigant. . . . Instead, the autonomy of a State is an essential component of federalism. If state autonomy is ignored in assessing the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power "may well be negligible." . . .

It has been difficult for this Court to craft bright lines defining the scope of the state autonomy protected by *National League of Cities*. Such difficulty is to be expected whenever constitutional concerns as important as federalism and the effectiveness of the commerce power come into conflict. Regardless of the difficulty, it is and will remain the duty of this Court to reconcile these concerns in the final instance. That the Court shuns the task today by appealing to the "essence of federalism" can provide scant comfort to those who believe our federal system requires something more than a unitary, centralized government. I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility. . . .

Case

PRINTZ V. UNITED STATES

521 U.S. 898; 117 S.Ct. 2365; 138 L.Ed. 2d 914 (1997)
Vote: 5–4

Here the Court considers the validity of provisions of the Brady Handgun Violence Prevention Act requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers.

Justice Scalia delivered the opinion of the Court.

. . . In 1993, Congress amended the [Gun Control Act of 1968] by enacting the Brady Act. The Act requires the Attorney General to establish a national instant background check system by November 30, 1998 . . . and immediately puts in place certain interim provisions until that system becomes operative. Under the interim provisions, a firearms dealer who proposes to transfer a handgun must first: (1) receive from the transferee a statement (the Brady Form), . . . containing the name, address and date of birth of the proposed transferee along with a sworn statement that the transferee is not among any of the classes of prohibited purchasers, . . . (2) verify the identity of the transferee by examining an identification document, . . . and (3) provide the "chief law enforcement officer" (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form. . . . With some exceptions, the dealer must then wait five business days before consummating the sale,

unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal. . . .

The Brady Act creates two significant alternatives to the foregoing scheme. A dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check, . . . or if state law provides for an instant background check. . . . In States that have not rendered one of these alternatives applicable to all gun purchasers, CLEOs are required to perform certain duties. When a CLEO receives the required notice of a proposed transfer from the firearms dealer, the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." . . . The Act does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but is not required to do so. If, however, the CLEO notifies a gun dealer that a prospective purchaser is ineligible to receive a handgun, he must, upon request, provide the would be purchaser with a written statement of the reasons for that determination. . . . Moreover, if the CLEO does not discover any basis for objecting to the sale, he must destroy any records in his possession relating to the transfer, including his copy of the Brady Form. . . . Under a separate provision of the GCA, any person who "knowingly violates [the section of the GCA amended by the Brady Act] shall be fined under this title, imprisoned for no more than 1 year, or both." . . .

Petitioners Jay Printz and Richard Mack, the CLEOs for Ravalli County, Montana, and Graham County, Arizona, respectively, filed separate actions challenging the constitutionality of the Brady Act's interim provisions. In each case, the District Court held that the provision requiring CLEOs to perform background checks was unconstitutional, but concluded that that provision was severable from the remainder of the Act, effectively leaving a voluntary background check system in place. . . . A divided panel of the Court of Appeals for the Ninth Circuit reversed, finding none of the Brady Act's interim provisions to be unconstitutional. . . . We granted certiorari. . . .

From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make "reasonable efforts" within five days to determine whether the sales reflected in the forms are lawful. While the CLEOs are subjected to no federal requirement that they prevent the sales determined to be unlawful (it is perhaps assumed that their state law duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of the federally prescribed 5 day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would be illegal.

The petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court. We treat those three sources, in that order, in this and the next two sections of this opinion.

Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented.

The Government contends, to the contrary, that the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws. . . .

The Government observes that statutes enacted by the first Congresses required state courts to record applications for citizenship, . . . to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, . . . and to register aliens seeking naturalization and issue certificates of registry. . . . It may well be, however, that these requirements applied only in States that authorized their courts to conduct naturalization proceedings. . . .

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. . . . And the Supremacy Clause, Art. VI, cl. 2, announced that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns

all the time. The principle underlying so called "transitory" causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum state would enforce. . . . The Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States. . . .

For these reasons, we do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power. The only early federal law the Government has brought to our attention that imposed duties on state executive officers is the Extradition Act of 1793, which required the "executive authority" of a State to cause the arrest and delivery of a fugitive from justice upon the request of the executive authority of the State from which the fugitive had fled. . . . That was in direct implementation, however, of the Extradition Clause of the Constitution itself. . . .

Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption. On September 23, 1789—the day before its proposal of the Bill of Rights, . . . the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures. Congress "recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their goals, to receive and safe keep therein all prisoners committed under the authority of the United States," and offered to pay 50 cents per month for each prisoner. . . . Moreover, when Georgia refused to comply with the request, . . . Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made. . . .

In addition to early legislation, the Government also appeals to other sources we have usually regarded as indicative of the original understanding of the Constitution. It points to portions of *The Federalist* which reply to criticisms that Congress's power to tax will produce two sets of revenue officers—for example, "Brutus's" assertion in his letter to the *New York Journal* of December 13, 1787, that the Constitution "opens a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community, eat up their substance, and riot on the spoils of the country." . . . "Publius" responded that Congress will probably "make use of the State officers and State regulations, for collecting" federal taxes. . . . The Government also invokes the *Federalist*'s more general observations that the Constitution would "enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws," . . . and that it was "extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed in the correspondent authority of the Union," . . . But none of these statements necessarily implies—what is the critical point here—that Congress could impose these responsibilities without the consent of the States. They appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government, . . . an assumption proved correct by the extensive mutual assistance the States and Federal Government voluntarily provided one another in the early days of the Republic, . . . including voluntary federal implementation of state law. . . .

To complete the historical record, we must note that there is not only an absence of executive commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years. . . .

The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. Some of these are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States; others, which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case. For deciding the issue before us here, they are of little relevance. Even assuming they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice. . . .

The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulate[s]," . . . a principle that controls the present cases.

It is incontestable that the Constitution established a system of "dual sovereignty." . . . Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty." . . . This is reflected throughout the Constitution's text . . . including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights." . . . Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal state conflict. . . . "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." . . . The great innovation of this design was that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." . . . The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. . . .

This separation of the two spheres is one of the Constitution's structural protections of liberty. . . .

. . . The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States. . . .

Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court. Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970s, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. The Courts of Appeals for the Fourth and Ninth Circuits invalidated the regulations on statutory grounds in order to avoid what they perceived to be grave constitutional issues, . . . and the District of Columbia Circuit invalidated the regulations on both constitutional and statutory grounds. . . . After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained, leading us to vacate the opinions below and remand for consideration of mootness. . . .

. . . [L]ater opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs. . . .

When we were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program, our decision should have come as no surprise. At issue in *New York v. United States* . . . (1992), were the so called "take title" provisions of the Low Level Radioactive Waste Policy Amendments Act of 1985, which required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of the waste—effectively requiring the States either to legislate pursuant to Congress's directions, or to implement an administrative solution. . . . We concluded that Congress could constitutionally require the States to do neither. . . . "The Federal Government," we held, "may not compel the States to enact or administer a federal regulatory program." . . .

Even assuming, moreover, that the Brady Act leaves no "policymaking" discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than . . . by "reduc[ing] [them] to puppets of a ventriloquist Congress." . . . It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. . . . It is no more compatible with this independence and autonomy that their officers be "dragooned" . . . into administering federal law, than it would

be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

Finally, the Government puts forward a cluster of arguments that can be grouped under the heading: "The Brady Act serves very important purposes, is most efficiently administered by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers." There is considerable disagreement over the extent of the burden, but we need not pause over that detail. Assuming all the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments. . . . But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect. . . .

We . . . conclude categorically . . . [that] "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." . . . The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule.

What we have said makes it clear enough that the central obligation imposed upon CLEOs by the interim provisions of the Brady Act—the obligation to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General," . . . is unconstitutional. Extinguished with it, of course, is the duty implicit in the background check requirement that the CLEO accept notice of the contents of, and a copy of, the completed Brady Form, which the firearms dealer is required to provide to him. . . .

. . . Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

Justice O'Connor, concurring. . . .

Justice Thomas, concurring. . . .

The Court today properly holds that the Brady Act violates the Tenth Amendment in that it compels state law enforcement officers to "administer or enforce a federal regulatory program." . . . Although I join the Court's opinion in full, I write separately to emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. . . . Accordingly, the Federal Government may act only where the Constitution authorizes it to do so. . . .

Justice Stevens, with whom ***Justice Souter***, ***Justice Ginsburg***, and ***Justice Breyer*** join, dissenting.

When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens. This conclusion is firmly supported by the text of the Constitution, the early history of the Nation, decisions of this Court, and a correct understanding of the basic structure of the Federal Government.

These cases do not implicate the more difficult questions associated with congressional coercion of state legislatures. . . . Nor need we consider the wisdom of relying on local officials rather than federal agents to carry out aspects of a federal program, or even the question whether such officials may be required to perform a federal function on a permanent basis. The question is whether Congress, acting on behalf of the people of the entire Nation, may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program. It is remarkably similar to the question, heavily debated by the Framers of the Constitution, whether the Congress could require state agents to collect federal taxes. Or the question whether Congress could impress state judges into federal service to entertain and decide cases that they would prefer to ignore.

Indeed, since the ultimate issue is one of power, we must consider its implications in times of national emergency. Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to

respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment, "in historical understanding and practice, in the structure of the Constitution, [or] in the jurisprudence of this Court," . . . that forbids the enlistment of state officers to make that response effective? More narrowly, what basis is there in any of those sources for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces today?

Perhaps today's majority would suggest that no such emergency is presented by the facts of these cases. But such a suggestion is itself an expression of a policy judgment. And Congress's view of the matter is quite different from that implied by the Court today.

The Brady Act was passed in response to what Congress described as an "epidemic of gun violence." . . . The Act's legislative history notes that 15,377 Americans were murdered with firearms in 1992, and that 12,489 of these deaths were caused by handguns. . . . Congress expressed special concern that "[t]he level of firearm violence in this country is, by far, the highest among developed nations." . . . The partial solution contained in the Brady Act, a mandatory background check before a handgun may be purchased, has met with remarkable success. Between 1994 and 1996, approximately 6,600 firearm sales each month to potentially dangerous persons were prevented by Brady Act checks; over 70% of the rejected purchasers were convicted or indicted felons. . . . Whether or not the evaluation reflected in the enactment of the Brady Act is correct as to the extent of the danger and the efficacy of the legislation, the congressional decision surely warrants more respect than it is accorded in today's unprecedented decision.

The text of the Constitution provides a sufficient basis for a correct disposition of this case. Article I, § 8, grants the Congress the power to regulate commerce among the States. Putting to one side the revisionist views expressed by Justice Thomas in his concurring opinion in *United States v. Lopez* (1995), there can be no question that that provision adequately supports the regulation of commerce in handguns effected by the Brady Act. Moreover, the additional grant of authority in that section of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns. In short, the affirmative delegation of power in Article I provides ample authority for the congressional enactment.

Unlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers. . . .

The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress. . . . Thus, the Amendment provides no support for a rule that immunizes local officials from obligations that might be imposed on ordinary citizens. Indeed, it would be more reasonable to infer that federal law may impose greater duties on state officials than on private citizens because another provision of the Constitution requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." . . .

It is appropriate for state officials to make an oath or affirmation to support the Federal Constitution because, as explained in *The Federalist,* they "have an essential agency in giving effect to the federal Constitution." . . . There can be no conflict between their duties to the State and those owed to the Federal Government because Article VI unambiguously provides that federal law "shall be the supreme Law of the Land," binding in every State. . . . Thus, not only the Constitution, but every law enacted by Congress as well, establishes policy for the States just as firmly as do laws enacted by state legislatures.

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I. Indeed, the historical materials strongly suggest that the Founders intended to enhance the capacity of the federal government by empowering it—as a part of the new authority to make demands directly on individual citizens —to act through local officials. . . .

The provision of the Brady Act that crosses the Court's newly defined constitutional threshold is more comparable to a statute requiring local police officers to report the identity of missing children to the Crime Control Center of the Department of Justice than to an offensive federal command to a sovereign state. If Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power. . . .

Justice Souter, dissenting. . . .

Justice Breyer, with whom ***Justice Stevens*** joins, dissenting. . . .

Case

ALDEN V. MAINE

527 U.S. 706; 119 S.Ct. 2240; 144 L.Ed. 2d 636 (1999)
Vote: 5–4

In Seminole Tribe of Florida v. Florida (1996), the Supreme Court held that Congress does not have authority under Article I of the Constitution to abrogate states' sovereign immunity with respect to suits filed in federal courts. In this case the Supreme Court considers whether Congress has authority to abrogate states' sovereign immunity with respect to suits filed in state courts.

Justice Kennedy delivered the opinion of the Court.

In 1992, petitioners, a group of probation officers, filed suit against their employer, the State of Maine, in the United States District Court for the District of Maine. The officers alleged the State had violated the overtime provisions of the Fair Labor Standards Act of 1938 (FLSA) . . . and sought compensation and liquidated damages. While the suit was pending, this Court decided *Seminole Tribe of Florida v. Florida* (1996), which made it clear that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts. Upon consideration of *Seminole Tribe,* the District Court dismissed petitioners' action, and the Court of Appeals affirmed. . . . Petitioners then filed the same action in state court. The state trial court dismissed the suit on the basis of sovereign immunity, and the Maine Supreme Judicial Court affirmed. . . .

The Maine Supreme Judicial Court's decision conflicts with the decision of the Supreme Court of Arkansas . . . and calls into question the constitutionality of the provisions of the FLSA purporting to authorize private actions against States in their own courts without regard for consent. . . . In light of the importance of the question presented and the conflict between the courts, we granted certiorari. . . . The United States intervened as a petitioner to defend the statute.

We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts. We decide as well that the State of Maine has not consented to suits for overtime pay and liquidated damages under the FLSA. On these premises we affirm the judgment sustaining dismissal of the suit.

I

The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." . . . We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

A

Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." . . . Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. . . . The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design. . . . Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." . . .

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." . . .

Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept

of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" . . . In this the founders achieved a deliberate departure from the Articles of Confederation: Experience under the Articles had "exploded on all hands" the "practicality of making laws, with coercive sanctions, for the States as political bodies." . . .

The States thus retain "a residuary and inviolable sovereignty." . . . They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.

B

The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts. . . .

Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified. . . .

The ratification debates, furthermore, underscored the importance of the States' sovereign immunity to the American people. Grave concerns were raised by the provisions of Article III which extended the federal judicial power to controversies between States and citizens of other States or foreign nations. . . .

The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity. . . .

Although the state conventions which addressed the issue of sovereign immunity in their formal ratification documents sought to clarify the point by constitutional amendment, they made clear that they . . . understood the Constitution as drafted to preserve the States' immunity from private suits. . . .

Despite the persuasive assurances of the Constitution's leading advocates and the expressed understanding of the only state conventions to address the issue in explicit terms, this Court held [in *Chisholm v. Georgia*], just five years after the Constitution was adopted, that Article III authorized a private citizen of another State to sue the State of Georgia without its consent. . . .

The Court's decision "fell upon the country with a profound shock." . . .

The States, in particular, responded with outrage to the decision. . . .

An initial proposal to amend the Constitution was introduced in the House of Representatives the day after *Chisholm* was announced; the proposal adopted as the Eleventh Amendment was introduced in the Senate promptly following an intervening recess. . . . Congress turned to the latter proposal with great dispatch; little more than two months after its introduction it had been endorsed by both Houses and forwarded to the States. . . .

Each House spent but a single day discussing the Amendment, and the vote in each House was close to unanimous. . . . All attempts to weaken the Amendment were defeated. . . .

Not only do the ratification debates and the events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States' constitutional immunity from suit, they also underscore the importance of sovereign immunity to the founding generation. Simply put, "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." . . .

II

. . . Whether Congress has authority under Article I to abrogate a State's immunity from suit in its own courts is . . . a question of first impression. In determining whether there is "compelling evidence" that this derogation of the States' sovereignty is "inherent in the constitutional compact" . . . we continue our discussion of history, practice, precedent, and the structure of the Constitution. . . .

. . . [W]hile the Eleventh Amendment by its terms addresses only "the Judicial power of the United States," nothing in *Chisholm,* the catalyst for the Amendment, suggested the States were not immune from suits in their own courts. . . .

In light of the language of the Constitution and the historical context, it is quite apparent why neither the ratification debates nor the language of the Eleventh Amendment addressed the States' immunity from suit in their own courts. The concerns voiced at the ratifying conventions, the furor raised by *Chisholm,* and the speed and unanimity with which the Amendment was adopted, moreover, underscore the jealous care with which the founding generation sought to preserve the sovereign immunity of the States. To read this history as permitting the inference that the Constitution stripped the States of immunity in their own courts and allowed Congress to subject them to suit there would turn on its head the concern of the founding generation—that Article III might be used to circumvent state-court immunity. In light of the historical record it is difficult to conceive that the Constitution would have been adopted if it had been understood

to strip the States of immunity from suit in their own courts and cede to the Federal Government a power to subject nonconsenting States to private suits in these fora. . . .

As it is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court . . . our decisions suggesting that the States retain an analogous constitutional immunity from private suits in their own courts support the conclusion that Congress lacks the Article I power to subject the States to private suits in those fora. . . .

Our final consideration is whether a congressional power to subject nonconsenting States to private suits in their own courts is consistent with the structure of the Constitution. We look both to the essential principles of federalism and to the special role of the state courts in the constitutional design.

Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation. . . .

Petitioners contend that immunity from suit in federal court suffices to preserve the dignity of the States. Private suits against nonconsenting States, however, present "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties". . . regardless of the forum. Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.

In some ways, of course, a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum. Although the immunity of one sovereign in the courts of another has often depended in part on comity or agreement, the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself. . . . A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. . . . Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.

It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege.

Underlying constitutional form are considerations of great substance. Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States. It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages. Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources.

A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen. . . .

Congress cannot abrogate the States' sovereign immunity in federal court; were the rule to be different here, the National Government would wield greater power in the state courts than in its own judicial instrumentalities. . . .

In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation. . . .

III

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution

and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." . . .

Sovereign immunity, moreover, does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicit in the constitutional principle of state sovereign immunity.

The first of these limits is that sovereign immunity bars suits only in the absence of consent. Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits. The rigors of sovereign immunity are thus "mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign." . . . Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits. . . .

The States have consented, moreover, to some suits pursuant to the plan of the Convention or to subsequent constitutional amendments. In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government. . . . A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to "take Care that the Laws be faithfully executed," . . . differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity. Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.

We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power. . . . By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment "fundamentally altered the balance of state and federal power struck by the Constitution." . . . When Congress enacts appropriate legislation to enforce this Amendment, . . . federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution. . . .

The second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State. . . . Nor does sovereign immunity bar all suits against state officers. Some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State.

. . . The rule, however, does not bar certain actions against state officers for injunctive or declaratory relief. . . . Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally. . . .

IV

The sole remaining question is whether Maine has waived its immunity. . . . To the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit. The State, we conclude, has not consented to suit.

V

This case at one level concerns the formal structure of federalism, but in a Constitution as resilient as ours form mirrors substance. Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.

In apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law. We seek to discover, however, only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system. We appeal to no higher authority than the Charter which they wrote and adopted. Theirs was the unique insight that freedom is enhanced by the creation of two governments, not one. We need not attach a label to our dissenting colleagues' insistence that the constitutional structure adopted by the founders must yield to the politics of the

moment. Although the Constitution begins with the principle that sovereignty rests with the people, it does not follow that the National Government becomes the ultimate, preferred mechanism for expressing the people's will. The States exist as a refutation of that concept. In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control. The Framers of the Constitution did not share our dissenting colleagues' belief that the Congress may circumvent the federal design by regulating the States directly when it pleases to do so, including by a proxy in which individual citizens are authorized to levy upon the state treasuries absent the States' consent to jurisdiction.

The case before us depends upon these principles. The State of Maine has not questioned Congress's power to prescribe substantive rules of federal law to which it must comply. Despite an initial good-faith disagreement about the requirements of the FLSA, it is conceded by all that the State has altered its conduct so that its compliance with federal law cannot now be questioned. The Solicitor General of the United States has appeared before this Court, however, and asserted that the federal interest in compensating the States' employees for alleged past violations of federal law is so compelling that the sovereign State of Maine must be stripped of its immunity and subjected to suit in its own courts by its own employees. Yet, despite specific statutory authorization, . . . the United States apparently found the same interests insufficient to justify sending even a single attorney to Maine to prosecute this litigation. The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second. The judgment of the Supreme Judicial Court of Maine is Affirmed.

Justice Souter, with whom ***Justice Stevens, Justice Ginsburg,*** and ***Justice Breyer*** join, dissenting.

. . . Today's issue arises naturally in the aftermath of the decision in *Seminole Tribe*. The Court holds that the Constitution bars an individual suit against a State to enforce a federal statutory right under the Fair Labor Standards Act of 1938 (FLSA) . . . when brought in the State's courts over its objection. In thus complementing its earlier decision, the Court of course confronts the fact that the state forum renders the Eleventh Amendment beside the point, and it has responded by discerning a simpler and more straightforward theory of state sovereign immunity than it found in *Seminole Tribe:* a State's sovereign immunity from all individual suits is a "fundamental aspect" of state sovereignty "confirm[ed]" by the Tenth Amendment. . . . As a consequence, *Seminole Tribe*'s contorted reliance on the Eleventh Amendment and its background was presumably unnecessary; the Tenth would have done the work with an economy that the majority in *Seminole Tribe* would have welcomed. Indeed, if the Court's current reasoning is correct, the Eleventh Amendment itself was unnecessary.

Whatever Article III may originally have said about the federal judicial power, the embarrassment to the State of Georgia occasioned by attempts in federal court to enforce the State's war debt could easily have been avoided if only the Court that decided *Chisholm v. Georgia* (1793), had understood a State's inherent, Tenth Amendment right to be free of any judicial power, whether the court be state or federal, and whether the cause of action arise under state or federal law.

The sequence of the Court's positions prompts a suspicion of error, and skepticism is confirmed by scrutiny of the Court's efforts to justify its holding. There is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood, and no evidence that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law.

Nor does the Court fare any better with its subsidiary lines of reasoning, that the state-court action is barred by the scheme of American federalism, a result supposedly confirmed by a history largely devoid of precursors to the action considered here. The Court's federalism ignores the accepted authority of Congress to bind States under the FLSA and to provide for enforcement of federal rights in state court. The Court's history simply disparages the capacity of the Constitution to order relationships in a Republic that has changed since the founding.

On each point the Court has raised it is mistaken, and I respectfully dissent from its judgment.

I

The Court rests its decision principally on the claim that immunity from suit was "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution," . . . an aspect which the Court understands to have survived the ratification of the Constitution in 1788 and to have been "confirm[ed]" and given constitutional status, . . . by the adoption of the Tenth Amendment in 1791. If the Court truly means by "sovereign immunity" what that term meant at common

law, . . . its argument would be insupportable. While sovereign immunity entered many new state legal systems as a part of the common law selectively received from England, it was not understood to be indefeasible or to have been given any such status by the new National Constitution, which did not mention it. . . . Had the question been posed, state sovereign immunity could not have been thought to shield a State from suit under federal law on a subject committed to national jurisdiction by Article I of the Constitution. Congress exercising its conceded Article I power may unquestionably abrogate such immunity. I set out this position at length in my dissent in *Seminole Tribe* and will not repeat it here.

The Court does not, however, offer today's holding as a mere corollary to its reasoning in *Seminole Tribe,* substituting the Tenth Amendment for the Eleventh as the occasion demands, and it is fair to read its references to a "fundamental aspect" of state sovereignty as referring not to a prerogative inherited from the Crown, but to a conception necessarily implied by statehood itself. The conception is thus not one of common law so much as of natural law, a universally applicable proposition discoverable by reason. . . .

. . . There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable. Whether one looks at the period before the framing, to the ratification controversies, or to the early republican era, the evidence is the same. Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common-law power defeasible, like other common-law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common-law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it. Natural law thinking on the part of a doubtful few will not, however, support the Court's position. . . .

If the natural law conception of sovereign immunity as an inherent characteristic of sovereignty enjoyed by the States had been broadly accepted at the time of the founding, one would expect to find it reflected somewhere in the five opinions delivered by the Court in *Chisholm v. Georgia* (1793). Yet that view did not appear in any of them. And since a bare two years before *Chisholm,* the Bill of Rights had been added to the original Constitution, if the Tenth Amendment had been understood to give federal constitutional status to state sovereign immunity so as to endue it with the equivalent of the natural law conception, one would be certain to find such a development mentioned somewhere in the *Chisholm* writings. In fact, however, not one of the opinions espoused the natural law view, and not one of them so much as mentioned the Tenth Amendment. . . .

It is clear enough that the Court has no historical predicate to argue for a fundamental or inherent theory of sovereign immunity as limiting authority elsewhere conferred by the Constitution or as imported into the Constitution by the Tenth Amendment. But what if the facts were otherwise and a natural law conception of state sovereign immunity in a State's own courts were implicit in the Constitution? On good authority, it would avail the State nothing, and the Court would be no less mistaken than it is already in sustaining the State's claim today. . . .

II

The Court's rationale for today's holding based on a conception of sovereign immunity as somehow fundamental to sovereignty or inherent in statehood fails for the lack of any substantial support for such a conception in the thinking of the founding era. The Court cannot be counted out yet, however, for it has a second line of argument looking not to a clause-based reception of the natural law conception or even to its recognition as a "background principle,". . . but to a structural basis in the Constitution's creation of a federal system. Immunity, the Court says, "inheres in the system of federalism established by the Constitution," . . . its "contours [being] determined by the founders' understanding, not by the principles or limitations derived from natural law." . . . Again, "[w]e look both to the essential principles of federalism and to the special role of the state courts in the constitutional design." . . . That is, the Court believes that the federal constitutional structure itself necessitates recognition of some degree of state autonomy broad enough to include sovereign immunity from suit in a State's own courts, regardless of the federal source of the claim asserted against the State. If one were to read the Court's federal structure rationale in isolation from the preceding portions of the opinion, it would appear that the Court's position on state sovereign immunity might have been rested entirely on federalism alone. If it had been, however, I would still be in dissent, for the Court's argument that state court sovereign immunity on federal questions is inherent in the very concept of federal structure is demonstrably mistaken. . . .

. . . Once "the atom of sovereignty" had been split, . . . the general scheme of delegated sovereignty as between the two component governments of the federal system was clear, and was succinctly stated by Chief Justice Marshall: "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." . . .

Hence the flaw in the Court's appeal to federalism. The State of Maine is not sovereign with respect to the national objective of the FLSA. It is not the authority that promulgated the FLSA, on which the right of action in this case depends. That authority is the United States acting through the Congress, whose legislative power under Article I of the Constitution to extend FLSA coverage to state employees has already been decided, . . . and is not contested here.

Nor can it be argued that because the State of Maine creates its own court system, it has authority to decide what sorts of claims may be entertained there, and thus in effect to control the right of action in this case. Maine has created state courts of general jurisdiction; once it has done so, the Supremacy Clause of the Constitution, . . . which requires state courts to enforce federal law and state-court judges to be bound by it, requires the Maine courts to entertain this federal cause of action. Maine has advanced no "valid excuse" . . . for its courts' refusal to hear federal-law claims in which Maine is a defendant, and sovereign immunity cannot be that excuse, simply because the State is not sovereign with respect to the subject of the claim against it. . . .

It is equally puzzling to hear the Court say that "federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." . . . So long as the citizens' will, expressed through state legislation, does not violate valid federal law, the strain will not be felt; and to the extent that state action does violate federal law, the will of the citizens of the United States already trumps that of the citizens of the State: the strain then is not only expected, but necessarily intended.

Least of all does the Court persuade by observing that "other important needs" than that of the "judgment creditor" compete for public money. . . . The "judgment creditor" in question is not a dunning bill-collector, but a citizen whose federal rights have been violated, and a constitutional structure that stints on enforcing federal rights out of an abundance of delicacy toward the States has substituted politesse in place of respect for the rule of law.

III

If neither theory nor structure can supply the basis for the Court's conceptions of sovereign immunity and federalism, then perhaps history might. The Court apparently believes that because state courts have not historically entertained Commerce Clause–based federal-law claims against the States, such an innovation carries a presumption of unconstitutionality. . . .

Today, however, in light of [*San Antonio Metro Transit Authority v.*] *Garcia* (overruling *National League of Cities v. Usery* [1976]), the law is settled that federal legislation enacted under the Commerce Clause may bind the States without having to satisfy a test of undue incursion into state sovereignty. . . . Because the commerce power is no longer thought to be circumscribed, the dearth of prior private federal claims entertained against the States in state courts does not tell us anything, and reflects nothing but an earlier and less expansive application of the commerce power.

Least of all is it to the point for the Court to suggest that because the Framers would be surprised to find States subjected to a federal-law suit in their own courts under the commerce power, the suit must be prohibited by the Constitution.

. . . The Framers' intentions and expectations count so far as they point to the meaning of the Constitution's text or the fair implications of its structure, but they do not hover over the instrument to veto any application of its principles to a world that the Framers could not have anticipated.

If the Framers would be surprised to see States subjected to suit in their own courts under the commerce power, they would be astonished by the reach of Congress under the Commerce Clause generally. The proliferation of Government, State and Federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes. But the Framers' surprise at, say, the FLSA, or the Federal Communications Commission, or the Federal Reserve Board is no threat to the constitutionality of any one of them. . . .

IV [omitted]

V

The Court has swung back and forth with regrettable disruption on the enforceability of the FLSA against the States, but if the present majority had a defensible position one could at least accept its decision with an expectation of stability ahead. As it is, any such expectation would be naive. The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in *laissez-faire,* the one being as unrealistic as the other, as indefensible, and probably as fleeting.

Case

TENNESSEE V. LANE

541 U.S. 509; 124 S.Ct. 1978; 158 L.Ed.2d 820 (2004)
Vote: 6–3

George Lane, a disabled man confined to a wheelchair, had to crawl up a flight of stairs in order to appear in a courtroom located on the second floor of an old Tennessee courthouse that was not equipped with an elevator. Lane subsequently sued the state of Tennessee under Title II of the Americans with Disabilities Act of 1990, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Tennessee moved for a dismissal on the ground that the Eleventh Amendment barred the lawsuit. The federal district court denied the motion and the State appealed. The question before the Supreme Court is whether Section 5 of the Fourteenth Amendment authorizes Congress to abrogate state sovereign immunity with respect to lawsuits under Title II of the ADA. The case thus involves not only questions of federalism but of the rights of persons with disabilities.

Justice Stevens delivered the opinion of the Court.

. . . In *Board of Trustees of University of Alaska v. Garrett* . . . (2001), we concluded that the Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the ADA. We left open, however, the question whether the Eleventh Amendment permits suits for money damages under Title II. . . .

Invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," the ADA is designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.

Title II . . . prohibits any public entity from discriminating against "qualified" persons with disabilities in the provision or operation of public services, programs, or activities. The Act defines the term "public entity" to include state and local governments, as well as their agencies and instrumentalities. Persons with disabilities are "qualified" if they, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, which authorizes private citizens to bring suits for money damages. . . .

The Eleventh Amendment renders the States immune from "any suit in law or equity, commenced or prosecuted . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State." Even though the Amendment "by its terms . . . applies only to suits against a State by citizens of another State," our cases have repeatedly held that this immunity also applies to unconsented suits brought by a State's own citizens. Our cases have also held that Congress may abrogate the State's Eleventh Amendment immunity. To determine whether it has done so in any given case, we "must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority."

The first question is easily answered in this case. The Act specifically provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." As in *Garrett,* no party disputes the adequacy of that expression of Congress's intent to abrogate the States' Eleventh Amendment immunity. The question, then, is whether Congress had the power to give effect to its intent.

In *Fitzpatrick v. Bitzer* . . . (1976), we held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. This enforcement power, as we have often acknowledged, is a "broad power indeed." It includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." We have thus repeatedly affirmed that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." . . .

Congress's § 5 power is not, however, unlimited. While Congress must have a wide berth in devising appropriate

remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." In *Boerne* [*v. Flores* (1997)], we recognized that the line between remedial legislation and substantive redefinition is "not easy to discern," and that "Congress must have wide latitude in determining where it lies." But we also confirmed that "the distinction exists and must be observed," and set forth a test for so observing it: Section 5 legislation is valid if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." . . .

Applying the *Boerne* test in *Garrett,* we concluded that Title I of the ADA was not a valid exercise of Congress's § 5 power to enforce the Fourteenth Amendment's prohibition on unconstitutional disability discrimination in public employment. . . . [W]e concluded Congress's exercise of its prophylactic § 5 power was unsupported by a relevant history and pattern of constitutional violations. Although the dissent pointed out that Congress had before it a great deal of evidence of discrimination by the States against persons with disabilities, the Court's opinion noted that the "overwhelming majority" of that evidence related to "the provision of public services and public accommodations, which areas are addressed in Titles II and III," rather than Title I. We also noted that neither the ADA's legislative findings nor its legislative history reflected a concern that the States had been engaging in a pattern of unconstitutional employment discrimination. We emphasized that the House and Senate Committee Reports on the ADA focused on "'discrimination [in] . . . *employment in the private sector,*'" and made no mention of discrimination in public employment. Finally, we concluded that Title I's broad remedial scheme was insufficiently targeted to remedy or prevent unconstitutional discrimination in public employment. Taken together, the historical record and the broad sweep of the statute suggested that Title I's true aim was not so much to enforce the Fourteenth Amendment's prohibitions against disability discrimination in public employment as it was to "rewrite" this Court's Fourteenth Amendment jurisprudence.

In view of the significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress's § 5 enforcement power. It is to that question that we now turn. . . .

The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II. In *Garrett* we identified Title I's purpose as enforcement of the Fourteenth Amendment's command that "all persons similarly situated should be treated alike." As we observed, classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose.

Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review. These rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment.

Whether Title II validly enforces these constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." *South Carolina v. Katzenbach* . . . (1966). While § 5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent. "Difficult and intractable problems often require powerful remedies," but it is also true that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one."

It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, "[a]s of 1979, most States . . . categorically disqualified 'idiots' from voting, without regard to individual capacity." The majority of these laws remain on the books and have been the subject of legal challenge as recently as 2001. Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors. The historical experience that Title II reflects is also documented in this Court's cases, which have identified

unconstitutional treatment of disabled persons by state agencies in a variety of settings . . .

This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it. In the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." It also uncovered further evidence of those shortcomings, in the form of hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions. As the Court's opinion in *Garrett* observed, the "overwhelming majority" of these examples concerned discrimination in the administration of public programs and services.

With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings. Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities. . . .

The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: "[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and *access to public services*." This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation. . . .

The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment. At the outset, we must determine the scope of that inquiry. Title II . . . reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees. Petitioner urges us both to examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity. According to petitioner, the fact that Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives. But nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole. Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.

Congress's chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable proble[m]" warranted "added prophylactic measures in response."

The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. But Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning

aides to assist persons with disabilities in accessing services. Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service.

This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts. Our cases have recognized a number of affirmative obligations that flow from this principle: the duty to waive filing fees in certain family-law and criminal cases, the duty to provide transcripts to criminal defendants seeking review of their convictions, and the duty to provide counsel to certain criminal defendants. Each of these cases makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.

For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress's § 5 authority to enforce the guarantees of the Fourteenth Amendment. The judgment of the Court of Appeals is therefore affirmed.

Justice Souter, with whom ***Justice Ginsburg*** joins, concurring.

. . . Although I concur in the Court's approach applying the congruence-and-proportionality criteria to Title II of the Americans with Disabilities Act of 1990 as a guarantee of access to courts and related rights, I note that if the Court engaged in a more expansive enquiry as the Chief Justice suggests, the evidence to be considered would underscore the appropriateness of action under § 5 to address the situation of disabled individuals before the courts, for that evidence would show that the judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under § 5. *Buck v. Bell* . . . (1927) was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities. Laws compelling sterilization were often accompanied by others indiscriminately requiring institutionalization, and prohibiting certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public. One administrative action along these lines was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he "produc[e] a depressing and nauseating effect" upon others. . . .

In sustaining the application of Title II today, the Court takes a welcome step away from the judiciary's prior endorsement of blunt instruments imposing legal handicaps.

Justice Ginsburg, concurring. . . .

Chief Justice Rehnquist, with whom ***Justice Kennedy*** and ***Justice Thomas*** join, dissenting.

. . . While the Court today pays lip service to the "congruence and proportionality" test, it applies it in a manner inconsistent with our recent precedents.

In *Garrett,* we conducted the three-step inquiry first enunciated in *City of Boerne* to determine whether Title I of the ADA satisfied the congruence-and-proportionality test. A faithful application of that test to Title II reveals that it too "'substantively redefine[s],'" rather than permissibly enforces, the rights protected by the Fourteenth Amendment.

The first step is to "identify with some precision the scope of the constitutional right at issue." This task was easy in *Garrett, Hibbs, Kimel,* and *City of Boerne* because the statutes in those cases sought to enforce only one constitutional right. . . .

In this case, the task of identifying the scope of the relevant constitutional protection is more difficult because Title II purports to enforce a panoply of constitutional rights of disabled persons: not only the equal protection right against irrational discrimination, but also certain rights protected by the Due Process Clause. However, because the Court ultimately upholds Title II "as it applies to the class of cases implicating the fundamental right of access to the courts," the proper inquiry focuses on the scope of those due process rights. The Court cites four access-to-the-courts rights that Title II purportedly enforces: (1) the right of the criminal defendant to be present at all critical stages of the trial; (2) the right of litigants to have a "meaningful opportunity to be heard" in judicial proceedings; (3) the right of the criminal defendant to trial by a jury composed of a fair cross section of the community; and (4) the public right of access to criminal proceedings.

Having traced the "metes and bounds" of the constitutional rights at issue, the next step in the congruence-and-proportionality inquiry requires us to examine whether

Congress "identified a history and pattern" of violations of these constitutional rights by the States with respect to the disabled. This step is crucial to determining whether Title II is a legitimate attempt to remedy or prevent actual constitutional violations by the States or an illegitimate attempt to rewrite the constitutional provisions it purports to enforce. Indeed, "Congress' § 5 power is appropriately exercised *only* in response to state transgressions." But the majority identifies nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons.

Rather than limiting its discussion of constitutional violations to the due process rights on which it ultimately relies, the majority sets out on a wide-ranging account of societal discrimination against the disabled. This digression recounts historical discrimination against the disabled through institutionalization laws, restrictions on marriage, voting, and public education, conditions in mental hospitals, and various other forms of unequal treatment in the administration of public programs and services. Some of this evidence would be relevant if the Court were considering the constitutionality of the statute as a whole; but the Court rejects that approach in favor of a narrower "as-applied" inquiry. We discounted much the same type of outdated, generalized evidence in *Garrett* as unsupportive of Title I's ban on employment discrimination. The evidence here is likewise irrelevant to Title II's purported enforcement of Due Process access-to-the-courts rights.

Even if it were proper to consider this broader category of evidence, much of it does not concern *unconstitutional* action by the *States*. The bulk of the Court's evidence concerns discrimination by nonstate governments, rather than the States themselves. We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated Eleventh Amendment immunity, a privilege enjoyed only by the sovereign States. Moreover, the majority today cites the same congressional task force evidence we rejected in *Garrett.* As in *Garrett,* this "unexamined, anecdotal" evidence does not suffice. Most of the brief anecdotes do not involve States at all, and those that do are not sufficiently detailed to determine whether the instances of "unequal treatment" were irrational, and thus unconstitutional . . . Therefore, even outside the "access to the courts" context, the Court identifies few, if any, constitutional violations perpetrated by the States against disabled persons.

With respect to the due process "access to the courts" rights on which the Court ultimately relies, Congress's failure to identify a pattern of actual constitutional violations by the States is even more striking. Indeed, there is *nothing* in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials.

The Court's attempt to disguise the lack of congressional documentation with a few citations to judicial decisions cannot retroactively provide support for Title II, and in any event, fails on its own terms. Indeed, because this type of constitutional violation occurs in connection with litigation, it is particularly telling that the majority is able to identify only *two* reported cases finding that a disabled person's federal constitutional rights were violated. . . .

Even if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally "inaccessible" courthouse—*i.e.,* one a disabled person cannot utilize without assistance—does not state a constitutional violation. A violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance. Indeed, the fact that the State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding. Nor does an "inaccessible" courthouse violate the Equal Protection Clause, unless it is irrational for the State not to alter the courthouse to make it "accessible." But financial considerations almost always furnish a rational basis for a State to decline to make those alterations. Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States' sovereign immunity. . . .

The third step of our congruence-and-proportionality inquiry removes any doubt as to whether Title II is valid § 5 legislation. At this stage, we ask whether the rights and remedies created by Title II are congruent and proportional to the constitutional rights it purports to enforce and the record of constitutional violations adduced by Congress.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." A disabled person is considered "qualified" if he "meets the essential eligibility requirements" for the receipt of the entity's services or participation in the entity's programs, "*with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation*

barriers, or the provision of auxiliary aids and services." The ADA's findings make clear that Congress believed it was attacking "discrimination" in all areas of public services, as well as the "discriminatory effect" of "architectural, transportation, and communication barriers." In sum, Title II requires, on pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.

"Despite subjecting States to this expansive liability," the broad terms of Title II "d[o] nothing to limit the coverage of the Act to cases involving arguable constitutional violations." By requiring special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination. We invalidated Title I's similar requirements in *Garrett,* observing that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." Title II fails for the same reason. Like Title I, Title II may be laudable public policy, but it cannot be seriously disputed that it is also an attempt to legislatively "redefine the States' legal obligations" under the Fourteenth Amendment. . . .

For the foregoing reasons, I respectfully dissent.

Justice Scalia, dissenting.

. . . I would replace "congruence and proportionality" with another test—one that provides a clear, enforceable limitation supported by the text of § 5. Section 5 grants Congress the power "to *enforce,* by appropriate legislation," the other provisions of the Fourteenth Amendment. . . . [O]ne does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. . . .

Requiring access for disabled persons to all public buildings cannot remotely be considered a means of "enforcing" the Fourteenth Amendment. The considerations of long accepted practice and of policy that sanctioned such distortion of language where state racial discrimination is at issue do not apply in this field of social policy far removed from the principal object of the Civil War Amendments. "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'" It is past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion. For these reasons, I respectfully dissent from the judgment of the Court.

Justice Thomas, dissenting. . . .

Case

COOLEY V. BOARD OF PORT WARDENS

12 How. (53 U.S.) 299; 13 L.Ed. 996 (1852)
Vote: 7–2

The controversy that led to this landmark constitutional decision began when Aaron Cooley violated a Pennsylvania law by first failing to hire pilots and then refusing to pay pilotage fees on two of his ships at the port of Philadelphia. The Board of Port Wardens successfully sued him in a local trial court, and this judgment was affirmed by the Pennsylvania Supreme Court. Cooley brought his case to the U.S. Supreme Court, challenging the pilotage law on several constitutional grounds. The following excerpts from Justice Curtis's majority opinion deal with the question of whether this law violated the Commerce Clause.

Mr. Justice Curtis delivered the opinion of the Court.

. . . That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws, requiring the masters of ships and vessels of the United

States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. . . . These have been from time to time added to and changed, and we are not aware that their validity has been questioned.

Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged.

And if Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. . . .

Nor should it be lost sight of, that this subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to, the general subject of commerce with foreign nations and among the several States, over which it was one main object of the Constitution to create a national control. . . .

It becomes necessary, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The Act of Congress of the 7th of August, 1789, . . . is as follows:

> That all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.

If the law of Pennsylvania, now in question, had been in existence at the date of this Act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this Act does, in effect, give the force of an Act of Congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the State which enacted them.

But the law on which these actions are founded was not enacted till 1803. What effect, then, can be attributed to so much of the Act of 1789 as declares that pilots shall continue to be regulated in conformity "with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress"?

If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this Act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. . . . [W]e are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the States of all power to regulate pilots.

This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter.

If they are excluded it must be because the nature of the power, thus granted Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words has been used to exclude them.

And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution . . . and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. . . .

. . . [W]hen the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature, some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The Act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the port within their limits. . . .

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question how far any regulation of a subject by Congress may be deemed to operate as an exclusion of all legislation by the States upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of Congress has left it. We go no farther. . . .

We are of opinion that this state law was enacted by virtue of a power, residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.

Messrs. Justices McLean and ***Wayne*** dissented. ***Mr. Justice Daniel,*** although he concurred in the judgment of the court, yet dissented from its reasoning.

Mr. Justice Daniel:

I agree with the majority in their decision, that the judgments of the Supreme Court of Pennsylvania in these cases should be affirmed, though I cannot go with them in the process or argument by which their conclusion has been reached. . . . The true question here is, whether the power to enact pilot laws is appropriate and necessary, or rather most appropriate and necessary to the state or the federal governments. It being conceded that this power has been exercised by the States from their very dawn of existence; that it can be practically and beneficially applied by the local authorities only; it being conceded, as it must be, that the power to pass pilot laws, as such, has not been in any express terms delegated to Congress, and does not necessarily conflict with the right to establish commercial regulations, I am forced to conclude that this is an original and inherent power in the States, and not one to be merely tolerated, or held subject to the sanction of the federal government.

Case

Oregon Waste Systems v. Department of Environmental Quality

511 U.S. 93; 114 S.Ct. 1345; 128 L.Ed. 2d 13 (1994)
Vote: 7–2

In Chemical Waste Management, Inc. v. Hunt (1992), the Supreme Court held that the Commerce Clause prohibited the State of Alabama from imposing a higher fee on the disposal of hazardous waste from other states than on the disposal of identical waste from Alabama. The Court's opinion suggested, however, that a surcharge might be acceptable if it was based on the increased costs of handling out-of-state waste. In the present case, the Court considers whether Oregon's allegedly cost-based surcharge on the disposal of out-of-state waste violates the Commerce Clause.

Justice Thomas delivered the opinion of the Court.

. . . Like other States, Oregon comprehensively regulates the disposal of solid wastes within its borders. Respondent Oregon Department of Environmental Quality oversees the State's regulatory scheme by developing and executing

plans for the management, reduction, and recycling of solid wastes. To fund these and related activities, Oregon levies a wide range of fees on landfill operators. . . . In 1989, the Oregon Legislature imposed an additional fee, called a "surcharge," on "every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site." . . . The amount of that surcharge was left to respondent Environmental Quality Commission (Commission) to determine through rulemaking, but the legislature did require that the resulting surcharge "be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for" under specified statutes. . . . At the conclusion of the rulemaking process, the Commission set the surcharge on out-of-state waste at $2.25 per ton.

In conjunction with the out-of-state surcharge, the legislature imposed a fee on the in-state disposal of waste generated within Oregon. . . . The in-state fee, capped by statute at $0.85 per ton (originally $0.50 per ton), is considerably lower than the fee imposed on waste from other States. . . . Subsequently, the legislature conditionally extended the $0.85 per ton fee to out-of-state waste, in addition to the $2.25 per ton surcharge, . . . with the proviso that if the surcharge survived judicial challenge, the $0.85 per ton fee would again be limited to in-state waste. . . .

The anticipated court challenge was not long in coming. Petitioners, Oregon Waste Systems, Inc. (Oregon Waste) and Columbia Resource Company (CRC), joined by Gilliam County, Oregon, sought expedited review of the out-of-state surcharge in the Oregon Court of Appeals. Oregon Waste owns and operates a solid waste landfill in Gilliam County, at which it accepts for final disposal solid waste generated in Oregon and in other States. CRC, pursuant to a 20-year contract with Clark County, in neighboring Washington State, transports solid waste via barge from Clark County to a landfill in Morrow County, Oregon. Petitioners challenged the administrative rule establishing the out-of-state surcharge and its enabling statutes under both state law and the Commerce Clause of the United States Constitution. The Oregon Court of Appeals upheld the statutes and rule. . . .

The State Supreme Court affirmed. . . .

We granted certiorari, . . . because the decision below conflicted with a recent decision of the United States Court of Appeals for the Seventh Circuit. We now reverse.

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." . . . Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. . . . The Framers granted Congress plenary authority over interstate commerce "in the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." . . . "This principle that our economic unity is the Nation, which alone has the gamut of powers necessary to control of the economy, . . . has as its corollary that the states are not separable economic units." . . .

Consistent with these principles, we have held that the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." . . . As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. . . . By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." . . .

In *Chemical Waste* [*Management v. Hunt* (1992)], we easily found Alabama's surcharge on hazardous waste from other States to be facially discriminatory because it imposed a higher fee on the disposal of out-of-state waste than on the disposal of identical in-state waste. . . . We deem it equally obvious here that Oregon's $2.25 per ton surcharge is discriminatory on its face. The surcharge subjects waste from other States to a fee almost three times greater than the $0.85 per ton charge imposed on solid in-state waste. The statutory determinant for which fee applies to any particular shipment of solid waste to an Oregon landfill is whether or not the waste was "generated out-of-state." . . . It is well-established, however, that a law is discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." . . .

Respondents argue, and the Oregon Supreme Court held, that the statutory nexus between the surcharge and "the [otherwise uncompensated] costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state," . . . necessarily precludes a finding that the surcharge is discriminatory. We find respondents' narrow focus on Oregon's compensatory aim to be foreclosed by our precedents. As we reiterated in *Chemical Waste,* the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory . . . Consequently, even if the surcharge merely recoups the costs of disposing of out-of-state waste in Oregon, the fact remains that the differential charge favors shippers of

Oregon waste over their counterparts handling waste generated in other States. In making that geographic distinction, the surcharge patently discriminates against interstate commerce.

Because the Oregon surcharge is discriminatory, the virtually *per se* rule of invalidity provides the proper legal standard here. . . . As a result, the surcharge must be invalidated unless respondents can "sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." . . . Our cases require that justifications for discriminatory restrictions on commerce pass the "strictest scrutiny." . . . The State's burden of justification is so heavy that "facial discrimination by itself may be a fatal defect." . . .

At the outset, we note two justifications that respondents have *not* presented. No claim has been made that the disposal of waste from other States imposes higher costs on Oregon and its political subdivisions than the disposal of in-state waste. Also, respondents have not offered any safety or health reason unique to nonhazardous waste from other States for discouraging the flow of such waste into Oregon. . . . Consequently, respondents must come forward with other legitimate reasons to subject waste from other States to a higher charge than is levied against waste from Oregon. . . .

Respondents' principal defense of the higher surcharge on out-of-state waste is that it is a "compensatory tax" necessary to make shippers of such waste pay their "fair share" of the costs imposed on Oregon by the disposal of their waste in the State. In *Chemical Waste,* we noted the possibility that such an argument might justify a discriminatory surcharge or tax on out-of-state waste. . . . In making that observation, we implicitly recognized the settled principle that interstate commerce may be made to "pay its way." . . . "It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden[s]." . . . Nevertheless, one of the central purposes of the Clause was to prevent States from "exacting *more* than a just share" from interstate commerce. . . .

At least since our decision in *Hinson v. Lott* . . . (1868), these principles have found expression in the "compensatory" or "complementary" tax doctrine. Though our cases sometimes discuss the concept of the compensatory tax as if it were a doctrine unto itself, it is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means. . . . Under that doctrine, a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and "substantially similar" tax on intrastate commerce does not offend the negative Commerce Clause. . . .

To justify a charge on interstate commerce as a compensatory tax, a State must, as a threshold matter, "identify . . . the [intrastate tax] burden for which the State is attempting to compensate." . . . Once that burden has been identified, the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce. . . . 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. . . .

Although it is often no mean feat to determine whether a challenged tax is a compensatory tax, we have little difficulty concluding that the Oregon surcharge is not such a tax. Oregon does not impose a specific charge of at least $2.25 per ton on shippers of waste generated in Oregon, for which the out-of-state surcharge might be considered compensatory. In fact, the only analogous charge on the disposal of Oregon waste is $0.85 per ton, approximately one-third of the amount imposed on waste from other States. . . . Respondents' failure to identify a specific charge on intrastate commerce equal to or exceeding the surcharge is fatal to their claim. . . .

Respondents argue that, despite the absence of a specific $2.25 per ton charge on in-state waste, intrastate commerce does pay its share of the costs underlying the surcharge through general taxation. Whether or not that is true is difficult to determine, as "[general] tax payments are received for the general purposes of the [government], and are, upon proper receipt, lost in the general revenues." . . . Even assuming, however, that various other means of general taxation, such as income taxes, could serve as an identifiable intrastate burden roughly equivalent to the out-of-state surcharge, respondents' compensatory tax argument fails because the in-state and out-of-state levies are not imposed on substantially equivalent events.

The prototypical example of substantially equivalent taxable events is the sale and use of articles of trade. . . . In fact, use taxes on products purchased out of state are the only taxes we have upheld in recent memory under the compensatory tax doctrine. . . . Indeed, the very fact that in-state shippers of out-of-state waste, such as Oregon Waste, are charged the out-of-state surcharge even though they pay Oregon income taxes refutes respondents' argument that the respective taxable events are substantially equivalent. . . . We conclude that, far from being substantially equivalent, taxes on earning income and utilizing Oregon landfills are "entirely different kind[s] of tax[es]." . . . We are no more inclined here . . . to "plunge . . . into the morass of weighing comparative tax burdens" by comparing taxes on dissimilar events. . . .

Respondents' final argument is that Oregon has an interest in spreading the costs of the in-state disposal of Oregon waste to all Oregonians. That is, because all citizens of Oregon benefit from the proper in-state disposal of waste from Oregon, respondents claim it is only proper for Oregon to require them to bear more of the costs of disposing of such waste in the State through a higher general tax burden. At the same time, however, Oregon citizens should not be required to bear the costs of disposing of out-of-state waste, respondents claim. The necessary result of that limited cost-shifting is to require shippers of out-of-state waste to bear the full costs of in-state disposal, but to permit shippers of Oregon waste to bear less than the full cost.

We fail to perceive any distinction between respondents' contention and a claim that the State has an interest in reducing the costs of handling in-state waste. Our cases condemn as illegitimate, however, any governmental interest that is not "unrelated to economic protectionism," . . . and regulating interstate commerce in such a way as to give those who handle domestic articles of commerce a cost advantage over their competitors handling similar items produced elsewhere constitutes such protectionism. . . . To give controlling effect to respondents' characterization of Oregon's tax scheme as seemingly benign cost-spreading would require us to overlook the fact that the scheme necessarily incorporates a protectionist objective as well. . . .

Respondents counter that if Oregon is engaged in any form of protectionism, it is "resource protectionism," not economic protectionism. It is true that by discouraging the flow of out-of-state waste into Oregon landfills, the higher surcharge on waste from other States conserves more space in those landfills for waste generated in Oregon. Recharacterizing the surcharge as resource protectionism hardly advances respondents' cause, however. Even assuming that landfill space is a "natural resource," "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." . . .

We recognize that the States have broad discretion to configure their system of taxation as they deem appropriate. . . . All we intimate here is that their discretion in this regard, as in all others, is bounded by any relevant limitations of the Federal Constitution, in this case the negative Commerce Clause. Because respondents have offered no legitimate reason to subject waste generated in other States to a discriminatory surcharge approximately three times as high as that imposed on waste generated in Oregon, the surcharge is facially invalid under the negative Commerce Clause. Accordingly, the judgment of the Oregon Supreme Court is reversed, and the cases are remanded for further proceedings not inconsistent with this opinion. . . .

Chief Justice Rehnquist, with whom ***Justice Blackmun*** joins, dissenting.

. . . The State of Oregon responsibly attempted to address its solid waste disposal problem through enactment of a comprehensive regulatory scheme for the management, disposal, reduction, and recycling of solid waste. For this Oregon should be applauded. The regulatory scheme included a fee charged on out-of-state solid waste. The Oregon Legislature directed the Commission to determine the appropriate surcharge "based on the costs . . . of disposing of solid waste generated out-of-state." . . . The Commission arrived at a surcharge of $2.25 per ton compared to the $0.85 per ton charged on in-state solid waste. . . . The surcharge works out to an increase of about $0.14 per week for the typical out-of-state solid waste producer. . . . This seems a small price to pay for the right to deposit your "garbage, rubbish, refuse . . . ; sewage sludge, septic tank and cesspool pumpings or other sludge; . . . manure, . . . dead animals, [and] infectious waste" on your neighbors. . . .

Nearly 20 years ago, we held that a State cannot ban all out-of-state waste disposal in protecting themselves from hazardous or noxious materials brought across the State's borders. . . . Two terms ago in *Chemical Waste Management, Inc. v. Hunt* . . . (1992), in striking down the State of Alabama's $72 per ton fee on the disposal of out-of-state hazardous waste, the Court left open the possibility that such a fee could be valid if based on the cost of disposing of waste from other States. . . . Once again, however, as in *Philadelphia* [*v. New Jersey*] and *Chemical Waste Management,* the Court further cranks the dormant Commerce Clause ratchet against the States by striking down such cost-based fees, and by so doing ties the hands of the States in addressing the vexing national problem of solid waste disposal. I dissent. . . .

The State of Oregon is not prohibiting the export of solid waste from neighboring States; it is only asking that those neighbors pay their fair share for the use of Oregon landfill sites. I see nothing in the Commerce Clause that compels less densely populated States to serve as the low-cost dumping grounds for their neighbors, suffering the attendant risks that solid waste landfills present. The Court, deciding otherwise, further limits the dwindling options available to States as they contend with the environmental, health, safety, and political challenges posed by the problem of solid waste disposal in modern society. . . .

APPENDIX A

The Constitution of the United States of America

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2

(1) The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

(2) No Person shall be a Representative who shall not have attained to the age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

(3) Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

(4) When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

(5) The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3

(1) The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

(2) Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

(3) No Person shall be a Senator who shall not have attained, to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

(4) The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

(5) The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.

(6) The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

(7) Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4

(1) The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State

by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

(2) The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5

(1) Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

(2) Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

(3) Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

(4) Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6

(1) The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

(2) No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7

(1) All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

(2) Every Bill which shall have passed the House of Representatives and the Senate, shall, before it 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 (Sunday excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

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

Section 8

(1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

(2) To borrow Money on the credit of the United States;

(3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

(4) To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

(5) To coin Money, regulate the Value thereof, and of foreign Coin, and to fix the Standard of Weights and Measures;

(6) To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

(7) To establish Post Offices and post Roads;

(8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

(9) To constitute Tribunals inferior to the supreme Court;

(10) To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

(11) To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

(12) To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

(13) To provide and maintain a Navy;

(14) To make Rules for the Government and Regulation of the land and naval Forces;

(15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

(16) To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

(17) To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

(18) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9

(1) The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or Duty may be imposed on such Importation, not exceeding ten dollars for each Person.

(2) The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.

(3) No Bill of Attainder or ex post facto Law shall be passed.

(4) No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

(5) No Tax or Duty shall be laid on Articles exported from any State.

(6) No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

(7) No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

(8) No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section 10

(1) No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

(2) No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

(3) No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of Delay.

Article II

Section 1

(1) The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

(2) Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the 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 chuse from them by Ballot the Vice President.

(3) The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

(4) 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.

(5) 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.

(6) 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.

(7) Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2

(1) The President shall be Commander in Chief of the Army and Navy of the United States, and of 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.

(2) He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

(3) The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

(1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(2) In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

(3) The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3

(1) Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

(2) The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2

(1) The Citizens of each State shall be entitled to all privileges and Immunities of Citizens in the several States.

(2) A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

(3) No Person held to Service of Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3

(1) New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

(2) The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

(1) All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

(2) This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

(3) The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Articles in Addition to, and Amendment of, the Constitution of the United States of America, Proposed by Congress, and Ratified by the Several States, Pursuant to the Fifth Article of the Original Constitution

Amendment I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II (1791)

A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III (1791)

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII (1791)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII (1791)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX (1791)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X (1791)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI (1798)

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII (1804)

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; A quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII (1865)

Section 1

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2

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

Amendment XIV (1868)

Section 1

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

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV (1870)

Section 1

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2

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

Amendment XVI (1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII (1913)

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of 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 XVIII (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 the Congress.

Amendment XIX (1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

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

Amendment XX (1933)

Section 1

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If 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 XXI (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

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII (1951)

Section 1

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of 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 XXIII (1961)

Section 1

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2

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

Amendment XXIV (1964)

Section 1

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2

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

Amendment XXV (1967)

Section 1

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI (1971)

Section 1

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2

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

Amendment XXVII (1992)

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

APPENDIX B

Chronology of Justices of the United States Supreme Court

Year of Court as Constituted	Chief Justice	Associate Justices							
1789	Jay	Rutledge, J.	Cushing	Wilson	Blair				
1790–91	Jay	Rutledge, J.	Cushing	Wilson	Blair	Iredell			
1792	Jay	Johnson, T.	Cushing	Wilson	Blair	Iredell			
1793–94	Jay	Paterson	Cushing	Wilson	Blair	Iredell			
1795	Rutledge, J.	Paterson	Cushing	Wilson	Blair	Iredell			
1796–97	Ellsworth	Paterson	Cushing	Wilson	Chase, S.	Iredell			
1798–99	Ellsworth	Paterson	Cushing	Washington	Chase, S.	Iredell			
1800	Ellsworth	Paterson	Cushing	Washington	Chase, S.	Moore			
1801–03	Marshall, J.	Paterson	Cushing	Washington	Chase, S.	Moore			
1804–05	Marshall, J.	Paterson	Cushing	Washington	Chase, S.	Johnson, W.			
1806	Marshall, J.	Livingston	Cushing	Washington	Chase, S.	Johnson, W.			
1807–10	Marshall, J.	Livingston	Cushing	Washington	Chase, S.	Johnson, W.	Todd		
1811–12	Marshall, J.	Livingston	Story	Washington	Duvall	Johnson, W.	Todd		
1813–25	Marshall, J.	Thompson	Story	Washington	Duvall	Johnson, W.	Todd		
1826–28	Marshall, J.	Thompson	Story	Washington	Duvall	Johnson, W.	Trimble		
1829	Marshall, J.	Thompson	Story	Washington	Duvall	Johnson, W.	McLean		
1830–34	Marshall, J.	Thompson	Story	Baldwin	Duvall	Johnson, W.	McLean		
1835	Marshall, J.	Thompson	Story	Baldwin	Duvall	Wayne	McLean		
1836	Taney	Thompson	Story	Baldwin	Barbour	Wayne	McLean		
1837–40	Taney	Thompson	Story	Baldwin	Barbour	Wayne	McLean	Catron	McKinley
1841–44	Taney	Thompson	Story	Baldwin	Daniel	Wayne	McLean	Catron	McKinley
1845	Taney	Nelson	Woodbury	(vacant)	Daniel	Wayne	McLean	Catron	McKinley
1846–50	Taney	Nelson	Woodbury	Grier	Daniel	Wayne	McLean	Catron	McKinley
1851–52	Taney	Nelson	Curtis	Grier	Daniel	Wayne	McLean	Catron	McKinley
1853–57	Taney	Nelson	Curtis	Grier	Daniel	Wayne	McLean	Catron	Campbell
1858–60	Taney	Nelson	Clifford	Grier	Daniel	Wayne	McLean	Catron	Campbell
1861	Taney	Nelson	Clifford	Grier	(vacant)	Wayne	McLean	Catron	Campbell

Year of Court as Constituted	Chief Justice	Associate Justices								
1862	Taney	Nelson	Clifford	Grier	Miller	Wayne	Swayne	Catron	Davis	
1863	Taney	Nelson	Clifford	Grier	Miller	Wayne	Swayne	Catron	Davis	Field
1864–65	Chase, S. P.	Nelson	Clifford	Grier	Miller	Wayne	Swayne	Catron	Davis	Field
1866–67	Chase, S. P.	Nelson	Clifford	Grier	Miller	Wayne	Swayne	(ended)*	Davis	Field
1868–69	Chase, S. P.	Nelson	Clifford	Grier	Miller	(vacant)	Swayne		Davis	Field
1870–71	Chase, S. P.	Nelson	Clifford	Strong	Miller	Bradley	Swayne		Davis	Field
1872–73	Chase, S. P.	Hunt	Clifford	Strong	Miller	Bradley	Swayne		Davis	Field
1874–76	Waite	Hunt	Clifford	Strong	Miller	Bradley	Swayne		Davis	Field
1877–79	Waite	Hunt	Clifford	Strong	Miller	Bradley	Swayne		Harlan	Field
1880	Waite	Hunt	Clifford	Woods	Miller	Bradley	Swayne		Harlan	Field
1881	Waite	Hunt	Gray	Woods	Miller	Bradley	Matthews		Harlan	Field
1882–87	Waite	Blatchford	Gray	Woods	Miller	Bradley	Matthews		Harlan	Field
1888	Fuller	Blatchford	Gray	Lamar, L.	Miller	Bradley	Matthews		Harlan	Field
1889	Fuller	Blatchford	Gray	Lamar, L.	Miller	Bradley	Brewer		Harlan	Field
1890–91	Fuller	Blatchford	Gray	Lamar, L.	Brown	Bradley	Brewer		Harlan	Field
1892	Fuller	Blatchford	Gray	Lamar, L.	Brown	Shiras	Brewer		Harlan	Field
1893	Fuller	Blatchford	Gray	Jackson, H.	Brown	Shiras	Brewer		Harlan	Field
1894	Fuller	White	Gray	Jackson, H.	Brown	Shiras	Brewer		Harlan	Field
1895–97	Fuller	White	Gray	Peckham	Brown	Shiras	Brewer		Harlan	Field
1898–1901	Fuller	White	Gray	Peckham	Brown	Shiras	Brewer		Harlan	McKenna
1902	Fuller	White	Holmes	Peckham	Brown	Shiras	Brewer		Harlan	McKenna
1903–05	Fuller	White	Holmes	Peckham	Brown	Day	Brewer		Harlan	McKenna
1906–08	Fuller	White	Holmes	Peckham	Moody	Day	Brewer		Harlan	McKenna
1909	Fuller	White	Holmes	Lurton	Moody	Day	Brewer		Harlan	McKenna
1910–11	White, E.	Van Devanter	Holmes	Lurton	Lamar, J.	Day	Hughes		Harlan	McKenna
1912–13	White, E.	Van Devanter	Holmes	Lurton	Lamar, J.	Day	Hughes		Pitney	McKenna
1914–15	White, E.	Van Devanter	Holmes	McReynolds	Lamar, J.	Day	Hughes		Pitney	McKenna
1916–20	White, E.	Van Devanter	Holmes	McReynolds	Brandeis	Day	Clarke		Pitney	McKenna
1921	Taft	Van Devanter	Holmes	McReynolds	Brandeis	Day	Clarke		Pitney	McKenna
1922	Taft	Van Devanter	Holmes	McReynolds	Brandeis	Butler	Sutherland		Pitney	McKenna
1923–24	Taft	Van Devanter	Holmes	McReynolds	Brandeis	Butler	Sutherland		Sanford	McKenna
1925–29	Taft	Van Devanter	Holmes	McReynolds	Brandeis	Butler	Sutherland		Sanford	Stone

*Congress ended the use of a ten-person Court in this year.

Year of Court as Constituted	Chief Justice	Associate Justices							
1930–31	Hughes	Van Devanter	Holmes	McReynolds	Brandeis	Butler	Sutherland	Roberts	Stone
1932–36	Hughes	Van Devanter	Cardozo	McReynolds	Brandeis	Butler	Sutherland	Roberts	Stone
1937	Hughes	Black	Cardozo	McReynolds	Brandeis	Butler	Sutherland	Roberts	Stone
1938	Hughes	Black	Cardozo	McReynolds	Brandeis	Butler	Reed	Roberts	Stone
1939	Hughes	Black	Frankfurter	McReynolds	Douglas	Butler	Reed	Roberts	Stone
1940	Hughes	Black	Frankfurter	McReynolds	Douglas	Murphy	Reed	Roberts	Stone
1941–42	Stone	Black	Frankfurter	Byrnes	Douglas	Murphy	Reed	Roberts	Jackson, R.
1943–44	Stone	Black	Frankfurter	Rutledge, W.	Douglas	Murphy	Reed	Roberts	Jackson, R.
1945	Stone	Black	Frankfurter	Rutledge, W.	Douglas	Murphy	Reed	Burton	Jackson, R.
1946–48	Vinson	Black	Frankfurter	Rutledge, W.	Douglas	Murphy	Reed	Burton	Jackson, R.
1949–52	Vinson	Black	Frankfurter	Minton	Douglas	Clark	Reed	Burton	Jackson, R.
1953–54	Warren	Black	Frankfurter	Minton	Douglas	Clark	Reed	Burton	Jackson, R.
1955	Warren	Black	Frankfurter	Minton	Douglas	Clark	Reed	Burton	Harlan
1956	Warren	Black	Frankfurter	Brennan	Douglas	Clark	Reed	Burton	Harlan
1957	Warren	Black	Frankfurter	Brennan	Douglas	Clark	Whittaker	Burton	Harlan
1958–61	Warren	Black	Frankfurter	Brennan	Douglas	Clark	Whittaker	Stewart	Harlan
1962–65	Warren	Black	Goldberg	Brennan	Douglas	Clark	White, B.	Stewart	Harlan
1965–67	Warren	Black	Fortas	Brennan	Douglas	Clark	White, B.	Stewart	Harlan
1967–69	Warren	Black	Fortas	Brennan	Douglas	Marshall, T.	White, B.	Stewart	Harlan
1969	Burger	Black	Fortas	Brennan	Douglas	Marshall, T.	White, B.	Stewart	Harlan
1969–70	Burger	Black	(vacant)	Brennan	Douglas	Marshall, T.	White, B.	Stewart	Harlan
1970–71	Burger	Black	Blackmun	Brennan	Douglas	Marshall, T.	White, B.	Stewart	Harlan
1972–75	Burger	Powell	Blackmun	Brennan	Douglas	Marshall, T.	White, B.	Stewart	Rehnquist
1975–81	Burger	Powell	Blackmun	Brennan	Stevens	Marshall, T.	White, B.	Stewart	Rehnquist
1981–86	Burger	Powell	Blackmun	Brennan	Stevens	Marshall, T.	White, B.	O'Connor	Rehnquist
1986–87	Rehnquist	Powell	Blackmun	Brennan	Stevens	Marshall, T.	White, B.	O'Connor	Scalia
1987–90	Rehnquist	Kennedy	Blackmun	Brennan	Stevens	Marshall, T.	White, B.	O'Connor	Scalia
1990–91	Rehnquist	Kennedy	Blackmun	Souter	Stevens	Marshall, T.	White, B	O'Connor	Scalia
1991–93	Rehnquist	Kennedy	Blackmun	Souter	Stevens	Thomas	White, B.	O'Connor	Scalia
1993–94	Rehnquist	Kennedy	Blackmun	Souter	Stevens	Thomas	Ginsburg	O'Connor	Scalia
1994–2005	Rehnquist	Kennedy	Breyer	Souter	Stevens	Thomas	Ginsburg	O'Connor	Scalia
2005–	Roberts	Kennedy	Breyer	Souter	Stevens	Thomas	Ginsburg	Alito	Scalia

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APPENDIX C

Supreme Court Justices

by Appointing President, State Appointed from, and Political Party

President / Justices Appointed	State Appointed from	Political Party
Washington		
John Jay (1745–1829)*	N.Y.	Federalist
John Rutledge (1739–1800)	S.C.	Federalist
William Cushing (1732–1810)	Mass.	Federalist
James Wilson (1724–1798)	Pa.	Federalist
John Blair (1732–1800)	Va.	Federalist
James Iredell (1751–1799)	N.C.	Federalist
Thomas Johnson (1732–1819)	Md.	Federalist
William Paterson (1745–1806)	N.J.	Federalist
Samuel Chase (1741–1811)	Md.	Federalist
Oliver Ellsworth (1745–1807)	Conn.	Federalist
Adams, J.		
Bushrod Washington (1762–1829)	Va.	Federalist
Alfred Moore (1755–1810)	N.C.	Federalist
John Marshall (1755–1835)	Va.	Federalist
Jefferson		
William Johnson (1771–1834)	S.C.	Dem.-Rep.
Henry Livingston (1757–1823)	N.Y.	Dem.-Rep.
Thomas Todd (1765–1826)	Va.	Dem.-Rep.
Madison		
Gabriel Duvall (1752–1844)	Md.	Dem.-Rep.
Joseph Story (1779–1845)	Mass.	Dem.-Rep.
Monroe		
Smith Thompson (1768–1843)	N.Y.	Dem.-Rep.
Adams, J. Q.		
Robert Trimble (1776–1828)	Ky.	Dem.-Rep.
Jackson		
John McLean (1785–1861)	Ohio	Dem. (later Rep.)
Henry Baldwin (1780–1844)	Penn.	Democrat
James M. Wayne (1790–1867)	Ga.	Democrat
Roger B. Taney (1777–1864)	Va.	Democrat
Philip P. Barbour (1783–1841)	Va.	Democrat
Van Buren		
John Catron (1778–1865)	Tenn.	Democrat
John McKinley (1780–1852)	Ala.	Democrat
Peter V. Daniel (1784–1860)	Va.	Democrat
Tyler		
Samuel Nelson (1792–1873)	N.Y.	Democrat
Polk		
Levi Woodbury (1789–1851)	N.H.	Democrat
Robert C. Grier (1794–1870)	Pa.	Democrat
Fillmore		
Benjamin R. Curtis (1809–1874)	Mass.	Whig

*Dates in parentheses indicate birth and death dates.

President / Justices Appointed	State Appointed from	Political Party
Pierce		
John A. Campbell (1811–1889)	Ala.	Democrat
Buchanan		
Nathan Clifford (1803–1881)	Maine	Democrat
Lincoln		
Noah H. Swayne (1804–1884)	Ohio	Republican
Samuel F. Miller (1816–1890)	Iowa	Republican
David Davis (1815–1886)	Ill.	Dem. (later Rep.)
Stephen J. Field (1816–1899)	Calif.	Democrat
Salmon P. Chase (1808–1873)	Ohio	Republican
Grant		
William Strong (1808–1895)	Pa.	Republican
Joseph P. Bradley (1813–1892)	N.J.	Republican
Ward Hunt (1810–1886)	N.Y.	Republican
Morrison Waite (1816–1888)	Ohio	Republican
Hayes		
John M. Harlan (1833–1911)	Ky.	Republican
William B. Woods (1824–1887)	Ga.	Republican
Garfield		
Stanley Matthews (1824–1889)	Ohio	Republican
Arthur		
Horace Gray (1828–1902)	Mass.	Republican
Samuel Blatchford (1820–1893)	N.Y.	Republican
Cleveland		
Lucius Q. C. Lamar (1825–1893)	Miss.	Democrat
Melville W. Fuller (1833–1910)	Ill.	Democrat
Harrison		
David J. Brewer (1837–1910)	Kans.	Republican
Henry B. Brown (1836–1913)	Mich.	Republican
George Shiras, Jr. (1832–1924)	Pa.	Republican
Howell E. Jackson (1832–1895)	Tenn.	Democrat
Cleveland		
Edward D. White (1845–1921)	La.	Democrat
Rufus W. Peckham (1838–1909)	N.Y.	Democrat
McKinley		
Joseph McKenna (1843–1926)	Calif.	Republican
Roosevelt, T.		
Oliver W. Holmes (1841–1935)	Mass.	Republican
William R. Day (1849–1923)	Ohio	Republican
William H. Moody (1853–1917)	Mass.	Republican
Taft		
Horace H. Lurton (1844–1914)	Tenn.	Democrat
Charles E. Hughes (1862–1948)	N.Y.	Republican
Willis Van Devanter (1859–1941)	Wyo.	Republican
Joseph R. Lamar (1857–1916)	Ga.	Democrat
Mahlon Pitney (1858–1924)	N.J.	Republican
Wilson		
James C. McReynolds (1862–1946)	Tenn.	Democrat
Louis D. Brandeis (1856–1941)	Mass.	Independent
John H. Clarke (1857–1945)	Ohio	Democrat
Harding		
William H. Taft (1857–1930)	Conn.	Republican
George Sutherland (1862–1942)	Utah	Republican
Pierce Butler (1866–1939)	Minn.	Democrat
Edward T. Sanford (1865–1930)	Tenn.	Republican
Coolidge		
Harlan F. Stone (1872–1946)	N.Y.	Republican
Hoover		
Owen J. Roberts (1875–1955)	Pa.	Republican
Benjamin N. Cardozo (1870–1938)	N.Y.	Democrat
Roosevelt, F. D.		
Hugo L. Black (1886–1971)	Ala.	Democrat
Stanley F. Reed (1884–1980)	Ky.	Democrat
Felix Frankfurter (1882–1965)	Mass.	Independent
William O. Douglas (1898–1980)	Conn.	Democrat
Frank Murphy (1890–1949)	Mich.	Democrat
James F. Byrnes (1879–1972)	S.C.	Democrat
Robert H. Jackson (1892–1954)	N.Y.	Democrat
Wiley B. Rutledge (1894–1949)	Iowa	Democrat

President / Justices Appointed	State Appointed from	Political Party
Truman		
Harold H. Burton (1888–1964)	Ohio	Republican
Fred M. Vinson (1890–1953)	Ky.	Democrat
Tom C. Clark (1899–1977)	Texas	Democrat
Sherman Minton (1890–1965)	Ind.	Democrat
Eisenhower		
Earl Warren (1891–1974)	Calif.	Republican
John M. Harlan (1899–1971)	N.Y.	Republican
William J. Brennan (b. 1906)	N.J.	Democrat
Charles E. Whittaker (1901–1973)	Mo.	Republican
Potter Stewart (1915–1986)	Ohio	Republican
Kennedy		
Byron R. White (1917-2002)	Colo.	Democrat
Arthur J. Goldberg (1908-1990)	Ill.	Democrat
Johnson, L.B.		
Abe Fortas (1910–1982)	Tenn.	Democrat
Thurgood Marshall (1908–1993)	N.Y.	Democrat
Nixon		
Warren E. Burger (1907–1995)	Minn.	Republican
Harry R. Blackmun (1908–1999)	Minn.	Republican
Lewis F. Powell, Jr. (1907–1998)	Va.	Democrat
William H. Rehnquist (1924–2005)	Ariz.	Republican
Ford		
John Paul Stevens (b. 1920)	Ill.	Republican
Reagan		
Sandra Day O'Connor (b. 1930)	Ariz.	Republican
Antonin Scalia (b. 1936)	N.J.	Republican
Anthony M. Kennedy (b. 1936)	Calif.	Republican
George H. W. Bush		
David Souter (b. 1939)	N.H.	Republican
Clarence Thomas (b. 1948)	Va.	Republican
Clinton		
Ruth Bader Ginsburg (b. 1933)	Wa., D.C.	Democrat
Stephen G. Breyer (b. 1938)	Mass.	Democrat
George W. Bush		
John G. Roberts (b. 1955)	Md.	Republican
Samuel Alito (b. 1950)	N.J.	Republican

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APPENDIX D

GLOSSARY

abate To do away with or lessen the impact of, as in abatement of a nuisance.

abortion The intentional termination of a pregnancy through destruction of the fetus.

abrogate To annul, destroy, or cancel.

abstention The doctrine under which the U.S. Supreme Court and other federal courts do not decide on, or interfere with, state cases even when empowered to do so. This doctrine is typically invoked when a case can be decided on the basis of state law.

accessory A person who aids in the commission of a crime.

accessory after the fact A person who with knowledge that a crime has been committed conceals or protects the offender.

accessory before the fact A person who aids or assists another in commission of an offense.

accommodation An approach to interpreting the Establishment Clause of the First Amendment that holds that government can and should accommodate religion whenever possible, while at the same time being officially neutral.

accomplice A person who voluntarily unites with another in commission of an offense.

accusatorial system A system of criminal justice in which the prosecution bears the burden of proving the defendant's guilt.

acquittal A judicial finding that a defendant is not guilty of a crime with which he or she has been charged.

act of omission The failure to perform an act required by law.

actual damages Money awarded to a plaintiff in a civil suit to compensate for injuries to that party's rights.

actual imprisonment standard The standard governing the applicability of the federal constitutional right of an indigent person to have counsel appointed in a misdemeanor case. In order for the right to be violated, the indigent defendant must actually be sentenced to jail time after having been tried without appointed counsel.

actual malice The deliberate intention to cause harm or injury.

actual possession Possession of something with the possessor having immediate control.

actus reus A "wrongful act" that, combined with other necessary elements of crime, constitutes criminal liability.

ad hoc "For this." For a special purpose.

***ad hoc* balancing** An effort by a court to balance competing interests in the context of the unique facts of a given case. In constitutional law, this term is used most frequently in connection with the adjudication of First Amendment issues.

adjudication The formal process by which courts decide cases.

adjudicatory hearing A proceeding in juvenile court to determine whether a juvenile has committed an act of delinquency.

ad litem "For the lawsuit"; pending the lawsuit, as in "guardian ad litem."

administrative law The body of law dealing with the structure, authority, policies, and procedures of administrative and regulatory agencies.

Administrative Procedure Act The 1946 act of Congress specifying rule making and adjudicatory procedures for federal agencies.

administrative searches Searches of premises by a government official to determine compliance with health and safety regulations.

adultery Voluntary sexual intercourse where at least one of the parties is married to someone other than the sexual partner.

ad valorem "According to the value." Referring to a tax or duty guaranteed according to the assessed value of the matter taxed.

adversary proceeding A legal action involving parties with adverse or opposing interests. A basic aspect of the American legal system, the adversary proceeding provides the framework within which most constitutional cases are decided. For an exception to this generalization, *see:* ex parte.

adversary system A system of justice involving conflicting parties where the role of the judge is to remain neutral.

advisory opinion A judicial opinion, not involving adverse parties in a "case or controversy," that is given at the request of the legislature or the executive. It has been a long-standing policy of the U.S. Supreme Court not to render advisory opinions.

affiant A person who makes an affidavit.

affidavit A person's voluntary sworn declaration attesting to a set of facts.

affirm To uphold, ratify, or approve.

affirmative action A program under which women and/or persons of particular minority groups are granted special consideration in employment, government contracts, and/or admission to programs of higher education.

a fortiori "With greater force of reason."

aggravating circumstances Factors attending the commission of a crime that make the crime or its consequences worse.

aggravating factors *See:* aggravating circumstances.

aiding and abetting Assisting in or otherwise facilitating the commission of a crime.

alibi Defense to a criminal charge that places the defendant at some place other than the scene of the crime at the time the crime occurred.

allegation Assertion or claim made by a party to a legal action.

amendment A modification, addition, or deletion.

Americans with Disabilities Act The 1990 federal statute forbidding discrimination on grounds of disability and guaranteeing access for the handicapped to public buildings.

amici "Friends," usually in reference to "friends of the Court." *See: amicus curiae*.

amicus curiae "Friend of the court." An individual or organization allowed to take part in a judicial proceeding, not as one of the adversaries, but as a party interested in the outcome. Usually an *amicus curiae* files a brief in support of one side or the other but occasionally takes a more active part in the argument of the case.

amnesty A blanket pardon issued to a large group of lawbreakers.

anonymous informant An informant whose identity is unknown to the police. *See also*: confidential informant.

anonymous tip Information from an unknown source concerning alleged criminal activity.

answer brief The appellee's written response to the appellant's law brief filed in an appellate court.

anticipatory search warrant A search warrant issued based on an affidavit that at a future time evidence of a crime will be at a specific place.

appeal Review by a higher court of a lower court decision.

appeal by right An appeal brought to a higher court as a matter of right under federal or state law.

appellant A person who takes an appeal to a higher court.

appellate courts Judicial tribunals that review decisions from lower tribunals.

appellate jurisdiction The legal authority of a court of law to hear an appeal from or otherwise review a decision by a lower court.

appellee The party against whom a case is appealed to a higher court.

appointment power The power of the president to appoint, with the consent of the Senate, judges, ambassadors, and high-level executive officials.

apportionment The allocation of representatives among a set of legislative districts.

arguendo "For the sake of argument."

arraignment An appearance before a court of law for the purpose of pleading to a criminal charge.

arrest To take someone into custody or otherwise deprive that person of freedom of movement.

arrest warrant A document issued by a magistrate or judge directing that a named person be taken into custody for allegedly having committed an offense.

arrestee A person who is arrested.

Article I, Section 8 Key section of the Constitution outlining the powers of Congress.

Articles of Confederation The constitution under which the United States was governed between 1781 and 1789.

assault The attempt or threat to inflict bodily injury upon another person.

assign To transfer or grant a legal right.

assignee One to whom a legal right is transferred.

assignments of error A written presentation to an appellate court identifying the points the appellant claims constitute errors made by the lower tribunal.

asylum Sanctuary; a place of refuge.

at bar Before the court, as in "the case at bar."

at-large election An election in which a number of officials are chosen to represent the entire district, as opposed to an arrangement under which each of the officials would represent one smaller district or ward.

attempt An intent to commit a crime coupled with an act taken toward committing the offense.

attorney general The highest legal officer of a state or of the United States.

attorney–client privilege The right of a person (client) not to testify about matters discussed in confidence with an attorney in the course of the attorney's representation.

automobile exception An exception to the Fourth Amendment search warrant requirement that allows the warrantless search of a vehicle by police who have probable cause to search, but for which it is impracticable to secure a warrant because of exigent circumstances.

automobile search The search of an automobile by police, usually performed without a warrant.

bad tendency test A restrictive interpretation of the First Amendment under which government may prohibit expression having a tendency to cause people to break the law.

bail The conditional release from custody of a person charged with a crime pending adjudication of the case.

battery The unlawful use of force against another person, entailing some injury or offensive touching.

bench trial A trial before a judge rather than a jury.

bench warrant An arrest warrant issued by a judge.

benevolent neutrality An approach to interpreting the Establishment Clause of the First Amendment that holds that government can and should take a benevolent posture toward religion while at the same time being officially neutral on such matters.

beyond a reasonable doubt The standard of proof that is constitutionally required to be introduced before a defendant can be found guilty of a crime or before a juvenile can be adjudicated a delinquent.

bicameralism The characteristic of having two houses or chambers. The U.S. Congress is a bicameral body in that it has a Senate and a House of Representatives.

bifurcated trial A capital trial with separate phases for determining guilt and punishment.

bigamy The crime of being married to more than one person at the same time.

bill of attainder A legislative act imposing punishment on a party without the benefit of a judicial proceeding.

Bill of Rights The first ten amendments to the Constitution, ratified in 1791, concerned primarily with individual rights and liberties.

Black Codes Statutes enacted in southern states after the Civil War denying African-Americans a number of basic rights.

bloc A group of decision makers in a collegial body who usually vote the same way. In judicial politics, the term refers to groups of judges or justices on appellate courts who usually vote together.

bona fide "In good faith"; without the attempt to defraud or deceive.

border search A search of persons entering the borders of the United States.

bounty hunter A person paid a fee or commission to capture a defendant who had fled a jurisdiction to escape punishment.

Brady Bill Legislation passed by Congress in 1993 requiring a five-day waiting period before the purchase of a handgun during which time a background check is conducted on the buyer.

Brandeis brief Pioneered by attorney Louis D. Brandeis in 1908, a type of appellate brief that emphasizes empirical evidence of the social or economic impact of law, as distinguished from a conventional brief that focuses solely on legal analysis.

breach of contract The violation of a provision in a legally enforceable agreement that gives the damaged party the right to recourse in a court of law.

breach of the peace The crime of disturbing the public tranquility and order. A generic term encompassing disorderly conduct, riot, and similar behaviors.

brief (1) In the judicial process, a document submitted by counsel setting forth legal arguments germane to a particular case. (2) In the study of constitutional law, a summary of a given case, reviewing the essential facts, issues, holdings, and reasoning of the court.

burden of persuasion The legal responsibility of a party to convince a court of the correctness of a position asserted.

burden of production of evidence The obligation of a party to produce some evidence in support of a proposition asserted.

burden of proof The requirement to introduce evidence to prove an alleged fact or set of facts.

bureaucracy Any large, complex, hierarchical organization staffed by appointed officials.

business affected with a public interest A nineteenth century doctrine holding that certain businesses are more closely associated with the public interest and are therefore more subject to government regulation.

cabinet The collective term for the heads of the executive departments of the federal government, such as the secretary of state, the attorney general, and the secretary of defense.

capias "That you take." A general term for various court orders requiring that some named person be taken into custody.

capitalist economy An economy based on private ownership and free enterprise.

capital offense A crime punishable by death.

capital punishment The death penalty.

carnal knowledge Sexual intercourse.

case A legal dispute between adverse parties to be resolved by a court of law.

case law Law derived from judicial decisions, also known as decisional law.

case or controversy requirement The requirement, under Article III of the Constitution, that the federal judicial power shall be extended to actual cases or controversies, not to hypothetical or abstract questions of law.

case reporters A series of books reprinting the decisions of a given court or set of courts. For example, the decisions of the U.S. Courts of Appeals are reported in the *Federal Reporter,* published by West Publishing Company.

castle doctrine The doctrine that "a man's home is his castle." At common law, the right to use whatever force is necessary to protect one's dwelling and its inhabitants from an unlawful entry or attack.

causation An act that produces an event or an effect.

cause A synonym for case; a reason or justification. *See also:* probable cause; show cause.

caveat emptor "Let the buyer beware." Common law maxim requiring the consumer to judge the quality of a product before making a purchase.

censorship Broadly defined, any restriction imposed by the government on speech, publication, or other form of expression.

certification A procedure under which a lower court requests a decision by a higher court on specified questions in a case, pending a final decision by the lower court.

certiorari "To be informed." A petition similar to an appeal, but it may be granted or refused at the discretion of the appellate court.

certiorari, writ of An order from a higher court to a lower court directing that the record of a particular case be sent up for review. *See also*: certiorari.

challenge for cause Objection to a prospective juror on some specified ground (for example, a close relationship to a party to the case).

change of venue The removal of a legal proceeding, usually a trial, to a new location.

checks and balances The constitutional powers granted each branch of government to prevent one branch from dominating the others.

child benefit theory The doctrine that government assistance to religious schools can be justified if the effect is to benefit the child rather than to promote religion.

chilling effect The effect of discouraging persons from exercising their rights.

circumstantial evidence Indirect evidence from which the existence of certain facts may be inferred.

citation (1) A summons to appear in court, often used in traffic violations. (2) A reference to a statute or court decision, often designating a publication where the law or decision appears.

civil action A lawsuit brought to enforce private rights and to remedy violations thereof.

civil case *See:* civil action.

civil infractions Noncriminal violation of a law, often referring to minor traffic violations.

civil law (1) The law relating to rights and obligations of parties. (2) The body of law, based essentially on Roman law, that exists in most non-English-speaking nations.

civil liberties The freedoms protected by the Constitution and statutes—for example, freedom of speech, religion, and assembly.

civil rights Legal protection against invidious discrimination in citizens' exercise of the rights of life, liberty, and property. The right to equality before the law and equal treatment by government.

Civil Rights Act of 1866 Federal civil rights law passed after the Civil War, aimed at eliminating the discriminatory Black Codes enacted by southern states.

Civil Rights Act of 1875 Federal civil rights law aimed at ending racial discrimination by places of public accommodation. Declared unconstitutional in 1883.

Civil Rights Act of 1964 Landmark civil rights statute aimed at ending racial discrimination in employment and by places of public accommodation.

Civil Rights movement The social movement beginning in the 1950s aimed at securing civil rights for African Americans.

civil service The system under which government employees are selected and retained based on merit, rather than political patronage.

civil suit *See:* civil action.

Civil War Amendments Reference to the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, designed primarily to protect the civil rights of former slaves.

claim of right A contention that an item was taken in a good-faith belief that it belonged to the taker; sometimes asserted as a defense to a charge of larceny or theft.

class action A lawsuit brought by one or more parties on behalf of themselves and others similarly situated.

classical conservatism Traditional conservatism stressing preservation of order and maintenance of traditional values.

clear and convincing evidence standard An evidentiary standard that is higher than the standard of "preponderance of the evidence" applied in civil cases, but lower than the standard of "beyond a reasonable doubt" applied in criminal cases. For example, under the new federal standard for the affirmative defense of insanity, the defendant must establish the defense of insanity by "clear and convincing evidence."

clear and present danger test The First Amendment test that protects expression up to the point that it poses a clear and present danger of bringing about some substantive evil that government has a right to prevent.

clear and probable danger test A somewhat more restrictive First Amendment test than clear and present danger. The test is "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of speech as is necessary to avoid the danger."

clemency A grant of mercy by an executive official commuting a sentence or pardoning a criminal.

closing arguments Arguments presented at trial by counsel at the conclusion of the presentation of evidence.

closure of pretrial proceedings Decision by a judge to close proceedings prior to trial of a criminal case in order to protect the defendant's right to a fair trial.

code A systematic collection of laws.

coercive federalism Term used to describe the fact that the federal government often uses federal grants to coerce states into adopting policies that it cannot directly mandate.

collateral attack The attempt to defeat the outcome of a judicial proceeding by challenging it in another court.

collateral estoppel A rule barring the making of a claim in one judicial proceeding that has been adjudicated in another, earlier proceeding.

comity Courtesy, respect, civility. A matter of good will and tradition, rather than of right; particularly important in a federal system where one jurisdiction is bound to respect the judgments of another.

commander in chief Term describing the president's authority to command the armed forces of the country.

commercial speech Commercial advertising, now viewed as entitled to some protection under the First Amendment.

common law A body of law that develops primarily through judicial decisions, rather than legislative enactments. The common law is not a fixed system but an ever-changing body of rules and principles articulated by judges and applied to changing needs and circumstances. *See also*: English Common law.

community control A sentence imposed on a person found guilty of a crime that requires the offender to be placed in an individualized program of noninstitutional confinement.

community service A sentence requiring that the criminal perform some specific service to the community for some specified period of time.

community standards Standards of decency, which may vary from community to community.

commutation A form of clemency that lessens the punishment for a person convicted of a crime.

comparative proportionality review A judicial examination to determine whether the sentence imposed in a given criminal case is proportionate to sentences imposed in similar cases.

compelling government interest A government interest sufficiently strong that it overrides the fundamental rights of persons adversely affected by government action or policy.

compelling interest An interest or justification of the highest order.

competency The state of being legally fit to give testimony or stand trial.

complicity A person's voluntary participation with another person in commission of a crime or wrongful act.

comprehensive planning A guide for the orderly development of a community, usually implemented by enactment of zoning ordinances.

compulsory process The requirement that witnesses appear and testify in court or before a legislative committee. *See also:* subpoena.

compulsory self-incrimination The requirement that an individual give testimony leading to his or her own criminal conviction; forbidden by the Fifth Amendment.

compulsory sterilization The requirement that an individual undergo procedures that render him or her unable to conceive children.

concurrent jurisdiction Jurisdiction that is shared by different courts of law.

concurrent powers Powers exercised jointly by the state and federal governments.

concurrent resolution An act expressing the will of both houses of the legislature but lacking a mechanism through which to enforce that will on parties outside the legislature.

concurrent sentencing The practice in which a trial court imposes separate sentences that may be served at the same time.

concurring in the judgment An agreement by a judge or justice in the judgment of an appellate court without necessarily agreeing to the court's reasoning processes.

concurring opinion An opinion by a judge or justice agreeing with the decision of the court. A concurring opinion may or may not agree with the rationale adopted by the court in reaching its decision. *See also*: Opinion of the Court.

conditions of probation A set of rules that must be observed by a person placed on probation.

conference As applied to the appellate courts, a private meeting of judges to decide a case or to determine whether to grant review in a case.

confidential informant An informant known to the police but whose identity is held in confidence. *See also:* anonymous informant.

conscientious objector One who opposes military service on religious or moral grounds.

consecutive sentencing The practice in which a trial court imposes a sentence or sentences to be served following completion of a prior sentence or sentences.

consent Voluntarily yielding to the will or desire of another person.

consent decree A court-enforced agreement reached by mutual consent of parties in a civil case or administrative proceeding.

conspiracy The crime of two or more persons planning to commit a specific criminal act.

constitutional case A judicial proceeding involving an issue of constitutional law.

Constitutional Convention of 1787 Convention of state delegates held in Philadelphia during the summer of 1787, ostensibly for the purpose of revising the Articles of Confederation. The convention resulted in a new Constitution, which was ratified in 1788.

constitutional democracy A democratic system of government in which majority rule is limited by constitutional principles such as limited government and individual rights.

constitutional law The fundamental and supreme law of the land defining the structure and powers of government and the rights of individuals vis-à-vis government.

constitutional republic A republican form of government based on a written constitution. The Framers of the U.S. Constitution avoided the term *democracy,* which they equated with unrestrained majoritarianism. They preferred the term *republican form of government,* which connoted representative institutions constrained by the rule of law.

constitutional right of privacy The right to make choices in matters of intimate personal concern without interference by government.

constitutional supremacy The doctrine that the Constitution is the supreme law of the land and that all actions and policies of government must be consistent with it.

constitutional theory (1) Broad term referring to theories about the Constitution generally, or particular theories about particular provisions of the Constitution. (2) In the area of the presidency, the theory that the president can exercise only those powers specifically granted by Article II.

construction Interpretation.

contemnor A person found to be in contempt of court.

contempt An action that embarrasses, hinders, obstructs, or is calculated to lessen the dignity of a judicial or legislative body.

contempt of Congress Any action that embarrasses, hinders, obstructs, or is calculated to lessen the dignity of Congress.

contempt of court Any action that embarrasses, hinders, obstructs, or is calculated to lessen the dignity of a court of law.

content-neutral Term referring to a time, place, or manner regulation that is enforced without regard to the content of expression.

continuance Delay of a judicial proceeding on the motion of one of the parties.

contraband Any property that is inherently illegal to produce or possess.

contracts Legally binding agreements between or among specific parties.

Contracts Clause Provision of Article I, Section 10, forbidding states from impairing the obligations of contracts.

contractual immunity A grant by a prosecutor with approval of the court that makes a witness immune from prosecution for the witness's testimony.

controlled substance A drug designated by law as contraband.

convening authorities The military authorities with jurisdiction to convene a court-martial for trial of persons subject to the Uniform Code of Military Justice.

conversion The unlawful assumption of the rights of ownership to someone else's property.

cooperative federalism A modern approach to American federalism in which powers and functions are shared among national, state, and local authorities.

corporal punishment Punishment that inflicts pain or injury on a person's body.

corpus delicti "The body of the crime." The material thing upon which a crime has been committed (for example, a burned-out building in a case of arson).

corrections system The system of prisons, jails, and other penal and correctional institutions.

corroboration Evidence that strengthens or validates evidence already given.

counsel A lawyer who represents a party.

court-martial A military tribunal convened by a commander of a military unit to try a person subject to the Uniform Code of Military Justice who is accused of violating a provision of that code.

Court of Appeals for the Armed Forces A court consisting of five civilian judges that reviews sentences affecting a general or flag officer or imposing the death penalty as well as cases certified for review by the judge advocate general of a branch of service. May grant review of convictions and sentences on petitions by service members.

court of general jurisdiction A court that conducts trials in felony and major misdemeanor cases. Also refers to a trial court with broad authority to hear and decide a wide range of civil and criminal cases.

court of last resort The highest court in a judicial system; the last resort for deciding appeals.

court of limited jurisdiction A trial court with narrow authority to hear and decide cases, typically pretrial matters, misdemeanors, and/or small claims.

court-ordered busing The transportation of public school students to schools outside their area, under court orders to alleviate racial segregation.

court system A set of trial and appellate courts established to resolve legal disputes in a particular jurisdiction.

creation science The idea that there are scientific reasons to believe in creationism as opposed to evolution.

criminal Pertaining to crime; a person convicted of a crime.

criminal action A judicial proceeding initiated by government against a person charged with the commission of a crime.

criminal case A judicial proceeding in which a person is accused of a crime.

criminal conspiracy *See:* conspiracy.

criminal contempt Punishment imposed by a judge against a person who violates a court order or otherwise intentionally interferes with the administration of the court.

criminal intent A necessary element of a crime; the evil intent associated with the criminal act.

criminal law The law defining crimes and punishments.

criminal negligence A failure to exercise the degree of caution or care necessary to avoid being charged with a crime.

criminal procedure The rules of law governing the procedures by which crimes are investigated, prosecuted, adjudicated, and punished.

criminal prosecution Legal action brought against a person accused of a crime.

criminal responsibility Term referring to the set of doctrines under which individuals are held accountable for criminal conduct.

criminal syndicalism The crime of advocating violence as a means to accomplish political change (archaic).

criminology The study of the nature of, causes of, and means of dealing with crime.

critical pretrial stages Significant procedural steps that occur preliminary to a criminal trial. A defendant has the right to counsel at these critical stages.

cross-examination The process of interrogating a witness who has testified on direct examination by asking the witness questions concerning testimony given. Cross-examination is designed to bring out any bias or inconsistencies in the witness's testimony.

cruel and unusual punishments Degrading punishments that shock the moral standards of the community, such as torturing or physically beating a prisoner.

culpability Guilt.

curtilage At common law, the enclosed space surrounding a dwelling house; in modern codes this space has been extended to encompass other buildings.

custodial interrogation Questioning by the police of a suspect in custody.

damages Monetary compensation awarded by a court to a person who has suffered injuries or losses to person or property as a result of someone else's conduct.

deadlocked jury A jury where the jurors cannot agree on a verdict. *See also*: hung jury.

deadly force The degree of force that may result in the death of the person against whom the force is applied.

death penalty Capital punishment; a sentence to death for the commission of a crime.

death-qualified jury A trial jury composed of persons who do not entertain scruples against imposing a death sentence.

decision on the merits A judicial decision that reaches the subject matter of a case.

decisional law Law declared by appellate courts in their written decisions and opinions.

declaratory judgment A judicial ruling conclusively declaring the rights, duties, or status of the parties but imposing no additional order, restriction, or requirement on them.

de facto "In fact"; as a matter of fact.

***de facto* segregation** Racial segregation that exists in fact, even though it is not required by law.

defamation A tort involving the injury to one's reputation by the malicious or reckless dissemination of a falsehood.

defendant A person charged with a crime or against whom a civil action is brought.

defense A defendant's stated reasons of law or fact as to why the prosecution or plaintiff should not prevail.

defense attorneys Lawyers who represent defendants in criminal cases.

definite sentencing Legislatively determined sentencing with no discretion given to judges or corrections officials to individualize punishment.

de jure "In law"; as a matter of law.

***de jure* discrimination** Discrimination that results from law, whether on its face or as applied.

delegation of legislative power A legislative act authorizing an administrative or regulatory agency to promulgate rules and regulations having the force of law.

delinquency petition A written document alleging that a juvenile has committed an offense and asking the court to hold an adjudicatory hearing to determine the merits of the petition.

de minimis Minimal, trifling, trivial.

demurrer An action of a defendant admitting to a set of alleged facts but nevertheless challenging the legal sufficiency of a complaint or criminal charge.

de novo Anew; for a second time.

Department of Justice The department of the federal government that is headed by the attorney general and staffed by U.S. attorneys.

deposition The recorded sworn testimony of a witness; not given in open court.

derivative evidence Evidence that is derived from or obtained only as a result of other evidence.

desegregation Efforts to eliminate de jure or de facto racial segregation.

detention Holding someone in custody.

detention hearing A proceeding held to determine whether a juvenile charged with an offense should be detained pending an adjudicatory hearing.

determinate sentence Variation on definite sentencing whereby a judge fixes the term of incarceration within statutory limits.

deterrence Prevention of criminal activity by punishing criminals so that others will not engage in such activity.

dicta *See: obiter dicta.*

diplomatic immunity A privilege to be free from arrest and prosecution, granted under international law to diplomats, their staffs, and household members.

direct contempt An obstructive or insulting act committed by a person in the immediate presence of the court.

directed verdict A verdict rendered by a jury upon direction of the presiding judge.

direct evidence Evidence that applies directly to proof of a fact or proposition. For example, a witness who testifies to having seen an act performed or having heard a statement made is giving direct evidence.

direct filing The filing of information by a prosecutor charging a juvenile with an offense, rather than filing a petition in juvenile court to declare the juvenile delinquent for having committed the offense.

direct–indirect test A test once used by the Supreme Court in its Commerce Clause jurisprudence. Under this test, a statute was valid only if the targeted activity had a direct impact on interstate commerce.

discrete and insular minorities Minority groups that are locked out of the political process.

discretion The power of public officials to act in certain situations according to their own judgment rather than relying on set rules or procedures.

discretionary review Form of appellate court review of lower court decisions that is not mandatory but occurs at the discretion of the appellate court. *See also:* certiorari.

discuss list The list of petitions for certiorari that are deemed worthy of discussion in conference.

dismissal A judicial order terminating a case.

disorderly conduct Illegal behavior that disturbs the public peace or order.

disparate impact Differential, often discriminatory effect of a facially neutral law or policy on members of different races or genders.

disposition The final settlement of a case.

dissent An appellate judge's formal vote against the judgment of the court in a given case.

dissenting opinion A written opinion by a judge or justice setting forth reasons for disagreeing with a particular decision of the court.

distinction between manufacturing and commerce An important element of the Supreme Court's Commerce Clause jurisprudence in the late nineteenth and early twentieth centuries. The distinction between manufacturing, or production, on the one hand, and commerce, or distribution, on the other hand, served to limit the reach of Congress's power under the Commerce Clause.

distributive articles Articles I, II, and III of the U.S. Constitution, delineating the powers and functions of the legislative, executive, and judicial branches, respectively, of the national government.

diversity jurisdiction The authority of a federal court to entertain a civil suit in which the parties are citizens of different states and the amount in controversy exceeds $50,000.

diversity of citizenship action A federal civil suit in which the parties are citizens of different states and the amount in controversy exceeds $75,000.

diversity of citizenship jurisdiction The authority of federal courts to hear lawsuits in which the parties are citizens of different states and the amount in controversy exceeds $75,000.

docket The set of cases pending before a court of law.

doctor-assisted suicide Administration by a physician of lethal drugs or gas to a terminally ill patient in order to produce death.

doctrine A legal principle or rule developed through judicial decisions.

doctrine of abstention The doctrine that federal courts should refrain from interfering with state judicial processes.

doctrine of incorporation The doctrine under which provisions of the Bill of Rights are held to be incorporated within the Due Process Clause of the Fourteenth Amendment and are thereby made applicable to actions of the state and local governments.

doctrine of original intent The doctrine that the Constitution is to be understood in terms of the intentions of the Framers.

doctrine of overbreadth The doctrine under which a person makes a facial challenge to a law on the ground that the law might be applied in the future against activities protected by the First Amendment.

doctrine of saving construction The doctrine under which courts adopt an interpretation of a statute that saves the statute from being declared unconstitutional.

doctrine of strict necessity The doctrine under which courts engage in judicial review only when strictly necessary to the settlement of a case.

double jeopardy The condition of being prosecuted a second time for the same offense.

drug courier profile A controversial law enforcement practice of identifying possible drug smugglers by relying on a set of characteristics and patterns of behavior believed to typify persons who smuggle drugs.

drug paraphernalia Items closely associated with the use of illegal drugs.

drug testing The practice of subjecting employees to urine tests to determine whether they are using illegal substances.

dual federalism A concept of federalism in which the national and state governments exercise authority within separate, self-contained areas of public policy and public administration.

Due Process Clause The clause found in both the Fifth and Fourteenth Amendments that prohibits government from taking a person's life, liberty, or property without due process of law.

Due Process Clause of the Fourteenth Amendment The provision of the Fourteenth Amendment that prohibits states from taking a person's life, liberty, or property without due process of law.

due process of law Procedural and substantive rights of citizens against government actions that threaten the denial of life, liberty, or property.

duress The use of illegal confinement or threats of harm to coerce someone to do something he or she would not do otherwise.

duty An obligation that a person has by law or contract.

easement A right of use over the property of another; frequently refers to a right-of-way across privately owned land.

ecclesiastical Pertaining to religious laws or institutions.

economic due process The doctrine under which the Supreme Court in the late nineteenth and early twentieth centuries used the Due Process Clauses of the Fifth and Fourteenth Amendments to protect free enterprise from government intervention.

economic freedom Another term for free enterprise—that is, the ability to conduct one's business without interference by government.

economic protectionism An attempt by one state to protect its domestic economy from outside competition.

Eighth Amendment Amendment included in the Bill of Rights prohibiting excessive bail, excessive fines, and cruel and unusual punishments.

Electoral College The body of electors chosen by the voters of each state and the District of Columbia for the purpose of formally electing the president and vice president of the United States. The number of electors (538) is equivalent to the total number of representatives and senators to which each state is entitled, plus three electors from the District of Columbia.

electronic eavesdropping Covert listening to or recording of a person's conversations by electronic means.

electronic media Electronic means of mass communication, including television, radio, and the Internet.

Eleventh Amendment Amendment to the Constitution prohibiting federal courts from hearing suits brought by a citizen of one state against the government of another state.

emergency search A warrantless search performed during an emergency, such as a fire or potential explosion.

eminent domain The power of government, or of individuals and corporations authorized to perform public functions, to take private property for public use.

enabling legislation As applied to public law, a statute authorizing the creation of a government program or agency and defining the functions and powers thereof.

en banc "In the bench."

***en banc* rehearing** A rehearing in an appellate court in which all or a majority of the judges participate.

enforcement power under the Fourteenth Amendment Congress's authority, recognized by Section 5 of the Fourteenth Amendment, to legislate in furtherance of the substantive provisions of the amendment.

English common law A system of legal rules and principles recognized and developed by English judges prior to the colonization of America and accepted as a basic aspect of the American legal system.

entrapment The act of government agents in inducing someone to commit a crime that the person otherwise would not be disposed to commit.

enumerated powers Powers specified in the text of the federal and state constitutions.

equal access Policies that permit religious and secular groups the same access to public buildings for purposes of meetings.

equality A condition in which persons hold the same status with respect to a particular criterion such as wealth, standing, or power.

Equal Protection Clause Clause in Section 1 of the Fourteenth Amendment that prohibits states from denying equal protection of the laws to persons within their jurisdictions.

equal protection of the laws Constitutional requirement that the government not engage in prohibited forms of discrimination against persons under its jurisdiction.

Equal Rights Amendment Failed attempt to amend the Constitution to guarantee equal rights for women.

equity Historically, a system of rules, remedies, customs, and principles developed in England to supplement the harsh common law by emphasizing the concept of fairness. In addition, because the common law served only to recompense after injury, equity was devised to prevent injuries that could not be repaired or recompensed after the fact. While American judges continue to distinguish between law and equity, these systems of rights and remedies are, for the most part, administered by the same courts.

error correction The function of appellate courts in correcting more or less routine errors committed by lower courts.

error, writ of An order issued by an appellate court for the purpose of correcting an error revealed in the record of a lower court proceeding.

escape Unlawfully fleeing to avoid arrest or confinement.

Establishment Clause Clause in the First Amendment prohibiting Congress from enacting laws "respecting an establishment of religion."

establishment of religion Official government support of religion or religious institutions. Prohibited by the First Amendment. *See also*: separation of church and state.

et al. "And others."

euthanasia Mercy killing.

evanescent evidence Evidence that will likely disappear if not immediately seized.

evidence Testimony, writings, or material objects offered in proof of an alleged fact or proposition.

evidentiary Pertaining to the rules of evidence or the evidence in a particular case.

evidentiary hearing A hearing on the admissibility of evidence into a civil or criminal trial.

evidentiary presumption A situation in which the establishment of one fact allows inference of another fact or circumstance.

evolving standards of decency Doctrine that holds that what constitutes cruel and unusual punishment must be determined in light of changing social standards of acceptable government conduct.

excessive bail An unreasonably large dollar amount or unreasonable conditions imposed by a court as a prerequisite for a defendant to be released before trial; prohibited by the Eighth Amendment.

excessive fines Fines that are deemed to be greater than is appropriate for the punishment of a particular crime.

exclusionary rule Judicial doctrine forbidding the use of evidence in a criminal trial where the evidence was obtained in violation of the defendant's constitutional rights.

exculpatory That which tends to exonerate a person of allegations of wrongdoing.

excusable homicide A death caused by accident or misfortune.

executive agreement An agreement between the United States and one or more foreign countries entered into by the president without ratification by the Senate.

executive order An order by a president or governor directing some particular action to be taken.

executive privilege The right of the president to withhold certain information from Congress or a court of law.

exhaustion of remedies The requirement that a party seeking review by a court first exhaust all legal options for resolution of the issue by nonjudicial authorities or lower courts.

exigent circumstances Situations that demand unusual or immediate action.

ex officio "By virtue of the office."

ex parte Term for a proceeding in which only one party is involved or represented.

expert witness A witness with specialized knowledge or training called to testify in his or her field of expertise.

ex post facto "After the fact."

***ex post facto* law** A retroactive law that criminalizes actions that were innocent at the time they were taken or that increases punishment for a criminal act after it was committed.

expressive conduct Conduct undertaken to express a message.

expressive religious conduct Conduct undertaken to express a religious message.

ex proprio vigore "By its own force."

ex rel. "On the relation or information of." A term usually designating the name of a person on whose behalf the government is bringing legal action against another party.

extradition The surrender of a person by one jurisdiction to another for the purpose of criminal prosecution.

ex vi termini "By definition"; from the very meaning of the term or expression used.

facial attack A legal attack on the constitutionality of a law as it is written, as opposed to how it is applied in practice.

facial neutrality Condition existing when a law, on its face, does not discriminate between or among classes of persons.

facial validity The quality of being legitimate or permissible on its face. A law may nevertheless be invalid as applied in a given case.

fair hearing A hearing in a court of law that conforms to standards of procedural justice.

fair notice The requirement stemming from due process that government provide adequate notice to a person before it deprives that person of life, liberty, or property.

fair trial doctrine The doctrine whereby, under the Fourteenth Amendment, states are required to provide fair trials to persons accused of crimes.

federal bureaucracy The collective term for the myriad departments, agencies, and bureaus of the federal government.

Federal Bureau of Investigation The primary agency charged with investigating violations of federal criminal laws.

federal courts The courts operated by the U.S. government.

federal habeas corpus review Review of a state criminal trial by a federal district court on a writ of habeas corpus after the defendant has been convicted, incarcerated, and has exhausted appellate remedies in the state courts.

federalism The constitutional distribution of government power and responsibility between the national government and the states.

The Federalist Papers The collection of essays written in 1788 by James Madison, Alexander Hamilton, and John Jay in support of ratification of the Constitution.

federal preemption The doctrine that federal law preempts states from enforcing regulations in areas necessarily occupied solely by the federal government.

federal question An issue arising under the U.S. Constitution or a federal statute, executive order, regulation, or treaty.

federal question jurisdiction The authority of federal courts to decide issues of national law.

Federal Register The publication containing all regulations proposed and promulgated by federal agencies.

Federal Rules of Appellate Procedure Rules governing the practice of law in the U.S. Courts of Appeals.

federal system A political system in which sovereignty is shared by national and regional governments.

fee simple Ownership of real property; the highest interest in real estate the law will permit.

felony A serious crime for which a person may be incarcerated for more than one year.

felony murder A homicide committed during the course of committing another felony other than murder (for example, armed robbery). The felonious act substitutes for malice aforethought ordinarily required in murder.

field sobriety test A test administered by police to persons suspected of driving while intoxicated. Usually consists of requiring the suspect to demonstrate the ability to perform such physical acts as touching one's finger to nose or walking backwards.

Fifteenth Amendment Amendment to the Constitution, ratified in 1870, that prohibits states from denying the right to vote on account of race.

Fifth Amendment Amendment included in the Bill of Rights providing for due process of law and prohibiting compulsory self-incrimination.

Fifth Amendment Due Process Clause The clause of the Fifth Amendment that forbids the federal government from depriving persons of life, liberty, or property without due process of law.

fighting words Utterances that are inherently likely to provoke a violent response from the audience.

fighting words doctrine The First Amendment doctrine that holds that certain utterances are not constitutionally protected as free speech if they are inherently likely to provoke a violent response from the audience.

First Amendment Amendment included in the Bill of Rights that protects freedom of religion and freedom of expression.

First Amendment absolutism The idea that the First Amendment prohibits any and all attempts by government to regulate the content of expression.

first appearance An initial judicial proceeding at which the defendant is informed of the charges, and the right to counsel, and a determination is made as to bail.

first degree murder The highest degree of unlawful homicide usually defined as "an unlawful act committed with the premeditated intent to take the life of a human being."

force The element of compulsion in such crimes against persons as rape and robbery.

forcible rape Rape, as defined by common law; that is, sexual intercourse with a female, other than the offender's wife, by force and against the will of the victim.

forensic experts Persons qualified in the application of scientific knowledge to legal principles, usually applied to those who participate in discourse or who testify in court.

forensic methods Investigatory procedures that apply scientific knowledge to legal principles.

foreperson The person selected by fellow jurors to chair deliberations and report the jury's verdict.

forfeiture Sacrifice of ownership or some right (usually property) as a penalty.

forgery The crime of making a false written instrument or materially altering a written instrument (such as a check, promissory note, or college transcript) with the intent to defraud.

fornication Sexual intercourse between unmarried persons; an offense in some jurisdictions.

Fourteenth Amendment Amendment to the Constitution, ratified in 1868, prohibiting states from depriving persons in their jurisdiction of due process of law.

Fourth Amendment Amendment within the Bill of Rights prohibiting unreasonable searches and seizures.

fraud Intentional deception or distortion in order to gain something of value.

freedom of assembly The right of people to peaceably assemble in a public place.

freedom of association The right of people to associate freely without unwarranted interference by government; implicitly protected by the First Amendment.

freedom of expression A summary term embracing freedom of speech and freedom of the press as well as symbolic speech and expressive conduct.

Freedom of Information Act Federal statute providing citizens a broad right of access to government information.

freedom of religion The First Amendment right to free exercise of one's religion.

freedom of speech The right to speak or express oneself freely without unreasonable interference by government.

freedom of the press The right to publish newspapers, magazines, and other print media free from prior restraint or sanctions by the government.

Free Exercise Clause Clause in the First Amendment prohibiting Congress from abridging the free exercise of religion.

free exercise of religion The constitutional right to be free from government coercion or restraint with respect to religious beliefs and practices; guaranteed by the First Amendment.

free marketplace of ideas The notion that expression should be unrestricted so that ideas can be traded freely in society, much as goods are freely exchanged in the marketplace.

frivolous appeals An appeal wholly lacking in legal merit.

fruit of the poisonous tree doctrine The doctrine that evidence derived from illegally obtained and thus inadmissible evidence is itself tainted and therefore likewise inadmissible.

Full Faith and Credit Clause The constitutional requirement (Article IV, Section 1) that states recognize and give effect to the records and legal proceedings of other states.

full opinion decision An appellate judicial decision rendered with one or more written opinions expressing the views of the judges in the case.

fundamental constitutional rights Those constitutional rights that have been declared to be fundamental by the courts. Includes First Amendment freedoms, the right to vote, and the right to privacy.

fundamental error An error in a judicial proceeding that adversely affects the substantial rights of the accused.

fundamental rights Those rights, whether or not explicitly stated in the Constitution, deemed to be basic and essential to a person's liberty and dignity.

gag order An order by a judge prohibiting certain parties from speaking publicly or privately about a particular case.

gambling Operating or playing a game for money in the expectation of gaining more than the amount played.

gay rights Summary term referring to the idea that persons should be permitted to engage in private homosexual conduct and be free from discrimination based on their sexual orientation.

gender-based classifications Laws that discriminate on the basis of gender.

gender-based peremptory challenges A challenge to a prospective juror's competency to serve based solely on the prospective juror's gender.

gender equity The idea that women should receive equal benefits conferred by government.

gender-neutral Term for a law or practice that applies equally to males and females—that is, one that is nondiscriminatory. For example, rape laws traditionally proscribed acts by a male against a female, whereas newer sexual battery laws proscribe acts by or against a person of either gender and thus are gender-neutral.

general court-martial A court-martial composed of three or more military members and a military judge or a military judge alone with jurisdiction to try the most serious offenses under the Uniform Code of Military Justice.

general objection An objection raised against a witness's testimony or introduction of evidence when the objecting party does not recite a specific ground for the objection.

general warrant A search or arrest warrant that is not particular as to the person to be arrested or the property to be seized.

gerrymander To intentionally manipulate legislative district boundaries for political purposes.

good-faith exception An exception to the exclusionary rule. Whereas the exclusionary rule bars the use of evidence obtained by a search warrant later found to be defective, the exception allows use of such evidence if the police acted in good faith that the warrant was valid.

good-time credit Credit toward early release from prison based on good behavior during confinement (often referred to as "gain time").

grandfather clause (1) In its modern, general sense, any legal provision protecting someone from losing a right or benefit as a result of a change in policy. (2) In its historic sense, a legal provision limiting the right to vote to persons whose ancestors held the right to vote prior to passage of the Fifteenth Amendment in 1870.

grand jury A group of twelve to twenty-three citizens convened to hear evidence in criminal cases to determine whether indictment is warranted.

group rights Rights that people have by virtue of membership in a group, as distinct from purely individual rights.

habeas corpus "You have the body." *See:* habeas corpus, writ of.

***habeas corpus*, writ of** A judicial order issued to an official holding someone in custody, requiring the official to bring the prisoner to court for the purpose of allowing the court to determine whether that person is being held legally. *See also*: habeas corpus.

habitual offender One who has been repeatedly convicted of crimes.

habitual offender statute A law that imposes an additional punishment on a criminal who has previously been convicted of crimes.

handwriting exemplar A sample of a suspect's handwriting.

hard-core pornography Pornography that is extremely graphic in its depiction of sexual conduct.

harmless error A procedural or substantive error that does not affect the outcome of a judicial proceeding.

harmless error analysis Judicial determination as to whether a particular procedural error requires reversal of a lower court's judgment.

harmless error doctrine The doctrine by which minor or harmless errors during a trial do not require reversal of the lower court's judgment by an appellate court. To be considered harmless, an error of constitutional magnitude must be found by the appellate court to be "harmless beyond any reasonable doubt."

hate crimes Crimes in which the victim is selected on the basis of race, religion, or ethnicity.

hate speech Offensive speech directed at members of racial, religious, or ethnic minorities.

hearing A public proceeding in a court of law, legislature, or administrative body for the purpose of ascertaining facts and deciding matters of law or policy.

hearsay evidence Statements made by someone other than a witness offered in evidence at a trial or hearing to prove the truth of the matter asserted.

heightened scrutiny The requirement that government justify a challenged policy by showing that it is substantially necessary to the achievement of an important objective.

high crimes and misdemeanors Offenses for which an official of the federal government may be impeached and removed from office by Congress.

holding The legal principle drawn from a judicial decision.

homicide The killing of a human being.

hot pursuit (1) The right of police to cross jurisdictional lines to apprehend a suspect or criminal. (2) The Fourth

Amendment doctrine allowing warrantless searches and arrests where police pursue a fleeing suspect into a protected area.

house arrest A sentencing alternative to incarceration where the offender is allowed to leave home only for employment and approved community service activities.

human rights statutes State laws protecting people from discrimination in a variety of forms.

hung jury A trial jury unable to reach a verdict.

Hyde amendment A federal law that prohibits the use of federal welfare funds to pay for nontherapeutic abortions.

hypothetical question A question based on an assumed set of facts. Hypothetical questions may be asked of expert witnesses in criminal trials.

illegitimacy The condition of being born out of wedlock.

imminent lawless action Unlawful conduct that is about to take place and which is inevitable unless there is intervention by the authorities.

imminently dangerous or outrageous conduct The type of action that, when resulting in someone's death, usually characterizes second-degree murder.

immunity Exemption from civil suit or prosecution. *See also:* transactional immunity; use immunity.

impeachment (1) A legislative act bringing a charge against a public official that, if proven in a legislative trial, will cause his or her removal from public office. (2) Impugning the credibility of a witness by introducing contradictory evidence or proving his or her bad character.

implied consent An agreement or acquiescence manifested by a person's actions or inaction.

implied consent statute A law providing that by accepting a license a driver arrested for a traffic offense consents to urine, blood, and breath tests to determine blood alcohol content.

implied powers Governmental powers not stated in but implied by the Constitution.

implied powers, doctrine of A basic doctrine of American constitutional law derived from the Necessary and Proper Clause of Article I, Section 8. Under this doctrine, Congress is not limited to exercising those powers specifically enumerated in Article I but rather may exercise powers reasonably related to the fulfillment of its broad constitutional powers and responsibilities.

Imports-Exports Clause Article I, Section 10, Clause 2 of the Constitution, restricting state power to tax imports and exports.

impoundment (1) Action by a president in refusing to allow expenditures approved by Congress. (2) In criminal law, the seizure and holding of a vehicle or other property by the police.

in camera "In a chamber." In private; term referring to a judicial proceeding or conference from which the public is excluded.

incapacitation The process of making it impossible for someone to do something.

incapacity An inability, legal or actual, to act.

incarceration Imprisonment.

incest Sexual intercourse with a close blood relative or, in some cases, a person related by affinity.

inchoate offenses Offenses preparatory to committing other crimes. Inchoate offenses include attempt, conspiracy, and solicitation.

incite To provoke or set in motion.

inciting a riot The crime of instigating or provoking a riot.

incorporation The process by which most provisions of the Bill of Rights have been extended to limit state action by way of the Due Process Clause of the Fourteenth Amendment. Specific protections of the Bill of Rights are said to be incorporated within the Fourteenth Amendment's broad restrictions on the states.

inculpatory That which tends to incriminate.

indefinite sentence Form of criminal sentencing whereby a judge imposes a term of incarceration within statutory parameters, and corrections officials determine actual time served through parole or other means.

independent agencies Federal agencies located outside the major cabinet-level departments.

independent counsel A special prosecutor appointed to investigate and, if warranted, prosecute official misconduct.

independent source doctrine The doctrine that permits evidence to be admitted at trial as long as it was obtained independently from illegally obtained evidence.

independent state grounds The doctrine that an individual's claim to a right or benefit not supported by federal law will nevertheless be recognized by a federal court if a state court has found that the claimed right or benefit rests on a valid provision of state law.

indeterminate sentence A prison sentence for an indefinite time, but within stipulated parameters, that allows correction officials to determine the prisoner's release date.

indictment A formal document handed down by a grand jury accusing one or more persons of the commission of a crime or crimes.

indigency Poverty; inability to afford legal representation.

indigent defendants Defendants who cannot afford to retain private legal counsel and are therefore entitled to be represented by a public defender or a court-appointed lawyer.

indirect contempt An act committed outside the presence of the court that insults the court or obstructs a judicial proceeding.

individual rights In the traditional constitutional law sense, the legal protections for individuals against government actions that threaten life, liberty, or property.

ineffective representation Representation by an attorney who is incompetent or less than reasonably effective.

inevitable discovery exception An exception to the *Miranda* requirements and the fruit of the poisonous tree doctrine; allows the admission of evidence that was derived from inadmissible evidence if it inevitably would have been discovered independently by lawful means.

inflammatory remarks Remarks by counsel during a trial designed to excite the passions of the jury.

in forma pauperis "In the manner of a pauper." Waiver of filing costs and other fees associated with judicial proceedings to allow an indigent person to proceed.

information A document filed by a prosecutor charging one or more persons with commission of crime.

infra "Below."

inherent executive power The powers of the president that flow from the nature of the office rather than from specific provisions of Article II.

inherent power The power existing in an agency, institution, or individual by definition of the office.

inherently suspect A law, policy, or classification that is, from a constitutional standpoint, questionable on its face.

initial appearance After arrest, the first appearance of the accused before a judge or magistrate.

injunction A judicial order requiring a person to do, or to refrain from doing, a designated thing.

in loco parentis "In the place of the parent(s)."

inmate One who is confined in a jail or prison.

in personam Term referring to legal actions brought against a person, as distinct from actions against property. *See also: in rem*.

in propria persona "In one's proper person." Term referring to the proper person to bring a legal action or make a motion before a court of law.

in re "In the matter of."

in rem Term referring to legal actions brought against things rather than persons. *See also: in personam*.

insanity A degree of mental illness that negates the legal capacity or responsibility of the affected person.

insanity defense A defense that seeks to exonerate the accused by showing that he or she was insane at the time of the crime and thus not legally responsible.

insufficient evidence Evidence that falls short of establishing that required by law; usually referring to evidence that does not legally establish an offense or a defense.

intelligible principle standard The doctrine whereby, in delegating power to the executive branch, Congress must provide a clear statement of policy to guide executive discretion.

intent A state of mind in which a person seeks to accomplish a given result through a course of action.

inter alia "Among other things."

intergovernmental tax immunity The doctrine that federal and state governments may not levy taxes on one another.

intermediate appellate courts Appellate courts positioned below the supreme or highest appellate court, whose primary function is to decide routine appeals not deserving review by the Supreme Court.

intermediate scrutiny *See:* heightened scrutiny.

interposition The archaic doctrine holding that when the federal government attempts to act unlawfully on an object within the domain of the state governments, a state may interpose itself between the federal government and the object of the federal government's action.

interpretation The process of assigning meaning to a text.

interpretivism The theory of constitutional interpretation holding that judges should confine themselves to the plain meaning of the text, the intentions of the Framers, and/or the historical meaning of the document.

interrogation Questioning of a suspect by police or questioning of a witness by counsel.

interrogatories Written questions put to a witness.

interstate agreements Formal agreements or compacts between or among states.

interstate commerce Commercial activity potentially extending beyond the boundaries of a state.

Interstate Commerce Act of 1887 Landmark act of Congress establishing the Interstate Commerce Commission.

interstate compacts Agreements between or among state governments, somewhat analogous to treaties.

intoxication A state of drunkenness resulting from the use of alcoholic beverages or drugs.

invalidate Annul, negate, set aside.

invasion of privacy A tort involving the unreasonable or unwarranted intrusion on the privacy of an individual.

inventory search An exception to the warrant requirement that allows police who legally impound a vehicle to conduct a routine inventory of the contents of the vehicle.

investigatory detention Brief detention of suspects by a police officer who has reasonable suspicion that criminal activity is afoot. *See also*: stop and frisk.

invidious Arousing animosity, envy, or resentment.

ipse dixit "He himself said it." An assertion resting on the authority of an individual.

ipso facto "By the mere fact"; by the fact itself.

irreparable injury An injury for which the award of money may not be adequate compensation and that may require the issuance of an injunction to fulfill the requirements of justice.

irresistible impulse A desire that cannot be resisted due to impairment of the will by mental disease.

Jim Crow laws Laws originating in the nineteenth century requiring various forms of racial segregation.

joinder The coupling of two or more criminal prosecutions.

joinder and severance of parties The uniting or severing of two or more parties charged with a crime or crimes.

joinder of offenses The uniting for trial in one case of different charges or counts alleged in an information or indictment.

joint resolution An act expressing the will of both houses of Congress in attempting to impose duties or limitations on parties outside the Congress; must be presented to the president for signature or veto.

judgment A judicial determination as to the claims made by parties to a lawsuit. In a criminal case, the court's formal declaration to the accused regarding the legal consequences of a determination of guilt.

judgment of acquittal (1) In a nonjury trial, a judge's order exonerating a defendant based on a finding that the defendant is not guilty. (2) In a case heard by a jury that finds a defendant guilty, a judge's order exonerating the defendant on the ground that the evidence was not legally sufficient to support the jury's finding of guilt.

judicial activism Approach to jurisprudence whose underlying philosophy is that judges should exercise power vigorously, as opposed to exercising judicial restraint.

judicial behavior The way judges make decisions; the academic study thereof.

judicial conference A meeting of judges to deliberate on the disposition of a case.

judicial federalism The constitutional relationship between federal and state courts of law.

judicial notice The act of a court recognizing, without proof, the existence of certain facts that are commonly known. Such facts are often brought to the court's attention through the use of a calendar or almanac.

judicial restraint Approach to jurisprudence whose underlying philosophy is that judges should exercise power cautiously and show deference to precedent and to the decisions of other branches of government, as opposed to exercising judicial activism.

judicial review Generally, the review of any issue by a court of law. In American constitutional law, the authority of a court to invalidate acts of government on constitutional grounds.

Judiciary Act of 1789 Landmark statute establishing the federal courts system.

juris privati "The private law," including such areas as torts, contracts, and property.

jurisdiction "To speak the law." The geographical area within which, the subject matter with respect to which, and the persons over whom a court can properly exercise its power.

jurist A person who is skilled or well versed in the law; often applied to lawyers and judges.

jury A group of citizens convened for the purpose of deciding factual questions relevant to a civil or criminal case.

jury instructions A judge's explanation of the law applicable to a case being heard by a jury.

jury nullification The act of a jury disregarding the court's instructions and rendering a verdict based on the consciences of the jurors.

jury pardon An action taken by a jury, despite the quality of the evidence, acquitting a defendant or convicting the defendant of a lesser crime than charged.

jury selection The process of selecting prospective jurors at random from lists of persons representative of the community.

jury trial A judicial proceeding to determine a defendant's guilt or innocence, conducted before a body of persons sworn to render a verdict based on the law and the evidence presented.

just compensation The constitutional requirement that a party whose property is taken by government under the power of eminent domain be justly compensated for the loss.

Just Compensation Clause Clause found in the Fifth Amendment requiring the federal government to provide owners reasonable and fair compensation when taking their property for a public use.

justiciability Appropriateness for judicial decision. A justiciable dispute is one that can be effectively decided by a court of law.

justifiable homicide Killing another in self-defense or defense of others when there is serious danger of death or great bodily harm to self or others, or when authorized by law.

justifiable use of force The necessary and reasonable use of force by a person in self-defense, defense of another, or defense of property.

justification A valid reason for one's actions.

juvenile A person who has not yet attained the age of legal majority.

juvenile court A judicial tribunal having jurisdiction over minors defined as juveniles who are alleged to be status offenders or to have committed acts of delinquency.

juvenile delinquency Actions of a juvenile in violation of the criminal law.

juvenile delinquency hearing Hearing in which a juvenile court determines whether a juvenile should be found to be delinquent. Analogous to a criminal trial in the adult justice system.

knock and announce The provision under federal and most state laws that requires a law enforcement officer to first knock and announce his or her presence and purpose before entering a person's home to serve a search warrant.

knowing and intelligent waiver A waiver of rights that is made with an awareness of the consequences.

laissez-faire capitalism The theory holding that a capitalist economy functions best when government refrains from interfering with the marketplace.

law clerk A judge's staff attorney.

lawmaking function One of the principal functions of an appellate court, often referred to as the law development function.

leading question A question that suggests an answer; permitted at a criminal trial on cross-examination of witnesses and in other limited instances.

least restrictive means test A judicial inquiry as to whether a particular policy that is being challenged as an infringement of some fundamental right is the least burdensome means of achieving the government's objective.

legislation Law enacted by a lawmaking body.

legislative veto A statutory provision under which a legislative body is permitted to overrule a decision of an executive agency.

legislature An elected lawmaking body such as the Congress of the United States or a state assembly.

***Lemon* test** Three-part test set forth in *Lemon v. Kurtzman* (1971). To pass muster under the Establishment Clause, a law must have a secular purpose, must not have the principal effect of advancing or inhibiting religion, and must avoid excessive entanglement between government and religious institutions.

lex non scripta "The unwritten law" or common law.

liability A broad legal term connoting debt, responsibility, or obligation; the condition of being bound to pay a debt, obligation, or judgment. This responsibility can be either civil or criminal.

libel The tort of defamation through published material. *See:* defamation.

libertarianism A philosophy that stresses individual freedom as the highest good.

liberty The absence of restraint.

liberty of contract The freedom to enter into contracts without undue interference from government.

limited government An idea central to republican constitutionalism in which the power of government is limited by constitutional provisions specifically defining the nature and scope of governmental powers and prohibiting government from acting in detriment to individual rights and liberties.

limiting doctrines Doctrines by which courts may refuse to render a decision on the merits in a case. *See:* abstention; exhaustion of remedies; political questions doctrine; mootness; standing.

line-item veto Executive act nullifying certain portions of a bill.

lineup A police identification procedure in which a suspect is included in a lineup with other persons who are exhibited to a victim or witness.

literacy test A test of reading and/or writing skills, often given as a prerequisite to employment. At one time, literacy tests were required by many states as preconditions for voting in elections.

litigant A party to, or participant in, a legal action.

local aspects of interstate commerce Regulations of interstate commerce imposed by local governments in response to unique local conditions such as the shape of a harbor.

loitering Standing around idly; "hanging around."

loss of civil rights Forfeiture of certain rights, such as voting, as a result of a criminal conviction.

lottery A drawing in which prizes are distributed to winners selected by lot from among those who have participated by paying a consideration.

magistrate A judge with minor or limited authority.

Magna Carta The "Great Charter" signed by King John in 1215 guaranteeing the legal rights of English subjects. Generally considered the foundation of Anglo-American constitutionalism.

majority opinion An appellate court opinion joined in by a majority of the judges who heard the appeal.

mala in se "Evil in itself." Term referring to crimes like murder that are universally condemned.

malapportionment A condition that exists when legislative districts in a state or subdivisions of a county or municipality contain substantially unequal numbers of voters; may result naturally as a function of population shifts or through deliberate gerrymandering.

mala prohibita "Prohibited evil." Term referring to crimes that are wrong primarily because the law declares them to be wrong.

malfeasance Misconduct that adversely affects the performance of official duties.

malice aforethought The mental predetermination to commit an illegal act.

***mandamus*, writ of** "We command." A judicial order commanding a public official or an organization to perform a specified duty.

mandate A command or order.

manifest necessity That is which clearly or obviously necessary or essential.

market participant exception The doctrine whereby states may impose regulations to inhibit competition by out-of-state competitors where the state is itself a participant in the market.

material Important, relevant, necessary.

memorandum decision A judicial decision rendered without a supporting Opinion of the Court.

mens rea "Guilty mind"; criminal intent.

militia Historically, a military force composed of all able-bodied citizens, in service only during time of war, rebellion, or emergency.

minimal scrutiny The most lenient form of judicial review of policies challenged as violations of civil rights and liberties.

***Miranda* warning** The warning given by police to individuals who are taken into custody before they are interrogated. Based on the Supreme Court's decision in *Miranda v. Arizona* (1966), the warning informs persons in custody that they have the right to remain silent and to have a lawyer present during questioning, and that anything they say can and will be used against them in a court of law.

misappropriation Wrongful taking or diversion of funds or other property.

miscarriage of justice Decision of a court that is inconsistent with the substantial rights of a party to the case.

misdemeanor A minor crime usually punishable by a fine or confinement for less than one year.

misrepresentation An untrue statement of fact made to deceive or mislead.

mistake of fact Unconscious ignorance of a fact or belief in the existence of something that does not exist.

mistake of law An erroneous opinion of legal principles applied to a set of facts.

mistrial A trial that is terminated due to misconduct, procedural error, or a hung jury (one that is unable to reach a verdict).

mitigating circumstances Circumstances or factors that tend to lessen culpability.

mitigating factors *See:* mitigating circumstances.

mitigation Reduction or alleviation, usually of punishment.

mockery of justice test Judicial test for determining whether a defendant was provided adequate representation. The question is whether performance by counsel constituted a mockery of justice.

modern administrative state Term for the highly bureaucratized federal government that emerged in the twentieth century.

moment of silence Policy under which public school students are required to observe a minute of silence at the beginning of the school day.

monetary fines Sums of money offenders are required to pay as punishment for the commission of crimes.

monogamy The practice of having only one spouse, as distinct from bigamy or polygamy.

moot A point that no longer has any practical significance; academic.

mootness Term referring to a question that does not involve rights currently at issue in, or pertinent to, the outcome of a case.

moral individualism The doctrine that individuals, not society or government, should make moral choices.

motion An application to a court to obtain a particular ruling or order.

motion for a new trial A formal request made to a trial court to hold a new trial in a particular case that has already been adjudicated.

motion for rehearing A formal request made to a court of law to convene another hearing in a case in which the court has already ruled.

motion to dismiss A formal request to a trial court to dismiss the criminal charges against the defendant.

motive A person's conscious reason for acting.

myth of legality The belief that judicial decisions are a function of legal rules, procedures, and principles rather than the ideological leanings or policy preferences of judges.

narrowly tailored Term used to describe a policy that is carefully designed to achieve its intended goal with a minimal negative impact on civil liberties.

narrowness doctrine The doctrine that judicial decisions should be framed in the narrowest possible terms or based on the narrowest possible grounds.

national supremacy The doctrine that holds that when state and federal authority collide, the federal authority must prevail.

natural law Principles of human conduct believed to be ordained by God or nature, existing prior to and superseding human law.

natural rights Rights believed to be inherent in human beings, the existence of which is not dependent on their recognition by government. In classical liberalism, natural rights are "life, liberty, and property." As recognized by the Declaration of Independence, they are "life, liberty, and the pursuit of happiness."

negligence The failure to exercise ordinary care or caution.

neutral and detached officer A judge or magistrate who is without an interest in the outcome of a case.

New Equal Protection A modern interpretation of the Equal Protection Clause of the Fourteenth Amendment under which policies that impinge on fundamental rights or discriminate on the basis of suspect classifications are presumed invalid by the courts.

new federalism Term for the variety of efforts in recent decades aimed at revitalizing the role of the states in the federal system or returning power to them.

New Jersey Plan A plan introduced by the New Jersey delegation at the Constitutional Convention of 1787. It called for a unicameral legislature in which all states would be equally represented.

new property Term referring to a person's interest in government benefits or entitlements.

Nineteenth Amendment Amendment to the Constitution, adopted in 1920, which prohibits the denial of voting rights on account of gender.

Ninth Amendment Amendment contained within the Bill of Rights that recognizes rights retained by the people even though they are not specifically enumerated in the Constitution.

no contest plea A plea to a criminal charge that, although it is not an admission of guilt, generally has the same effect as a plea of guilty. *See also: nolo contendere.*

nolo contendere "I will not contest it." Alternate term for a plea of no contest in a criminal case.

nondeadly force Force that does not result in death.

nondelegation doctrine The doctrine that Congress may not delegate its legislative authority to the executive branch.

noninterpretivism A term referring to a variety of theories of constitutional interpretation, the common element of which is the rejection of interpretivism. *See also*: interpretivism.

nonunanimous verdicts Jury verdicts rendered by a less-than-unanimous vote of the jurors.

notary public A person empowered by law to administer oaths, to certify things as true, and to perform various minor official acts.

notice of appeal Document filed with an appellate court notifying the court of an appeal from a judgment of a lower court.

nuisance An unlawful or unreasonable use of a person's property that results in an injury to another or to the public.

nullification The act of rendering something invalid; the process by which something may be invalidated. Historically, a doctrine under which states claimed the right to nullify actions of the national government.

obiter dicta "Something said in passing." Incidental statements in a judicial opinion that are not binding and are unnecessary to support the decision.

objective test A legal test based on external circumstances rather than the perceptions or intentions of an individual actor.

obscenity Explicit sexual material that is patently offensive, appeals to a prurient or unnatural interest in sex, and lacks serious scientific, artistic, or literary content.

obstruction of justice The crime of impeding or preventing law enforcement or the administration of justice.

open fields exception An exception to the Fourth Amendment search warrant requirement, holding that Fourth Amendment protection does not apply to the open fields around a home, even if these open fields are private property.

open public trial A trial that is held in public and is open to spectators.

opening statement A prosecutor's or defense lawyer's initial statement to the judge or jury in a trial.

opinion A written statement accompanying a judicial decision, authored by one or more judges, supporting or dissenting from that decision.

opinion concurring in the judgment A judicial opinion in which the author agrees with the decision of the court, but for reasons other than those stated in the court's principal opinion.

opinion evidence Testimony in which the witness expresses an opinion, as distinct from knowledge of specific facts.

Opinion of the Court An opinion announcing both the decision of the court and its supporting rationale. The opinion can either be a majority opinion or a unanimous opinion.

oral argument A hearing before an appellate court in which counsel for the parties appear for the purpose of making statements and answering questions from the bench.

ordinance An enactment of a local governing body such as a city council or commission.

organized crime Syndicates involved in racketeering and other criminal activities.

original intent, doctrine of The doctrine holding that the Constitution should be interpreted and applied according to the intentions of the Framers, insofar as those intentions can be determined.

originalism The doctrine that courts must preserve the original meaning of the Constitution.

original jurisdiction The authority of a court of law to hear a case in the first instance.

original package doctrine Archaic doctrine under which states were prohibited from imposing taxes on imported goods that, although no longer in the stream of commerce, remained in their original packages.

overbreadth doctrine First Amendment doctrine that holds that a law is invalid if it can be applied to punish people for engaging in constitutionally protected expression.

overrule To reverse or annul by subsequent action.

oversight The responsibility of a legislative body to monitor the activities of government agencies it created.

oversight hearings Formal hearings conducted for the purpose of monitoring actions by government agencies.

panel A set of jurors or judges assigned to hear a case.

pardon An executive action that mitigates or sets aside punishment for a crime.

parens patriae "The parent of the country." Term referring to the role of the state as guardian of minors or other legally disabled persons.

parliamentary system A democratic system of government in which there is no formal separation of the legislative and executive offices. The leader of the majority party in the parliament is the prime minister, or chief executive.

parochial legislation Legislation that favors narrow, localized interests.

parole The conditional early release from prison.

parole revocation hearing An administrative hearing held for the purpose of determining whether an offender's parole should be revoked.

partisan gerrymandering The intentional manipulation of legislative district lines in order to provide one political party a competitive advantage over another.

party (1) A person taking part in a legal transaction; includes plaintiffs and defendants in lawsuits but also has a far broader legal connotation. (2) In politics, an organization established for the principal purpose of recruiting and nominating candidates for public office.

pat-down search A manual search of the exterior of a suspect's outer garments.

patently offensive Plainly or obviously offensive; disgusting.

penal Of or pertaining to punishment.

pendency of the appeal The period after an appeal is filed but before the appeal is adjudicated.

penitentiary A prison.

penology The study or practice of prison management.

penumbra An implied right or power emanating from an enumerated right or power.

per curiam "By the court." Term referring to an opinion attributed to a court collectively, usually not identified with the name of any particular member of the court.

peremptory challenge An objection to the selection of a prospective juror in which the attorney making the challenge is not required to state the reason for the objection.

per se "By itself"; in itself.

petition A written request, usually addressed to a court, asking for a specified action. Sometimes the term indicates written requests in an *ex parte* proceeding, where there is no adverse party. In some jurisdictions, the term refers to the first pleading in a lawsuit.

petitioner A person who brings a petition before a court of law.

petit jury A trial jury, usually composed of either six or twelve persons.

petty (petit) offenses Minor crimes for which fines or short jail terms are the only prescribed modes of punishment.

picketing Carrying signs of protest in the public forum.

places of public accommodation Businesses that open their doors to the general public.

plaintiff The party initiating legal action; the complaining party.

plain view Readily visible to the naked eye. *See also:* plain view doctrine.

plain view doctrine The Fourth Amendment doctrine under which a police officer may seize evidence of crime that is readily visible to the officer's naked eye as long as the officer is legally in the place where the evidence becomes visible.

plea bargain An agreement between a defendant and a prosecutor whereby the defendant agrees to plead guilty in exchange for some concession (for example, a reduction in the severity or number of charges brought).

plea of guilty A formal answer to a criminal charge in which the accused acknowledges guilt and waives the right to trial.

plea of not guilty A formal answer to a criminal charge in which the accused denies guilt and thus exercises the right to a trial.

plenary Full, complete; often used with reference to the nature and extent of governmental powers enumerated in the federal Constitution.

plenary review Full, complete review by an appellate court.

pluralism A social or political system in which diverse groups compete for status or power; the theory that the role of government is to serve as broker among competing interest groups.

plurality opinion An opinion that states the judgment of the Court but that does not have the endorsement of a majority of justices.

pocket veto The power of a chief executive to effectively veto legislation by not acting on a bill passed within ten days prior to adjournment of a legislative session.

police deception Intentional deception by police in order to elicit incriminating statements from a suspect.

police interrogation Questioning by the police of a suspect in custody.

police power The power of government to legislate to protect public health, safety, welfare, and morality.

police powers of the states The powers of state governments to enact laws to further the public health, safety, welfare, and morality.

political dissent Organized or public opposition to the government.

political question A question that a court believes to be appropriate for decision by the legislative or the executive branch of government and thus improper for judicial decision making.

political questions doctrine The doctrine that holds that courts should avoid ruling on political questions.

poll tax A tax that must be paid before a person is permitted to vote in an election.

polling the jury Practice in which trial judge asks each member of the jury to affirm that he or she supports the jury's verdict.

polygamy Plural marriage; having more than one spouse.

polygraph evidence Results of lie detector tests (generally inadmissible into evidence).

popular sovereignty The idea that political authority is vested ultimately not in the rulers but in the people they rule.

pornography Material that appeals to the sexual impulse or appetite.

postconviction relief Term applied to various mechanisms a defendant may use to challenge a conviction after other routes of appeal have been exhausted.

power of contempt The authority of a court of law to punish someone who insults the court or flouts its authority.

power to investigate The power of a legislative body to conduct hearings and subpoena witnesses in order to investigate an issue or area over which it has legislative authority.

power to regulate interstate commerce The power of Congress, and to a lesser extent the powers of state and local governments, to enact laws and regulations affecting commerce involving more than one state.

precedent A judicial decision cited as authority controlling or influencing the outcome of a similar case.

preemption In constitutional law, the doctrine under which a field of public policy, previously open to action by the states, is brought by the U.S. Congress within the primary or exclusive control of the national government.

preferred freedoms Certain freedoms, in particular the First Amendment freedom of speech, that are accorded greater protection than other activities. When a legislative measure that restricts preferred freedoms is challenged, the ordinary presumption that the restriction is constitutional is reversed in favor of the presumptive protection of free expression.

prejudicial error An error at trial that substantially affects the interests of the accused.

preliminary hearing A hearing held to determine whether there is sufficient evidence to hold an accused for trial.

preliminary injunction An injunction issued pending a trial on the merits of the case.

preparatory conduct Actions taken in order to prepare to commit a crime.

preponderance of evidence Evidence that has greater weight than countervailing evidence.

presentment A synonym for indictment.

presentment requirement As outlined in the Presentment Clause (Article I, Section 7) of the Constitution, the requirement that a bill that has passed both houses of Congress be "presented" to the president for signature or veto.

presidential immunity The barrier against bringing a civil suit against the president for any of his official actions.

presidential pardon Action by the president pardoning one or more persons for the commission of a crime.

presidential power to make foreign policy The president's broad authority to set policy as it relates to international relations and foreign affairs.

presidential war powers Term referring to the president's authority as commander in chief.

presumption (1) An inference drawn by reasoning. (2) A rule of law subject to rebuttal.

presumption of constitutionality The doctrine of constitutional law holding that laws are presumed to be constitutional with the burden of proof resting on the plaintiff to demonstrate otherwise.

presumption of innocence The notion that the accused in a criminal trial is presumed innocent until proven guilty.

presumption of validity *See:* presumption of constitutionality.

preterm conference The Supreme Court's conference held prior to the beginning of its annual term in which the Court disposes of numerous petitions for certiorari.

pretextual stop An incident in which police stop a suspicious vehicle on the pretext of a motor vehicle infraction.

pretrial detention The holding of a defendant in custody prior to trial.

pretrial discovery The process by which the defense and prosecution interrogate witnesses for the opposing party and gain access to the evidence possessed by the opposing party prior to trial.

pretrial diversion program A program in which a first-time offender is afforded the opportunity to avoid a criminal conviction by participating in some specified treatment, counseling, or community service.

pretrial motion Any of a variety of motions made by counsel prior to the inception of a trial.

pretrial publicity Media coverage of a case that has the potential to deprive a defendant of the right to a fair trial by an impartial jury.

pretrial release The release of a defendant pending trial.

preventive detention Holding a suspect in custody before trial to prevent escape or other wrongdoing.

prima facie "On the face of it"; at first glance. Term referring to a point that will be considered true unless contested or refuted.

principals Persons whose conduct involves direct participation in a crime.

prior restraint An official act preventing publication of a particular work.

prisoners' rights The set of rights that prisoners retain or attempt to assert through litigation.

private property Property held by individuals or corporations, not by the public generally.

privilege In general, an activity in which a person may engage without interference. The term is often used interchangeably with "right" in American constitutional law, with reference to the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment of the Constitution.

privileges Rights extended to persons by virtue of law.

Privileges and Immunities Clause (1) Article IV, Section 2, Clause 1, of the Constitution, providing that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." (2) Similar provision contained in Section 1 of the Fourteenth Amendment.

probable cause Knowledge of specific facts providing reasonable grounds for believing that criminal activity is afoot.

probable cause hearing A hearing held in a court to make a formal determination on an issue of probable cause.

probation Conditional release of a convicted criminal in lieu of incarceration.

probative Tending to prove the truth or falsehood of a proposition.

pro bono "For the good." Performing service without compensation.

procedural criminal law The branch of the criminal law that deals with the processes by which crimes are investigated, prosecuted, and punished.

procedural due process Set of procedures designed to ensure fairness in a judicial or administrative proceeding.

procedural law The law regulating governmental procedure (for example, rules of criminal procedure).

profanity Vulgar, coarse, or filthy language; irreverence toward sacred things.

pro forma Merely for the sake of form.

prohibition, writ of An appellate court order preventing a lower court from exercising its jurisdiction in a particular case.

promissory estoppel The doctrine of contract law under which a promise that induces action on the part of the promissee may be legally enforceable.

pronouncement of sentence Formal announcement of a criminal punishment by a trial judge.

proof beyond a reasonable doubt The standard of proof in a criminal trial or a juvenile delinquency hearing.

proper forum The correct court or other institution in which to press a particular claim.

property rights The bundle of rights that exist relative to private ownership and control of property.

proportionality The degree to which a particular punishment matches the seriousness of a crime or matches the penalty other offenders have received for the same crime.

proportional representation An electoral system in which the percentage of votes received by a given political party entitles that party to the same percentage of seats in the legislature.

proportionate representation The idea that certain groups should be represented by ensuring that the legislature is composed according to the proportion of such groups in society.

proscribe To forbid; prohibit.

pro se "On one's own behalf." *See also*: pro se defense.

prosecution Initiation and conduct of a criminal case.

prosecutor A public official empowered to initiate criminal charges and conduct prosecutions.

prosecutorial discretion The leeway afforded prosecutors in deciding whether or not to bring charges and to engage in plea bargaining.

prosecutorial immunity A prosecutor's legal shield against civil suits stemming from his or her official actions.

***pro se* defense** Representing oneself in a criminal case.

protective tariffs Taxes on products imported from other nations, which increase their cost and thus make domestic products more appealing to consumers. Opposed by supporters of free trade.

provocation An action or behavior that prompts another person to react through criminal conduct.

proximate cause The cause that is nearest a given effect in a causal relationship.

prurient interest An excessive or unnatural interest in sex.

public accommodations statute A law prohibiting various forms of discrimination by businesses that open their doors to the general public.

public defender An attorney responsible for defending indigent persons charged with crimes.

public drunkenness The offense of appearing in public while intoxicated.

public figures Public officials or persons who are in the public eye.

public forum A public space generally acknowledged as appropriate for public assemblies or expressions of views.

public law General classification of law consisting of constitutional law, administrative law, international law, and criminal law.

public safety exception Exception to the *Miranda* requirement that police officers promptly inform suspects taken into custody of their rights to remain silent and have an attorney present during questioning. Under the public safety exception, police may ask suspects questions motivated by a desire to protect public safety without jeopardizing the admissibility of suspects' answers to those questions or subsequent statements.

punitive damages A sum of money awarded to the plaintiff in a civil case as a means of punishing the defendant for wrongful conduct.

punitive isolation Solitary confinement of a person who is incarcerated.

pure speech Communication that is purely spoken.

putting witnesses under the rule Placing witnesses under the rule that requires them to remain outside the courtroom except when testifying.

qua As; in the character or capacity of.

quash To vacate or annul.

quasi-judicial authority The authority of certain regulatory or administrative agencies to make determinations with respect to the rights of private parties under their jurisdiction.

race-conscious remedies Remedies to racial injustices that specifically take race into account.

racial gerrymandering The intentional manipulation of legislative district boundaries in order to diminish or enlarge the political influence of African-American or other minority voters.

racially motivated peremptory challenges Peremptory challenges to prospective jurors, based solely on racial animus or racial stereotypes.

rational basis test The test of the validity of a statute inquiring whether it is rationally related to a legitimate government objective.

real property Land and buildings permanently attached thereto.

reapportionment The redrawing of legislative district lines so as to remedy malapportionment.

reasonable doubt standard The standard of proof in a criminal trial under which a defendant must not be convicted of a crime if, after hearing all the evidence, a reasonable person would have doubt as to the defendant's guilt. Sometimes the term "reasonable doubt" is equated to lack of moral certainty.

reasonable expectation of privacy A person's reasonable expectation that his or her activities in a certain place are private; society's expectations with regard to whether activities in certain places are private.

reasonable force The maximum degree of force that is necessary to accomplish a lawful purpose.

reasonable suspicion A reasonable person's suspicion that criminal activity is afoot.

reasoning The logic of a legal argument or judicial opinion.

rebuttal witnesses Witnesses called to dispute the testimony of the opposing party's witnesses.

reciprocal immunity *See:* intergovernmental tax immunity.

recognizance An obligation to appear in a court of law at a given time.

recusal A decision of a judge to withdraw from a case, usually due to bias or personal interest in the outcome.

recuse To disqualify oneself from participating in a court case.

redeeming social importance Value to society that redeems an otherwise worthless instance of expression.

referendum An election in which voters decide a question of public policy.

regulation A legally binding rule or order prescribed by a controlling authority; generally used with respect to the rules promulgated by administrative and regulatory agencies.

rehabilitation The process of restoring someone or something to its former status; a justification for punishment emphasizing reform rather than retribution.

release on personal recognizance Pretrial release of a defendant based solely on the defendant's promise to appear for future court dates.

released time programs Public school programs in which students are permitted to leave school grounds to attend religious exercises.

relevant evidence Evidence tending to prove or disprove an alleged fact.

Religion Clauses of the First Amendment The Establishment Clause and Free Exercise Clause of the First Amendment.

Religious Freedom Restoration Act (RFRA) Act of Congress designed to enhance religious freedom vis-à-vis government; declared unconstitutional by the Supreme Court in 1997.

religious speech Expression of a religious nature.

religious tests Tests to determine whether individuals hold "appropriate" religious convictions.

remand To send back, as from a higher court to a lower court, for the latter to take specified action in a case or to follow proceedings designated by the higher court.

remedy The means by which a right is enforced or a wrong is redressed.

removal power The power of the president to remove officials in executive departments and agencies.

rendition The act of one state in surrendering a fugitive to another state.

Rendition Clause Clause of Article IV, Section 2 of the Constitution, requiring states to surrender fugitives to other states upon proper request.

repeal A legislative act removing a law from the statute books.

reply brief A brief submitted in response to an appellee's answer brief.

reporters Books containing judicial decisions and accompanying opinions. *See:* case reporters.

representative democracy A form of government in which policy decisions are made by representatives chosen in periodic competitive elections. *See:* representative government.

representative government Form of government in which officials responsible for making policy are elected by the people in periodic free elections. *See:* representative democracy.

reprimands Minor punitive actions taken by military commanders for various infractions committed by military servicepersons.

resentencing A new sentencing hearing ordered by an appellate court.

reserved powers Powers reserved to the states or the people under the Tenth Amendment.

res judicata "A thing decided." A matter decided by a judgment, connoting the firmness and finality of the judgment as it affects the parties to the lawsuit; has the general effect of bringing litigation on a contested point to an end.

res nova "New thing." A new issue or case.

resolution A legislative act expressing the will of one or both houses of the legislature. Unlike a statute, a resolution has no enforcement clause. *See also:* concurrent resolution; joint resolution.

respondent A person asked to respond to a lawsuit or writ.

restitution The act of compensating someone for losses suffered.

restrictive covenant An agreement among property holders restricting the use of property or prohibiting the rental or sale of it to certain parties.

retribution Something demanded in payment for a debt; in criminal law, the demand that a criminal pay his or her debt to society.

retroactive Changing the legal status or character of past events or transactions.

reverse To set aside a decision on appeal.

review An examination by an appellate court of a lower court's decision.

revocation The withdrawal of some right or power (for example, the revocation of parole).

RICO Act The Racketeer Influenced and Corrupt Organizations Act, passed in 1970, which essentially prohibits infiltration of organized crime into organizations or enterprises engaged in interstate commerce.

rider A small provision attached to a contract, document, or bill.

right Anything to which a person has a just and valid claim.

right of confrontation The right to cross-examine witnesses for the opposing party in a criminal case.

right of cross-examination *See:* right of confrontation.

right of privacy Constitutional right to engage in intimate personal conduct or make fundamental life decisions without interference by the state.

right to appeal Statutory right to appeal decisions of lower courts in certain circumstances.

right to a speedy trial Constitutional right to have an open public trial conducted without unreasonable delay.

right to be let alone Another term for the right of privacy.

right to counsel (1) The right to retain an attorney to represent oneself in court. (2) The right of an indigent person to have an attorney provided at public expense.

right to die Controversial "right" to terminate one's own life under certain circumstances.

right to keep and bear arms Right to possess certain weapons, protected against federal infringement by the Second Amendment to the Constitution.

right to refuse medical treatment The right of a patient or patient's surrogate in some instances to refuse to allow doctors to perform medical treatment.

right to vote The right of an individual to cast a vote in an election.

riot A public disturbance involving acts of violence, usually by three or more persons.

ripeness Readiness for review by a court of law. An issue is "ripe for review" in the Supreme Court when a case presents adverse parties who have exhausted all other avenues of appeal.

ripeness doctrine The doctrine under which courts consider only those questions that are deemed to be "ripe for review."

roadblocks Barriers set up by police to stop motorists.

robbery The crime of taking money or property from a person against that person's will by means of force.

rule making The power of a court or agency to promulgate rules; the process through which rules are promulgated.

rule of four U.S. Supreme Court rule whereby the Court grants certiorari only on the agreement of at least four justices.

rule of law The idea that law, not the discretion of officials, should govern public affairs.

rules of procedure Rules promulgated by courts governing civil, criminal, and appellate procedure.

sanction Penalty or other mechanism of enforcement.

saving construction, doctrine of The doctrine that, given two plausible interpretations of a statute, a court will adopt the interpretation that prevents the statute from being declared unconstitutional.

scarcity theory Theory holding that government can and should regulate access to the public airwaves, as these are scarce commodities.

school prayer Various activities of a religious nature in the public schools.

school prayer decisions Collective term for the Supreme Court's decisions of the 1960s prohibiting various activities of a religious nature in the public schools.

scientific evidence Evidence obtained through scientific and technological innovations.

Scopes trial Sensational criminal trial held in 1925 in Dayton, Tennessee, in which John Scopes, a high school biology teacher, was convicted under a state law (now defunct) prohibiting the teaching of evolution.

search and seizure Term referring to the police search for and/or seizure of contraband or other evidence of crime.

search based on consent A search of person or property conducted after a person voluntarily permits police to do so.

search incident to a lawful arrest Search of a person placed under arrest and the area within the arrestee's grasp and control.

search warrant A court order authorizing a search of a specified area for a specified purpose.

secession Action by a state formally withdrawing from the Union.

Second Amendment Amendment contained within the Bill of Rights guaranteeing the "right to keep and bear arms."

Section 1983 action A federal lawsuit brought under 42 U.S. Code Section 1983 to redress violations of civil and/or constitutional rights.

secular government Government that is not affiliated with or controlled by religious authorities.

secular humanism The philosophy that man, not God, is the source of standards of right and wrong.

sedition The crime of inciting insurrection or attempting to overthrow the government.

seditious speech Expression aimed at inciting insurrection or overthrow of the government.

seduction The common law crime of inducing a woman of previously chaste character to have sexual intercourse outside of wedlock on the promise of marriage.

seizure Action of police in taking possession or control of property or persons.

selective incorporation Doctrine under which selected provisions comprising most of the Bill of Rights are deemed applicable to the states by way of the Fourteenth Amendment.

selective prosecution Singling out defendants for prosecution on the basis of race, religion, or other impermissible classifications.

self-representation *See:* pro se defense.

sentence The official pronouncement of punishment in a criminal case.

sentencing guidelines Legislative guidelines mandating that sentencing conform to guidelines absent a compelling reason for departing from them.

sentencing hearing A hearing held by a trial court prior to the pronouncement of sentence.

separate but equal doctrine A now defunct doctrine that permitted racial segregation as long as equal facilities or accommodations were provided.

separation of church and state First Amendment doctrine that holds that there must be a "wall of separation" between religion and government.

separation of powers Constitutional assignment of legislative, executive, and judicial powers to different branches of government.

sequestration Holding jurors incommunicado during trial.

seriatim Serially, individually.

set-aside Term for the affirmative action policies that reserve a certain proportion of government contracts for minority businesses.

Seventh Amendment Amendment contained within the Bill of Rights guaranteeing the right to a jury trial in federal civil suits.

severability The doctrine under which courts will declare invalid only the offending provision of a statute and allow the other provisions to remain in effect.

severability clause A clause found in a statute indicating that if any particular provision of the law is invalidated, the other provisions remain in effect.

sexual harassment Offensive interaction of a sexual nature in the workplace.

Shays's rebellion A 1786 uprising of farmers in Massachusetts led by Daniel Shays, a former Revolutionary Army captain. The rebellion was spawned by economic conditions that the rebels believed to be grossly unfair to farmers and working people. It was put down in January 1787. Shays and thirteen other leaders of the rebellion were tried for treason and sentenced to death. Two were executed. Shays and the other leaders were eventually pardoned by Massachusetts governor John Hancock.

Sherman Antitrust Act of 1890 A federal statute prohibiting any contract, combination, or conspiracy in restraint of trade. The act is designed to protect and preserve a system of free and open competition. Its scope is broad and reaches individuals and entities in profit and nonprofit activities as well as local governments and educational institutions.

show cause A court order requiring a party to appear and present a legal justification for a particular act.

showup An event in which a crime victim is taken to see a suspect to make an identification.

silver platter doctrine Doctrine under which federal and state authorities could share illegally obtained evidence before the exclusionary rule was made applicable to all jurisdictions.

similar fact evidence Evidence of facts similar to the facts in the crime charged. The test of admissibility is whether such evidence is relevant and has a probative value in establishing a material issue. Under some limited circumstances, evidence of other crimes or conduct similar to that charged against the defendant may be admitted in evidence in a criminal prosecution.

sine qua non "Without which not." A necessary or indispensable condition or prerequisite.

Sixth Amendment Amendment contained within the Bill of Rights guaranteeing the right to counsel and the right to trial by jury in criminal cases.

slander The tort of defaming someone's character through verbal statements.

small claims Minor civil suits.

sobriety checkpoints Roadblocks set up for the purpose of administering field sobriety tests to motorists who appear to be intoxicated.

social contract The theory that government is the product of agreement among rational individuals who subordinate themselves to collective authority in exchange for security of life, liberty, and property.

social Darwinism The theory that society improves through unrestricted competition and the "survival of the fittest."

sodomy Oral or anal sex between persons, or sex between a person and an animal (the latter is often referred to as bestiality).

solicitation (1) The crime of offering someone money or other thing of value in order to persuade that person to commit a crime. (2) An active effort on the part of an attorney or other professional to obtain business.

sovereign immunity A common law doctrine under which the sovereign may be sued only with its consent.

special prosecutor A prosecutor appointed specifically to investigate a particular episode and, if criminal activity is found, to prosecute those involved. Also referred to as an independent counsel.

specific performance A court-imposed requirement that a party perform obligations incurred under a contract.

Speech or Debate Clause Provision of Article I, Section 6, protecting members of Congress from arrest or interference with their official duties.

speedy and public trial An open and public criminal trial held without unreasonable delay; guaranteed by the Sixth Amendment to the Constitution.

spending power The power of the legislature to spend public money for public purposes.

standby counsel An attorney appointed to assist an indigent defendant who elects to represent himself or herself at trial.

standing The right to initiate a legal action or challenge based on the fact that one has suffered or is likely to suffer a real and substantial injury.

stare decisis "To stand by decided matters." The principle that past decisions should stand as precedents for future decisions. This principle, which supports the proposition that precedents are binding on later decisions, is said to be followed less rigorously in constitutional law than in other branches of the law.

state action doctrine The doctrine that limits constitutional prohibitions to official government or government-sponsored action, as opposed to action that is merely private in character.

state power to regulate interstate commerce The limited power of a state government to make and enforce rules affecting commerce that transcends the state.

state's attorney A state prosecutor.

states' rights The constitutional rights and powers reserved to state governments under the Tenth Amendment. Historically, the philosophy that states should be accorded broad latitude within the American federal system.

status offenses Noncriminal conduct on the part of juveniles that may subject them to the jurisdiction of the court.

statute A generally applicable law enacted by a legislature.

statute of limitations A law proscribing prosecutions for specific crimes after specified periods of time.

statutory construction The official interpretation of a statute rendered by a court of law.

statutory rape The strict-liability offense of having sexual intercourse with a minor.

stay To postpone, hold off, or stop the execution of a judgment.

stay of execution An order suspending the enforcement of a judgment of a court.

stewardship theory The theory that the president, being steward of the country, may exercise any and all powers he deems necessary to that end, unless they are specifically prohibited by the Constitution.

stop and frisk An encounter between a police officer and a suspect during which the latter is temporarily detained and subjected to a pat-down search for weapons.

stream of commerce doctrine The doctrine, first articulated by Justice Holmes in 1905, permitting federal regulation of commerce that is no longer of an interstate nature.

strict judicial scrutiny Judicial review of government action or policy in which the ordinary presumption of constitutionality is reversed.

strict liability offenses Offenses that do not require proof of the defendant's intent.

strict necessity, doctrine of The doctrine that a court should consider a constitutional question only when strictly necessary to resolve the case at bar.

strict neutrality The doctrine that government must be strictly neutral on matters of religion.

strict scrutiny The most demanding level of judicial review in cases involving alleged infringements of civil rights or liberties.

strip searches Searches of suspects' or prisoners' private parts.

sua sponte "Of its own will." Voluntarily, without coercion or suggestion.

subjective test A legal test based on the perceptions or intentions of an individual actor, rather than external circumstances.

subpoena "Under penalty." A judicial order requiring a person to appear in court in connection with a designated proceeding.

subpoena duces tecum "Under penalty you shall bring with you." A judicial order requiring a party to bring certain described records, papers, books, or documents to court.

substantial federal question A significant legal question pertaining to the U.S. Constitution, a federal statute, treaty, regulation, or judicial interpretation of any of the foregoing.

substantial step A significant step toward completion of an intended result.

substantive criminal law That branch of the criminal law that defines criminal offenses and defenses and specifies criminal punishments.

substantive due process Doctrine that the Due Process Clauses of the Fifth and Fourteenth Amendments require legislation to be fair and reasonable in content as well as application.

substantive law That part of the law that creates rights and proscribes wrongs.

sui juris "Under law"; having full legal rights.

summary decisions Decisions made by appellate courts without the submission of briefs or oral arguments.

summary judgment A decision rendered without extended argument where no material legal question is presented in a case.

summary justice Trial held by court of limited jurisdiction without benefit of a jury.

summary trial A bench trial of a minor misdemeanor.

summons A court order requiring a person to appear in court to answer a criminal charge.

Sunday closing laws Laws, now largely defunct, prohibiting business from opening on Sundays.

supervisory power The power of the Supreme Court to supervise the lower federal courts.

suppression doctrine *See:* exclusionary rule.

supra "Above."

Supremacy Clause Provision of Article VI of the Constitution making that document, and all federal legislation consistent with it, the "supreme Law of the Land."

suspect classification doctrine The doctrine that laws classifying people according to race, ethnicity, and religion are inherently suspect and should be subjected to strict judicial scrutiny.

suspended sentence A trial court's decision to place a defendant on probation or under community control instead of imposing an announced sentence, on the condition that the original sentence may be imposed if the defendant violates the conditions of the suspended sentence.

sustain To uphold.

symbolic speech An activity that expresses a point of view or message symbolically, rather than through pure speech.

taking Government action taking private property or depriving the owner the use and control thereof.

tax exemptions Rules under which certain organizations or individuals are not required to pay certain taxes.

taxing power The power of government to levy taxes.

taxpayer suits Suits brought by taxpayers to challenge certain government actions. Taxpayer suits as such are prohibited in the federal courts in that one does not acquire standing merely by virtue of paying taxes to support policies of which one does not approve.

Tenth Amendment Amendment to the Constitution reserving to the states powers not delegated to the federal government.

***Terry* stop** *See:* stop-and-frisk.

testimony Evidence given by a witness who has sworn to tell the truth.

Third Amendment Amendment found in the Bill of Rights prohibiting the military from quartering soldiers in citizens' homes without their consent.

third party A person not directly connected with a legal proceeding but potentially affected by its outcome.

third-party consent Consent, usually to a search, given by a person on behalf of another. For example, a college roommate who allows the police to search his or her roommate's effects.

Thirteenth Amendment Amendment to the Constitution, ratified in 1865, formally abolishing slavery.

time, place, and manner doctrine First Amendment doctrine holding that government may impose reasonable limitations on the time, place, and manner of expressive activities.

time, place, and manner regulations Reasonable government regulations as to the time, place, and manner of expressive activities protected by the Constitution.

tolling Ceasing. For example, someone who conceals himself or herself from the authorities generally causes a tolling of the statutes of limitation on prosecution of a crime.

tort A wrong or injury other than a breach of contract for which the remedy is a civil suit for damages.

totality of circumstances The entire collection of relevant facts in a particular case.

transactional immunity A grant of immunity applying to offenses to which a witness's testimony relates.

transcript A written record of a trial or hearing.

treason The crime of attempting by overt acts to overthrow the government, or of betraying the government to a foreign power.

treaty A legally binding agreement between one or more countries. In the United States, treaties are negotiated by the president but must be ratified by the Senate.

trespass An unlawful interference with one's person or property.

trial A judicial proceeding held for the purpose of making factual and legal determinations.

trial by jury A trial in which the verdict is determined not by the court but by a jury of the defendant's peers.

trial courts Courts whose primary function is the conduct of civil and/or criminal trials.

trial de novo "A new trial." Refers to trial court review of convictions for minor offenses by courts of limited jurisdiction by conducting a new trial instead of merely reviewing the record of the initial trial.

trial jury A fixed number of citizens, usually six or twelve, selected according to law and sworn to hear the evidence presented at a trial and to render a verdict based on the law and the evidence.

tribunal A court of law.

trimester framework The framework established in *Roe v. Wade* (1973) governing the validity of laws regulating abortion in the three stages of pregnancy.

true bill An indictment handed down by a grand jury.

trustee A person entrusted to handle the affairs of another.

trusty A prisoner entrusted with authority to supervise other prisoners in exchange for certain privileges and status.

tuition tax credits Vouchers that taxpayers may "spend" at schools of their choice, be they public or private.

Twenty-fifth Amendment Amendment ratified in 1967 dealing with issues of presidential disability and removal.

Twenty-first Amendment Amendment ratified in 1933 repealing the unpopular Eighteenth Amendment (1919) that had established Prohibition.

Twenty-second Amendment Amendment ratified in 1951 limiting presidents to two terms in office.

Twenty-sixth Amendment Amendment ratified in 1971 lowering the voting age in federal and state elections to 18.

two-party system A political system, such as that of the United States, organized around two major competing political parties.

two-witness rule A requirement that to prove a defendant guilty of perjury the prosecution must prove the falsity of the defendant's statements either by two witnesses or by one witness and corroborating documents or circumstances.

tyranny of the majority A political system in which the rights of the individual or minority group are not protected against the will of the majority.

ultra vires "Beyond the power"; beyond the scope of a prescribed authority.

umpire of the federal system Term that describes the Supreme Court's role in refereeing disputes between the national government and the states.

unalienable rights Rights that are vested in individuals by birth, not granted by government.

unanimity rule A decision rule requiring a unanimous vote.

unconstitutional as applied Declaration by a court of law that a statute is invalid insofar as it is enforced in some particular context.

unconstitutional per se A statute that is unconstitutional under any given circumstances.

unconventional religious practices Practices outside the religious mainstream.

unicameral legislature A one-house legislative body.

Uniform Code of Military Justice (UCMJ) A code of laws enacted by Congress that govern military servicepersons and define the procedural and evidentiary requirements in military law and the substantive criminal offenses and punishments.

unitary system A political system in which all power is vested in one central government.

universal suffrage The requirement that all citizens (at least all competent adults not guilty of serious crimes) be eligible to vote in elections.

unlawful assembly A group of individuals, usually five or more, assembled to commit an unlawful act or to commit a lawful act in an unlawful manner.

unreasonable searches and seizures Searches that violate the Fourth Amendment to the Constitution.

U.S. attorneys Attorneys appointed by the president with consent of the U.S. Senate to prosecute federal crimes in a specific geographical area of the United States.

U.S. Court of Appeals for the Armed Forces *See:* Court of Appeals for the Armed Forces.

U.S. Courts of Appeals The intermediate appellate courts of appeals in the federal system that sit in geographical areas of the United States and in which panels of appellate judges hear appeals in civil and criminal cases primarily from the U.S. District Courts.

U.S. District Courts The principal trial courts in the federal system that sit in ninety-four districts where usually one judge hears proceedings and trials in both civil and criminal cases.

use immunity A grant of immunity that forbids prosecutors from using immunized testimony as evidence in criminal prosecutions.

U.S. Sentencing Commission A federal body that proposes guideline sentences for defendants convicted of federal crimes.

U.S. Supreme Court The highest court in the United States, consisting of nine justices, with jurisdiction to review, by appeal or writ of certiorari, the decisions of lower federal courts and many decisions of the highest courts of each state.

vacate To annul, set aside, or rescind.

vagrancy The crime of going about without visible means of support (virtually archaic).

vagueness doctrine Doctrine of constitutional law holding unconstitutional (as a violation of due process) legislation that fails to clearly inform the person what is required or proscribed.

venire The set of persons summoned for jury duty. The actual jury is selected from the venire. *See:* voir dire.

venue The location of a trial or hearing.

verdict The formal decision rendered by a jury in a civil or criminal trial.

vested rights Rights acquired by the passage of time.

veto The power of a chief executive to block adoption of a law by refusing to sign the legislation.

viability That point in pregnancy where the fetus is able to survive outside the womb.

victim impact statements Statements during the sentencing phase of a criminal trial in which evidence is introduced relating to the physical, economic, and psychological impact that the crime had on the victim or victim's family.

victimless crimes Crimes in which no particular person appears or claims to be injured, such as prostitution or gambling.

Virginia Plan A plan introduced by James Madison, a member of the Virginia delegation to the Constitutional Convention of 1787. It called for a bicameral Congress, in which members of the House of Representatives would be elected by the people and members of the Senate would be elected by the state legislatures. State representation in both bodies would be based on population.

voice exemplar A sample of a person's voice; usually taken by police for the purpose of identifying a suspect.

void-for-vagueness doctrine *See:* vagueness doctrine.

voir dire "To speak the truth." The process by which prospective jurors are questioned by counsel and/or the court before being selected to serve on a jury.

voluntariness of confessions The quality of a confession having been freely given.

vote dilution The reduction or diminution of the voting power of individuals or minorities as a result of malapportionment, gerrymandering, or some other discriminatory practice.

voting blocs Groups of individuals who usually vote together.

Voting Rights Act of 1965 Landmark federal legislation protecting voters from racial discrimination.

waiver The intentional and voluntary relinquishment of a right, or conduct from which such relinquishment may be inferred.

waiver of juvenile court jurisdiction A relinquishment by a juvenile court to allow prosecution of a juvenile in an adult court.

waiver of *Miranda* rights A known relinquishment of the right against self-incrimination provided by the Fifth Amendment to the Constitution.

War Powers Resolution The 1973 act of Congress purporting to limit a president's authority to commit troops to a combat situation abroad.

warrant A court order authorizing a search, seizure, or arrest.

warrant requirement The Fourth Amendment's "preference" that searches be based on warrants issued by judges or magistrates.

warrantless arrest An arrest made by police who do not possess an arrest warrant.

warrantless search A search made by police who do not possess a search warrant.

weight of the evidence The balance or preponderance of the evidence. Weight of the evidence is to be distinguished from "legal sufficiency of the evidence," which is the concern of an appellate court.

well-regulated militia Body of citizens organized for military service but subject to government regulation.

white primary Historically, a primary election in which participation was limited to whites.

wiretap order A court order permitting electronic surveillance for a limited period.

wiretapping The use of highly sensitive electronic devices designed to intercept electronic communications.

writ An order issued by a court of law requiring the performance of some specific act.

writ of *certiorari* *See:* certiorari, writ of.

writ of error *See:* error, writ of.

writ of *habeas corpus* *See:* habeas corpus, writ of.

writ of *mandamus* *See:* mandamus, writ of.

writ of prohibition *See:* prohibition, writ of.

writs of assistance Ancient writs issuing from the Court of Exchequer in England granting sheriffs broad powers of search and seizure for the purpose of assisting in the collection of debts owed to the Crown.

yellow dog contracts Contracts, generally illegal, making the right to work conditioned upon the employee's agreement not to join a labor union.

zoning Laws regulating the use of land.

APPENDIX E

INTERNET RESOURCES

Name of Resource	Description	URL
American Civil Liberties Union	The premier civil rights/civil liberties interest group	http://www.aclu.org/
American Enterprise Institute	Conservative policy research organization that emphasizes economic issues	http://www.aei.org/
American Land Rights Association	An organization dedicated to protecting private property rights, especially in rural areas	http://www.landrights.org/
Americans United for Separation of Church and State	A site maintained by one of the best known antiestablishmentarian organizations	http://www.au.org/
Ballot Access News	A nonpartisan online newsletter reporting on the problems associated with ballot access for independent and third-party candidates	http://www.ballot-access.org/
Bureau of Justice Statistics	Agency with the U.S. Department of Justice responsible for collecting and disseminating data dealing with crime and the justice system	http://www.ojp.usdoj.gov/bjs/
Catholic League for Religious and Civil Rights	Site promoting the nation's largest Catholic civil rights organization	http://www.catholicleague.org/
Cato Institute	A leading libertarian think tank	http://www.cato.org/
Center for Religious Freedom	Devoted to promotion of religious freedom worldwide	http://www.freedomhouse.org/religion/
	Academic institute dedicated to the study of federalism	http://www.temple.edu/federalism/
Center for Voting and Democracy	Organization interested in the impact of different voting systems on voter turnout, representation, accountability, and the influence of money on elections	http://www.fairvote.org/
Christian Coalition	A political organization dedicated to public policies informed by conservative Christian ideas	http://www.cc.org/
Civil Rights Division, U.S. Department of Justice	Division of the Justice Department responsible for enforcing civil rights laws	http://www.usdoj.gov/crt/
Compassion and Choices	An organization supporting the "right to die"	http://www.compassionandchoices.org/
Congressional Quarterly	Congressional news, general background information on Members of Congress, information about bills sponsored, speeches made, roll call votes, etc.	http://www.cq.com/
Court TV	Good source for news on crime, courts, and the legal system	http://www.courttv.com/
C-SPAN Online	Gavel-to-gavel coverage of the U.S. House and other public affairs programming	http://www3.capwiz.com/c-span/

Name of Resource	Description	URL
Eagle Forum	Phyllis Shlafly's organization—a conservative alternative to feminism	http://www.eagleforum.org/
Exploring Constitutional Law	Explores some of the great issues and controversies that surround our Nation's founding document	http://www.law.umkc.edu/faculty/projects/FTrials/conlaw/home.html
Federal Bureau of Investigation	The premier federal law enforcement agency	http://www.fbi.gov/
Federal Bureau of Prisons	Federal agency responsible for running the federal government's prison system	http://www.bop.gov/
Federal Courts Home Page (Administrative Office of the U.S. Courts)	A clearinghouse for information from and about the federal courts	http://www.uscourts.gov
Federal Judicial Center	The federal courts' agency for research and continuing education	http://www.fjc.gov
Federal Register Online	Federal Register searchable database	http://www.gpoaccess.gov/fr/index.html
Federalism Project (American Enterprise Institute)	Provides a conservative perspective	http://www.federalismproject.org/
FedWorld Information Network	National Technical Information Service, U.S. Department of Commerce	http://www.fedworld.gov/
Findlaw	A comprehensive legal Web site including a database of Supreme Court decisions and various constitutional law materials	http://findlaw.com
Freedom Forum	A nonpartisan foundation dedicated to freedoms of speech and press	http://www.freedomforum.org/
Hudson Institute	A non-partisan policy research organization that promotes global security	http://www.hudson.org/
Institute for Justice	A libertarian alternative to the ACLU	http://www.ij.org/
Jurist	An excellent legal Web site	http://jurist.law.pitt.edu
Lambda Legal Defense and Education Fund	An interest group promoting the cause of gay rights	http://www.lambdalegal.org/
Legal Information Institute (Cornell University)	A searchable database of Supreme Court opinions	http://supct.law.cornell.edu/supct
Library of Congress	Links to various agencies within the Executive Branch	http://www.loc.gov/index.html
NAACP	The oldest and best known organization devoted to promoting civil rights for African Americans	http://www.naacp.org/
National Abortion Rights Action League	An interest group dedicated to maintaining legalized abortion	http://www.naral.org/
National Gay and Lesbian Task Force (NGLTF)	A leading gay rights organization	http://www.ngltf.org/
National Organization for Women	The leading interest group in the movement for women's rights	http://www.now.org/
National Rifle Association	The leading organization dedicated to promoting the right to keep and bear arms	http://www.nra.org/
Not Dead Yet	A national organization of people with disabilities who oppose the legalization of physician-assisted suicide	http://acils.com/notdeadyet/

Name of Resource	Description	URL
Operation Rescue	An antiabortion interest group	http://www.operationsaveamerica.org
Oyez	A multimedia database about the U.S. Supreme Court	http://www.oyez.org/
Public Citizen	A pro-consumer, pro-democracy group founded by Ralph Nader	http://www.citizen.org/
Publius: The Journal of Federalism	A scholarly journal devoted to issues of federalism	http://publius.oxfordjournals.org
Secular Web	A Web site devoted to promoting secular humanism	http://www.secular.org/
Southern Poverty Law Center	A prominent civil rights organization with a particular emphasis on combating "hate groups" and "hate crimes"	http://www.splcenter.org/
The American Civil Rights Union	A conservative counterpart to the ACLU	http://www.civilrightsunion.org/
The Center for the Study of the Presidency	An educational institution devoted to the study of the Presidency and other aspects of American government and politics	http://www.cspresidency.org/
The White House	Information on the President and Vice President, events and tours at the White House, press releases, e-mail addresses, etc. Also includes links to offices within the Executive Office of the President	http://www.whitehouse.gov
Thomas Jefferson Center for the Protection of Free Expression	A nonprofit organization located in Charlottesville, Virginia devoted to the defense of free expression in all its forms	http://www.tjcenter.org/
U.S. Code	The United States Code in a searchable database	http://uscode.house.gov/search/criteria.shtml
U.S. Government Printing Office—Congress Page	Various Congressional informational resources	http://www.gpoaccess.gov/congress/index.html
U.S. Sentencing Commission	The federal agency responsible for promulgating federal sentencing guidelines	http://www.ussc.gov/
United States Supreme Court Home Page	The Supreme Court's own Web site	http://www.supremecourtus.gov

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